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CALIFORNIA REPORTER

IN VOLUME

103 PACIFIC REPORTER

SECOND SERIES

15 Cal.2d 542

CITY OF OAKLAND v. WILLIAMS, City Auditor.

S. F. 16406.

Supreme Court of California.

May 28, 1940.

1. Evidence 🔑10(1, 2)

The Supreme Court could take judicial notice of geographical location and topography of area as bearing on question whether sewage disposal problem of seven contiguous cities could be solved by independent action of cities, or whether joint action by cities was only practical solution.

2. Municipal corporations 🔑62

Under statute providing for joint exercise of powers by counties, by municipalities, or by municipalities and counties, cities may contract in effect to delegate to one of their number the exercise of a power or the performance of an act in behalf of all of them, and which each independently could have exercised or performed. St.1921, p. 542, §§ 1–5.

3. Municipal corporations 🔑61

The statute authorizing joint exercise of powers separately possessed by municipalities grants no new powers to municipalities, but merely sets up a new procedure for the exercise of existing powers. St.1921, p. 542, §§ 1–5.

4. Municipal corporations 🔑278

Under statute providing for joint exercise of powers by counties, by municipalities, or by municipalities and counties, seven contiguous cities were authorized to take joint action in contemplated plan of sewage disposal, which, because of proximity of cities, presented a common problem. St.1921. p. 542, §§ 1–5.

5. Municipal corporations 🔑57

Where charter is silent a city may exercise powers conferred upon it by general law, provided such general powers are not inconsistent with those granted by the charter. Const. art. 11, §§ 6, 8.

6. Municipal corporations 🔑57

"City charters" are not grants of municipal power, but are merely restrictions and limitations upon such powers, and, if no restrictions or limitations are found in charter, the power of city in municipal affairs is full and complete. Const. art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "City Charters".

7. Municipal corporations 🔑278

The charters of cities of Oakland and Berkeley did not preclude joint action by cities with neighboring cities in the contemplated plan of sewage disposal, which, because of proximity of cities, presented a common problem. St.1921, p. 542, §§ 1–5; Const. art. 11, §§ 6, 8.

8. Municipal corporations 🔑62

A contract of city of Oakland to enter into a joint survey with six neighboring cities of sewage problem, which, because of proximity of cities, presented a common problem, by the terms of which the city of Berkeley was to become sponsor of proposed survey and depository of funds agreed by cities to be paid toward cost of survey and an executive committee composed of one representative of each contracting city was to approve of all contemplated action of sponsor city, was not invalid as making an unlawful delegation of handling and disposition of substantial amount of public tax funds. St. 1921, p. 542, §§ 1–5.

9. Municipal corporations 🔑864(6)

A contract of the city of Oakland to enter into a joint survey with six neighboring cities of sewage problem, which provided for each of contracting cities to pay one-half of amount to be contributed by it for the survey on or before February 1, 1940, and the "remaining one-half at such time and in such specified amounts as may be requested * * * to pay for obligations incurred after July 1, 1940", was not within inhibitions of constitutional debt limitation provision, in absence of some showing that, when and if future payments accrue, they would exceed in any one year the revenue provided for such year, especially since future payments under contract were contingent depending upon ultimate cost of survey, and a sum payable upon a contingency is not a "debt" until contingency has happened. St.1921, p. 542, §§ 1–5; Const. art. 11, § 18.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt".

10. Municipal corporations 🔑861

The expenditure of funds by city of Oakland pursuant to a contract with several contiguous cities to contribute to the conduct of a joint survey of sewage problem, which, because of proximity of cities, presented a common problem, was a proper "municipal expenditure". St.1921, p. 542, §§ 1–5.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Expenditure".

11. Municipal corporations ⇐216(1)

The civil service provision of charter of city of Oakland was not applicable to a contract of city of Oakland with several contiguous cities to conduct a joint survey of sewage problem by terms of which the city of Berkeley was to become sponsor of proposed survey. St.1921, p. 542, §§ 1–5

12. Municipal corporations ⇐217(3)

The charter provision of city of Oakland precluding city employees from holding dual public positions could have no application to a contract of city of Oakland with several contiguous cities to conduct a joint survey of sewage problem, by terms of which the city of Berkeley was to become sponsor of proposed survey, since persons engaged in proposed survey would under the agreement be employees of sponsor city Berkeley. St. 1921, p. 542, §§ 1–5.

13. Municipal corporations ⇐330(1)

The charter provision of city of Oakland calling for competitive bids on public works contracts was not applicable to a contract of city of Oakland with several contiguous cities to conduct a joint survey of sewage problem, by terms of which the city of Berkeley was to become sponsor of proposed survey. St.1921, p. 542, §§ 1–5.

14. Master and servant ⇐69
Municipal corporations ⇐217(3)

The charter provision of city of Oakland requiring minimum wages and employment only of citizens on public works was not applicable to a contract of city of Oakland with several contiguous cities to conduct a joint survey of sewage problem, by term of which the city of Berkeley was to become sponsor of proposed survey. St.1921, p. 542, §§ 1–5.

15. Municipal corporations ⇐244(1)

An agreement of city of Oakland with several contiguous cities to conduct a joint survey of sewage problem did not violate Oakland charter provisions relative to powers of Oakland Port Commission, in that commission was not consulted with respect thereto, though agreement and survey concerned in part the territory of the Port of Oakland, since city was not required to consult commission until time arrived to lay plans to construct a new sewer as result of the survey. St.1921, p. 542, §§ 1–5.

In Bank.

Proceeding by the City of Oakland, a municipal corporation, for a peremptory writ of mandate directing Harry G. Williams, as Auditor of the City of Oakland, to countersign and indorse his certificate upon a certain contract for and on behalf of City of Oakland, as required by its charter, submitted under the provisions of sections 1138-1140, inclusive, of the Code of Civil Procedure of the State of California.

Writ granted.

F. Bert Fernhoff, City Atty., and Homer W. Buckley, Asst. City Atty., both of Oakland for petitioner.

Fred Hutchinson, City Atty., of Berkeley, H. Albert George, City Atty., of Oakland, Joseph J. Yovino Young, City Atty., of Albany, Girard Richardson, City Atty., of Piedmont, and Thomas Carlson, City Atty., of Richmond, amici curiæ.

Charles A. Beardsley, Port Atty., and W. Reginald Jones, Asst. Port Atty., both of Oakland, on behalf of Board of Port Commissioners, City of Oakland.

Markell C. Baer, Clarence De Lancey, and Melville C. McDonough, all of Oakland, for respondent Harry G. Williams.

SHENK, Justice.

This is an application for a peremptory writ of mandate directing Harry G. Williams, as Auditor of the City of Oakland, to countersign and endorse his certificate upon a certain contract for and on behalf of said city, as required by sections 125 and 131 of its charter. The proceeding comes before us on an agreed statement of facts pursuant to the provisions of sections 1138-1140, inclusive of the Code of Civil Procedure. Briefly, the parties hereto seek an adjudication of the validity of said contract and of the contemplated expenditure thereunder of some $60,000 for an extended survey of the sewage disposal problem of the signatories thereto, some seven municipalities situated on the east side of San Francisco Bay.

It appears that the seven interested municipalities consist of the cities of Oakland, Berkeley, Piedmont, Alameda, Albany and Richmond, operating under freeholders' charters, and Emeryville, a city of the sixth class, organized under the Municipal Corporation Act, St. 1883, p. 93. These cities are contiguous and presently discharge their sewage by many outlets into San Francisco Bay, several of such outlets being jointly used by two or more cities. By reason of the proximity of these outlets, dispersion has proved highly unsatisfactory, and admittedly a grave condition exists threatening both health and property. Specifically, it is alleged that the prevailing method of sewage disposal of said municipalities has caused the illness of persons required to work in the general vicinity, has resulted in damage to nearby property and ships, and has caused a pollution of shellfish. The State Board of Public Health has by resolution declared the sewage-laden mud flats of the East Bay to be a public nuisance and has urged the several named municipalities to take action looking to the early abatement thereof.

In an effort to overcome and terminate such unhealthy and unsatisfactory condition, each of the named municipalities in 1937 appointed an official to a body known as the East Bay Executives' Association, whose province it was to investigate and find the facts. A sub-committee of the Executives' Association, composed of the city engineers of the several cities, made further studies. These investigations and studies disclosed that the problem could not be satisfactorily solved by independent action of each of the municipalities, but, instead, required a joint survey and investigation of conditions in all the area and of the suitability of different methods of disposal to the peculiar circumstances there existing. It was also reported that such a survey would require approximately seven months and would involve an expenditure of $60,000. Thereupon the seven named municipalities, by appropriate action of their governing bodies, approved such recommendation and respectively authorized the execution of a proposed agreement among them looking to such joint survey and study and directed the appropriate officers to execute the same on their behalf, each agreeing to pay its share of the expenses incident thereto. Williams, as auditor of the City of Oakland, is required under the charter to countersign and endorse his certificate on any contract to the effect that there remains a balance of funds sufficient to pay the expense of executing it, and no contract is binding without such endorsement. Admittedly, ample funds remain in the Oakland treasury for the performance and discharge of its obligation under the contract here involved, but Williams, as auditor, nevertheless has refused to countersign the contract on the ground generally that the City of Oakland is without authority under its charter to enter into such a contract with its neighboring cities for a joint survey of the sewage disposal problem. In support thereof he advances several reasons which under the charter assertedly preclude such a contract. They will be stated and disposed of in the order in which they are advanced.

[1] Preliminarily, it is well to state that while it may not be wholly impossible for each of the several named cities to separately solve its sewage disposal problem, yet by reason of their geographical location and the topography of the area, with which this court is quite familiar and of which it may take judicial knowledge, any independent action of one or more of said cities looking to the solution of the problem would, because of the action of the tides and currents of San Francisco Bay, still leave unabated the obnoxious nuisance and health menace resulting from sewage deposited on the common shores by the neighboring cities continuing to discharge their sewage into the bay. This and the further fact that there is a present interlocking or common use of certain sewers and outfalls by the named cities makes it readily apparent that the proposed joint solution of the problem is the only feasible and practical one. Therefore, the Executive Association above mentioned proposed a form of contract, later agreed upon and approved by the governing bodies of the several cities, by which said cities would contract with one of their number to do the work under certain restrictive conditions and subject to the approval and supervision of an executive committee whose membership would consist of one representative from each of the contracting cities. The City of Berkeley was thought to be best adapted to carry out the work, and accordingly the agreement whose validity is here involved was entered into. By its terms the City of Berkeley will become the sponser of the proposed survey and the depository of the funds agreed by the several signatories to be paid toward the cost and completion of such survey. All contentions of Williams to the contrary notwithstanding, it may generally be stated that by the terms of the agreement the City of Berkeley is to be the employer of all

persons engaged upon the survey. It is to enter into all necessary contracts in its own name and is to disburse all funds from the Sewage Disposal Survey Fund. But, in order to give each of the cities contributing to the fund the right to approve the expenditures and to determine that the agreement is being carried out as intended, the City of Berkeley agrees that none of the money will be disbursed except upon approval of the executive committee, and that it will not enter into any contract or employ any person unless the matter is first approved by the executive committee composed, as hereinbefore stated, of one representative from each of the contracting cities. However, the executive committee itself is without authority to incur any expense, execute any contract or employ any person. The committee's approval is merely a condition precedent to the exercise of the powers conferred by the agreement on the City of Berkeley. All acts and obligations are those of the City of Berkeley. By the adoption of an ordinance providing for the employment by it of all necessary survey employees, the City of Berkeley appears to have given to the agreement a practical construction meriting the consideration and approval of this court. We need not here further detail the many provisions of the contract, but shall refer to them as necessary in the discussion of the many assaults thereon by Williams, as auditor of the City of Oakland.

The statute under which the above contract was drafted was enacted in 1921 (Stats.1921, p. 542) and is entitled "An act providing for the joint exercise of powers by counties, by municipalities or by municipalities and counties." Section 1 thereof, among other things, provides that two or more municipalities "by agreement entered into respectively by them and authorized by their legislative bodies, may jointly exercise any power or powers common to the several contracting parties." Section 2 of the act designates in general language the nature and contents of such a joint agreement. Section 3 declares that "The parties to such agreement may provide that contributions from the treasuries may be made for the purpose for which the agreement was entered into or payments of public funds shall be made to defray the cost thereof which funds may be made to and disbursed by such agency as may be agreed upon; provided, however, that the method of disbursement shall agree as far as the same is practicable with the method provided by law for the disbursement by the parties to such agreement." Sections 4 and 5, respectively, provide for the term of such a joint agreement and for the disposition of any property or surplus remaining upon completion of the agreement and accomplishment of its purpose.

In Re City and County of San Francisco, 191 Cal. 172, 215 P. 549, we had occasion to consider and approve the validity of the cited act and a joint agreement there entered into pursuant to its provisions. The several cities involved in the present proceeding assert that the contract now before us follows both the provisions of the statute and the agreement approved in the cited case. In opposition to the contentions of its auditor the City of Oakland urges, and in that it is joined by the other signatory cities and by the Port of Oakland, who have appeared and filed briefs herein as friends of the court, that the agreement does no violence to any of the provisions of the charter of the City of Oakland, and further, that even if it be assumed that a conflict does exist between the agreement and one or more charter provisions, the latter would have to be held inapplicable for the reason that the subject matter of the contract, sewage disposal as contemplated, is a "state affair" and not a "municipal affair", thus making the provisions of the general law applicable rather than the charter provisions. With this preliminary statement we proceed to a detailed discussion of the objections advanced in his brief by Auditor Williams.

[2-4] In substance, Williams, as auditor of the City of Oakland, urges that the statute above referred to authorizing the joint exercise by municipalities of powers "common" to them does not contemplate or permit the joint exercise of powers that may be separately or independently exercised by them, but only permits of the joint exercise of powers already possessed in common. Such a construction of the statute is strained and would render it meaningless. In other words, if municipalities possessed a power in common there would be no need for a statute authorizing their joint exercise. The statute means nothing if it does not mean that cities may contract in effect to delegate to one of their number the exercise of a power or the performance of an act in behalf of all of them, and which each independently could have exercised or per-

formed. A statute thus authorizing the joint exercise of powers separately possessed by municipalities cannot be said to enlarge upon the charter provisions of said muncipalities. It grants no new powers but merely sets up a new procedure for the exercise of existing powers. The cities that are parties to the contract here involved possess the necessary police power, both under constitutional grant and under their respective charters, to abate nuisances, to preserve the health of their inhabitants and to construct and maintain sewers. The 1921 statute merely provides a procedure whereby this power may be exercised by cooperative action. This type of statute is not unusual in this state. In other instances, the Legislature has authorized two or more governmental agencies to contract, whereby one is empowered to perform a governmental function for another. See, among others, Stats.1895, p. 219, Deering's Gen.Laws, Act 8464; Stats.1915, p. 329, Deering's Gen.Laws, Act 5616. In so legislating the Legislature recognizes that there are certain situations and problems that can best be met and solved by several governmental agencies acting jointly and permitting one of their number to act for all. As already indicated, this court approved this statute and an agreement thereunder. In re City and County of San Francisco, 191 Cal. 172, 215 P. 549.

[5-7] It is next urged that the Oakland charter contemplates joint action in two particulars not here pertinent and that such specific mention necessarily excludes the assumption that other and unmentioned powers may be jointly exercised. However, we are satisfied that the admitted exception to the cited rule here governs, i.e., where the charter is silent a city may exercise powers conferred upon it by general law, provided such general powers are not inconsistent with those granted by the charter. We find no such inconsistency in this case. In other words, under sections 6 and 8 of article XI of the State Constitution, city charters are no longer grants of municipal power but are merely restrictions and limitations upon such powers. If no restrictions or limitations are found in the charter the power of the city in "municipal affairs" is full and complete, assuming for present purposes that sewage disposal generally is a municipal as distinguished from a state affair. We find no restriction or limitation in the Oakland charter precluding joint action with neighboring municipalities in the contemplated plan of sewage disposal, which, because of the proximity of said cities, presents a common problem.

Much of what we have just above stated is equally applicable to the contention that the City of Berkeley is without power to authorize the proposed agreement for a joint survey of the sewage problem confronting the East Bay cities. We are aware of no provision of the Berkeley charter, and none has been called to our attention, which restricts and limits that city's right to execute the agreement. From what has been said it follows that it is the City of Berkeley and not the executive committee that is to act under the contract when executed. The committee merely approves any contemplated action by the sponsor, City of Berkeley.

[8] The point is made that said contract provides for an unlawful delegation by Oakland of the handling and disposition of a substantial amount of the public tax funds and in the determination of the particular purpose for which they may be expended. In this connection it is urged that an unbridled discretion is vested in the City of Berkeley or the executive committee, or both, as to the type of survey to be carried on, and that it may develop that Oakland tax funds are being expended in studying the tideland flats of the other contracting cities. Obviously, if a joint survey is to be successfully effected some administrative discretion must be conferred upon the sponsor city and the engineers and other necessary employees appointed by it. The City of Oakland, through its council, has itself exercised the function and discretion of determining whether to enter into the contract for a joint survey and of appropriating money to execute it. It cannot be said that the delegation of the administrative function of checking the expenditure of money in accomplishment of the desired purpose infringes upon any constitutional or charter provision.

[9] It is next urged that the joint agreement violates section 18 of article XI of the Constitution, the so-called debt limitation provision, which precludes a city from incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year. It

is contended that the constitutional provision is violated in that the contract "provides for the incurrence by the municipalities of obligations which may become due and payable in future years, without a vote of the electorate being had." The point lacks merit. Under the terms of the agreement each of the seven cities is to pay one-half of the amount to be contributed by it on or before February 1, 1940, (in the case of the City of Oakland that amount is $20,000) and the "remaining one-half at such time and in such specified amounts as may be requested * * * to pay for obligations incurred after July 1, 1940." It does not appear, nor can we say, that when and if future payments accrue they will exceed in any one year the income and revenue provided for such year. In the absence of some showing on the subject, it will not be presumed that a violation of the constitutional provision will result. In re City and County of San Francisco, 191 Cal. 172, 181, 215 P. 549, 554. It is there declared that "Whether the city will be able to meet the payment of an undetermined sum * * * to fall due on a day in futuro is a question prematurely presented and cannot be decided in this controversy * * * but in no event would we be justified in presuming, in the absence of a showing to the contrary, that the city would not be amply prepared to meet its future obligations or that it will not keep within the law in respect to charter and constitutional restrictions." In Wyckoff v. Force, 61 Cal.App. 246, 214 P. 489, 490, it is stated that "It does not appear that any installment coming due in any year during the life of the contract was in excess of the income and revenue of that year. The contract is not, therefore, within the inhibitions of section 18 of article 11 of the Constitution." To the same effect see McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191, and Posz v. Taylor, 61 Cal.App. 523, 215 P. 107. Moreover, future payments under the contract may or may not be required, depending upon the ultimate cost of the proposed survey. It is not inconceivable that the initial installment may prove adequate. It has been held that "a sum payable upon a contingency is not a debt, or does not become a debt until the contingency has happened". McBean v. City of Fresno, 112 Cal. 168, 44 P. 361, 31 L.R.A. 794, 53 Am.St.Rep. 191, supra.

[10] An assault is made upon the contract based on the declaration that it would permit the expenditure of Oakland tax funds for non-municipal purposes in that a portion of said funds may assertedly be expended outside the territorial limits of Oakland and for the purpose of surveying the tidelands of one or more of the other contracting cities. It is hinted that such result would likewise run counter to the constitutional inhibition against the gift of public funds. We cannot approve the contention. Nor are we prepared to join in the assumption or fear that those empowered under the contract may abuse their authority. Among other things, the city in reply to this contention advances its alternative argument mentioned at the beginning of this opinion to the effect that sewage disposal technically presents more than a municipal problem and is of statewide interest. It is urged that cities daily expend their funds in a legal manner in the enforcement of various state laws which in the strict sense of the word do not involve municipal purposes but, on the contrary, involve public purposes or state affairs. Be that as it may, we are satisfied that if in the solution of their respective municipal sewage problems it becomes necessary, as here, for several contiguous cities to contribute to the conduct of a joint survey of the entire affected area, the expenditure of the funds of each such city in this manner is a proper municipal expenditure.

[11] We are likewise constrained to reject the argument that the joint survey agreement does violence to the civil service provisions of the charter of the City of Oakland. This contention is in effect premised upon the theory that the City of Berkeley is not, under the agreement, to carry out the survey and that the persons to be engaged in the project must therefore necessarily be employees of the City of Oakland and subject to its civil service requirements. Earlier in this opinion we rejected this theory, pointing out that the City of Berkeley under the agreement was to be the sponsor of the survey and was to enter into all necessary contracts and obligations, pay all appropriate expenses out of the sewage disposal fund and employ all persons essential to the project, subject only to the approval of the executive committee. This being so, the civil service provisions of the City of Oakland are without rele-

vancy for, obviously, such provisions can have no application to the employees of those who contract with the City of Oakland. In view of what has been said, we need only mention, without considering, the city's additional argument, that if, as it contends, the sewage disposal problem presents a state affair and not strictly a municipal affair, the city charter provisions under established principles are likewise inapplicable.

[12] In principle, the disposition made of the last point is equally applicable to the contention which asserts that the joint survey agreement runs counter to section 38 of the Oakland charter prohibiting the city from employing any person "holding any office or position of profit under the government of this state, or any other state of the United States, or of any nation, government or country". As stated just above, under the agreement, persons engaged in the survey will be employees of the sponsor city Berkeley. Consequently, a charter provision of the City of Oakland which precludes its employees from holding dual public positions can have no application. Moreover, even if the relevancy of the charter provision were to be admitted, it may not now be said that dual employment will necessarily result under the agreement.

[13] The contention is made that the joint survey agreement does violence to section 125 and other sections of the Oakland charter calling for competitive bids on public work contracts. We cannot accede to the application of said charter provisions under an agreement such as we have here, in which one of the several contracting cities undertakes to carry on the survey. If the conceivably conflicting charter provisions of all the contracting cities were held to be applicable and relevant, the effect would be to vitiate the statute authorizing joint and cooperative action. In other words, there could only be joint action under such a theory when the charter provisions of all contracting cities are identical. To state the matter is to reveal its absurdity.

[14] Section 128½ of the Oakland charter, requiring the payment of minimum wages and the employment only of citizens on public work, is advanced as another obstacle to the joint survey agreement. We are satisfied from a reading of the section that the city is correct in its answering assertion that it "applies only to a 'contract for work' which is let pursuant to a 'resolution calling for bids' for such work".

[15] It is also urged that the agreement violates those provisions of the Oakland charter relative to the powers of the Oakland Port Commission. The argument is that while the agreement and survey concern in part the territory of the Port of Oakland, the commissioners of said port have not been consulted with respect thereto. The obvious answer of the city is that when the time arrives to lay plans to construct a new sewer as a result of the survey, "the Port Commission will be consulted, their jurisdiction will be duly honored and their consent obtained".

What we have said adequately disposes of the points urged by Auditor Williams in support of his refusal to countersign the agreement. We do not find it necessary to further consider his general discussion as to the lack of necessity for such joint agreement and as to the asserted dangerous precedent that will follow from an approval thereof.

Let a peremptory writ of mandate issue directing Harry G. Williams, as auditor of the City of Oakland, to countersign the agreement and to endorse thereon his certificate, as required by sections 125 and 131 of the city charter.

We concur: CARTER, J.; CURTIS, J.; GIBSON, J.; SPENCE, Justice, pro tem.

39 Cal.App.2d 523

CLARK et al. v. JANSS.

Civ. 2474.

District Court of Appeal, Fourth District, California.

June 18, 1940.

1. Negligence 🔑**93(1)**

In order to constitute a "joint enterprise" between motorist and occupant, so as to render negligence of motorist imputable to occupant, it is not sufficient that the parties have a common purpose and a common destination, but occupant must have exercised control over, or have had the legal right to control, the actions of motorist in driving of automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Enterprise".

2. Negligence 🔑**136(30)**

Where two sisters were granted permission by mother to use her automobile for purpose of driving to another city and on way home sisters became involved in a collision, fact that sister, who was not driving at time of accident, requested a bystander to look after damaged automobile, did not establish as a matter of law that sisters were at time of accident engaged in a "joint enterprise", so that contributory negligence of one driving would defeat right of other sister to recover from driver of other automobile for injuries sustained in collision.

3. Negligence 🔑**122(1)**

Burden of proving that injured automobile occupant was engaged in joint enterprise with driver was on operator of automobile colliding with automobile in which occupant was riding.

4. Negligence 🔑**135**

Evidence that two sisters were granted permission by mother to use her automobile for purpose of driving to another city, that both sisters were able to drive automobile, and that no particular consideration was given to question of who would do driving, failed to establish a "joint enterprise" between sisters, so that contributory negligence of one driving would defeat right of other sister to recover from driver of other automobile for injuries sustained in collision.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Marjorie Clark and Marie Clark, by her guardian ad litem, Claudia Murnane, against Elmer R. Janss, for injuries sustained by plaintiffs in an automobile collision. From a judgment for plaintiff Marjorie Clark, the defendant appeals.

Affirmed.

McFadden & Coomber, of Anaheim, for appellant.

Wm. J. M. Heinz, of Anaheim, for respondents.

BARNARD, Presiding Justice.

The plaintiffs were injured in a collision between an automobile in which they were riding, and which was driven by Marie Clark, and another car owned by the defendant. In this action for damages the court found that the collision occurred as a result of negligence on the part of the defendant and contributory negligence on the part of Marie Clark. From a judgment for $1,139.50 in favor of the plaintiff Marjorie Clark, the defendant has appealed.

The sole ground of appeal is that, as a matter of law, the negligence of Marie Clark must be imputed to Marjorie Clark since the undisputed evidence conclusively shows that the two plaintiffs were engaged in a joint enterprise.

[1] It is well settled in this state that in order to constitute a joint enterprise in such a case as this it is not sufficient that the parties in question have a common purpose and a common destination, but the one to whom negligence is sought to be imputed must have exercised control over, or have had the legal right to control, the actions of the other in the driving of the car. Pope v. Halpern, 193 Cal. 168, 223 P. 470; Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Wessling v. Southern Pacific Co., 116 Cal.App. 455, 3 P.2d 25; Rogers v. Goodrich, 131 Cal.App. 245, 21 P.2d 122; Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198; Moore v. Franchetti, 22 Cal.App.2d 75, 70 P.2d 492; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651. In Wessling v. Southern Pac. Co., supra, the court said [116 Cal.App. 455, 3 P.2d 26]: "The true rule in this state, as we understand it, is that where there is nothing in common between the passenger and the driver of the vehicle except a common destination and a common purpose in going there the negligence of the driver is not to be imputed to the passenger, but the passenger must control

or have some legal right to control the actions of the driver in the operation of the vehicle." In Collins v. Graves, supra, in discussing this rule, it is said [17 Cal. App.2d 288, 61 P.2d 1201]: "The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it. 'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.'"

The evidence relied upon by the appellant to support his contention is thus stated by him:

"Marjorie and Marie are sisters. The car in which they were riding at the time of the accident was owned by their mother, who loaned, or 'gave them permission to use', the car for the purpose of driving to Santa Ana and eating dinner. They proceeded to Santa Ana, ate dinner, and on the way home became involved in the accident out of which this litigation arose.

"Marie drove to Santa Ana and was driving en route home at the time of the accident. Just why Marie drove instead of Marjorie is not clear. It appears that all the driving for the family is done by Marie and Marjorie. When starting upon this trip no particular consideration was given to the question of who would do the driving; for in the family it was not a question of one or the other driving, either might drive. Upon this occasion Marjorie didn't want to drive. Nothing was said to Marie concerning the driving, it was just taken for granted. Marjorie went out and closed the garage door, at which time Marie stepped under the driver's wheel. Had Marjorie wanted, she could have driven both to Santa Ana and on the return trip. * * *

"Questions designed to elicit information in connection with the right, or authority, to control the car brought forth the following facts: That while Marie, in driving to Santa Ana, selected and chose the route, apparently the route actually traveled met with Marjorie's approval and she made no objection. Also, that there was no discussion about any particular route to be taken. In Santa Ana, the place of parking the car was agreeable with Marjorie, but Marjorie stated that had there been an objection Marie would gladly have parked the car in the place indicated by her if it were possible.

"After the collision, Marjorie approached Mr. Hargrove, who was present at the scene of the accident, and made the following statement: 'You know me, Mr. Hargrove, I am Marjorie Clark. Will you please look after my car while I am gone?'"

[2] It is argued that Marjorie Clark's request to a bystander to look after the injured car indicates that she had an interest in the car at least equal to that of her sister; that the undisputed facts show that the right to drive the car had not been given to Marie Clark individually or to Marjorie Clark individually, but had been given to both of them; that either one had the privilege of driving and the only reason Marie Clark drove was because her sister did not want to drive; and that these facts establish as a matter of law that the two were, at the time of the accident, engaged in a joint enterprise.

[3, 4] The burden of proving a joint enterprise rested upon the appellant. Huber v. Scott, 122 Cal.App. 334, 10 P.2d 150. In the absence of more convincing evidence than here appears, that burden was not met and much less may it be held as a matter of law that such a situation existed. The mother of the plaintiffs had given each of them permission to drive the car. In the absence of any showing to the contrary this necessarily implies the right of each to fully control the operation of the vehicle during the time she was driving it. Although each was given that right during the time she was driving, there is nothing to show that either was given any right of control over the actions of the other while the other was driving. It cannot be presumed, in the absence of evidence, that the mother gave both daughters the right to drive or to control the operation of the vehicle at the same time, or gave either of them the right to control while the other was driving. The fact that each had permission to use the car in no way indicates that either had the right to interfere with or control the other's operation of the car. Nothing further appears than that these sisters had a common destination and a common purpose in making this trip, and there is an entire absence

of evidence showing the necessary right of control on the part of the respondent Marjorie Clark.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

39 Cal.App.2d 401

ESTERGREN v. SAGER.

Civ. 11903.

District Court of Appeal, Second District, Division 1, California.

June 5, 1940.

1. Tenancy in common 🔑38(1)

An owner in common of a chattel cannot maintain an action against his co-owner for a recovery of the specific chattel or the value of his undivided interest therein.

2. Tenancy in common 🔑38(1)

Owner in common of tractor which was in possession of co-owner was not entitled to recover possession thereof, but was entitled to recover his pro rata share of the reasonable rental value of the tractor during the period that he was ousted from possession thereof, and from rentals and profits incidental thereto.

3. Tenancy in common 🔑38(8)

In action by owner in common to recover possession of tractor and damages for loss of its use, wherein co-owner counterclaimed for money allegedly due following dissolution of a joint farming venture in which the parties were engaged, co-owner was improperly denied right to prove nature of the ownership and to show repossession of tractor by original seller under conditional sales contract for purpose of establishing length of time tractor was held in the exclusive possession of co-owner.

4. Pleading 🔑48, 72

The questions of proper designation of the action or of prayer for relief are not matters of serious concern in considering sufficiency of a complaint, but important question is whether complaint states any cause of action entitling plaintiff to any relief at law or in equity, since the court has jurisdiction to grant any relief consistent with the case made by the complaint and embraced within the issue. Code Civ.Proc. § 580.

5. Tenancy in common 🔑38(7)

Complaint *held* to state a cause of action by one co-owner of tractor to recover against the other the former's pro rata share of the reasonable rental value of the property during period when he was excluded from possession thereof and from rents and profits.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by G. E. Estergren against A. H. Sager to recover possession of a tractor and to recover damages for loss of its use, wherein defendant filed an answer and counterclaim. From a judgment for defendant on his counterclaim, plaintiff appeals.

Reversed, and cause remanded for new trial.

Coleman E. Stewart, of Santa Barbara, for appellant.

Webster & Lyon, of Paso Robles, for respondent.

WHITE, Justice.

Plaintiff and defendant were owners in common of a certain tractor. Plaintiff commenced this action to recover possession of the tractor and damages for loss of use. The complaint alleged that on February 23, 1935, the defendant "wrongfully and without plaintiff's consent seized said Allis-Chalmers Caterpillar Tractor and took the same into his own possession and converted the same to his own use, and has ever since said date refused to return said tractor to plaintiff or account to plaintiff for the use of said tractor or to compensate plaintiff for his interest therein". It was further alleged that the reasonable market value of the tractor on February 23, 1935, was $2,981.37, and that the usable value thereof was $30 per day. The prayer was for recovery of possession of the personal property in question or in lieu thereof for the value of plaintiff's one-half interest therein, together with the sum of $15 per day from February 23, 1935, to the date of judgment. Defendant filed an answer and counterclaim, in the former of which the equal interests of plaintiff and defendant in the tractor were admitted, subject to the terms of a conditional sales contract upon which the machine was purchased, and further alleged that by reason of default in the payments due under such sales contract the seller repossessed the tractor on November 13, 1935. That defendant seized the tractor as alleged in plaintiff's complaint was denied by the answer, as was the alleged usable value of such tractor. By his counterclaim defendant sought the recovery of certain money allegedly due him by reason of the dissolution of a joint farming venture in which the parties were engaged and for use in which the tractor was acquired by them.

Trial by the court resulted in a denial of any relief to the plaintiff upon his complaint and a judgment for defendant in the sum of $582.21 upon the latter's counterclaim. From such judgment plaintiff prosecutes this appeal.

Upon the issue of deprivation of plaintiff from the use of and any control over said tractor the evidence without conflict shows that while the tractor was rented out the plaintiff contacted the renter thereof and directed him to return the machine to plaintiff's ranch, while defendant requested that it be delivered to him. Heeding the latter's request, the renter of the tractor delivered the same to defendant, who kept it in his barn. Going to defendant's ranch, plaintiff demanded of defendant that the latter permit him to use the tractor, which demand defendant rejected and maintained exclusive control over the machine. The testimony as to the value of the tractor was in conflict, ranging from $1,000 to $2,000, while the only testimony introduced as to the usable value of the tractor established that at $30 per day when rented out.

[1, 2] Plaintiff was not entitled to a judgment authorizing him to recover the chattel, because the complaint does not contain, nor did the evidence establish, the elements of a conversion, for the reason that the common property was in existence and in the possession of one of the co-owners. It was not lost or destroyed, nor removed from the state, and the interests of plaintiff and defendant were indivisible, the property not being of a kind which could be separated into portions absolutely alike in quality. The situation here presented does not bring the case within any of the classes in which an owner in common may recover for a conversion of the property by his co-owner. The instant controversy, therefore, comes within the rule that an owner in common of a chattel cannot maintain an action against his co-owner for a recovery of the specific chattel or the value of his undivided interest therein. However, plaintiff, having been excluded or ousted from possession of the tractor and from the rentals and profits incidental thereto, was entitled to recover his pro rata share of the reasonable rental value of such tractor during the period of such ouster. The record conclusively shows that defendant's conduct toward plaintiff amounted to an ouster and exclusion of plaintiff as a co-owner in the personalty. Defendant neither contended nor proved that he did not receive the rentals from the use of the tractor, as established by plaintiff. Therefore the court should have rendered judgment in favor of the plaintiff for his pro rata share of the rentals accruing from the common property of the parties.

[3] It was error for the court to deny to defendant the right to prove the nature of the ownership by him and his co-owner and to show the repossession of the tractor by the original seller under a conditional sales contract. This was essential in order to establish the length of time defendant held the tractor to the exclusion of plaintiff's right to participate in the possession thereof.

[4, 5] Respondent's contention that appellant has mistaken his remedy cannot be upheld. In considering the sufficiency of a complaint, the questions of proper designation of the action or the prayer for relief are not matters of serious concern. The important question is, does the complaint state any cause of action entitling plaintiff to any relief at law or in equity? Hayden v. Collins, 1 Cal.App. 259, 81 P.2d 1120; Keele v. Clouser, 92 Cal.App. 526, 268 P. 682; Luckey v. Superior Court, 209 Cal. 360, 287 P. 450. The court is clothed with jurisdiction to grant "any relief consistent with the case made by the complaint and embraced within the issue". Code Civ.Proc., sec. 580; Hinkel v. Crowson, 83 Cal.App. 87, 256 P. 479. Judged in the light of the rules just announced, we hold that the complaint herein stated a cause of action by one co-owner of a chattel to recover against the other such owner the former's pro rata share of the reasonable rental value

of the property during the period when he was excluded or ousted from the possession thereof and from the rents and profits.

The judgment is reversed and the cause remanded for a new trial in accordance with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.

39 Cal.App.2d 250

PEOPLE v. GILLILAND et al.

Cr. 3221.

District Court of Appeal, Second District,
Division 1, California.
May 24, 1940.

1. Criminal law 🔑1023(8, 10)

Attempted appeals from verdicts and sentences and from orders denying motions in arrest of judgment were dismissed because not authorized by law. Pen.Code, § 1237.

2. Criminal law 🔑424(3)

Testimony as to alleged statements made by conspirator imputing to coconspirator an attempt to suborn perjury through the medium of bribing a witness at his trial to give false testimony was inadmissible as "hearsay" against coconspirator where coconspirator was not present when statement was purportedly made without his knowledge or consent and conspiracy had terminated.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

3. Criminal law 🔑424(1)

A conspiracy may continue beyond the commission of the crime to which the conspiracy relates for purpose of concealing the crime, securing proceeds thereof or bribing or influencing witnesses, but there must be evidence showing that such activities were part of scheme or plan of the conspirators.

4. Criminal law 🔑1169(11)

In prosecution for conspiracy to violate the Corporate Securities Act and grand theft by obtaining money from a woman through a stock-selling scheme, where defendant had made a statement to district attorney, and his counsel interrogated him on direct examination as to a specified item therein, cross-examination indicating that defendant had been accused of obtaining money from five or six other women, and that he was implicated in other fraudulent schemes, was prejudicial error not cured because during the voir dire examination of jurors defendant's counsel referred to one of the charges. St.1917, p. 673.

5. Criminal law 🔑424(3)

In prosecution for conspiracy to violate the Corporate Securities Act and grand theft by obtaining money from woman through stock-selling scheme, evidence indicating that one defendant had made a statement to district attorney prior to return of the indictment, and in absence of codefendant, relating to other alleged prior and independent criminal and fraudulent acts on part of defendant, was inadmissible as against a codefendant, since as to him it was "hearsay". St.1917, p. 673.

6. Witnesses 🔑277(4)

In prosecution for conspiracy to violate the Corporate Securities Act and grand theft, where defendant prior to return of indictment made statement to district attorney indicating other alleged fraudulent and criminal acts, and his attorney on direct examination elicited testimony only as to one item of statement, cross-examination by district attorney indicating other fraudulent and criminal acts was unauthorized under statute because not relating to the same subject inquired into on direct examination, and necessary to make it understood and because exceeding the limits allowed by the Penal Code restricting cross-examination of defendant as to all matters about which he was examined in chief. St.1917, p. 673; Code Civ.Proc. § 1854; Pen.Code, § 1323.

7. Criminal law 🔑633(1)

Accused charged with crime were entitled to a fair and impartial trial upon the issues raised by indictment and in accord with established rules of evidence.

8. Criminal law 🔑921

When irrelevant testimony is admitted and it is prejudicial to the accused, a new trial must be granted. Const. art. 6, § 4½.

9. Criminal law 🔑424(3)

Statement made by one conspirator outside the presence of his coconspirator, not in furtherance of the alleged conspiracy and after consummation of the conspiracy, is inadmissible as "hearsay".

10. Criminal law ⚷424(3)

In prosecution of conspiracy to violate Corporate Securities Act and grand theft, testimony that a conspirator out of the presence of coconspirator and at a time long subsequent to consummation of alleged conspiracy admitted taking money from complaining witness was inadmissible as against coconspirator. St.1917, p. 673.

11. Criminal law ⚷1186(4)

Under constitutional provision that no judgment shall be set aside or new trial granted because of improper admission or rejection of evidence unless error has resulted in "miscarriage of justice", phrase "miscarriage of justice" has no hard or fast definition and does not mean that a guilty man has escaped or that an innocent man has been convicted, and is equally applicable where acquittal or conviction has resulted from some form of trial in which essential rights of people or of accused were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

12. Criminal law ⚷1186(4)

Where reviewing court was unable to say whether accused would or would not have been convicted but for the errors of the court in admitting evidence, conviction could not be sustained on ground that no "miscarriage of justice" resulted. Const. art. 6, § 4½.

13. Conspiracy ⚷43(1)

An indictment charging conspiracy to violate Corporate Securities Act and grand theft and that the acts of the accused allegedly constituting the conspiracy all occurred "in the County of Los Angeles and State of California and within the jurisdiction of this court" and describing the principal elements of the crimes charged was sufficient to state an offense. Pen.Code, §§ 182, 950–952; St.1917, p. 673.

14. Statutes ⚷71

The statute penalizing a conspiracy to commit a crime is not unconstitutional as permitting two different punishments for the crime in that conspiracy to commit a crime is punishable in the same manner as would be the commission of the crime itself, whereas conspiracy to commit a felony is punishable by imprisonment in the state prison for a maximum of two years. St. 1931, p. 950, § 18; Pen.Code, § 182; Const. art. 1, § 11.

15. Statutes ⚷71

A law need not operate universally, but, if it applies to all of a certain class alike and operates uniformly upon all persons standing in the same category and upon rights and things in the same relation, it does not contravene constitutional provision that all laws of general nature shall have uniform operation. Const. art. 1, § 11.

16. Conspiracy ⚷43(6)

Where indictment charged accused with conspiracy to violate Corporate Securities Act and grand theft, accused were not prejudiced because the words "to commit" were omitted before the words "grand theft" in verdict. St.1931, p. 950, § 18; Pen.Code, § 182.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

C. Ray Gilliland and Ralph L. Goetz were convicted of violation of the Corporate Securities Act and grand theft, and from a judgment of conviction and from the verdicts and sentences and orders denying motions in arrest of judgment, defendants appeal.

Reversed and remanded.

Jerry Giesler and Henry G. Bodkin, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen. and Alberta Belford, Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1] In an indictment returned by the grand jury of Los Angeles county defendants were jointly accused in count I of the crime of conspiracy to violate the Corporate Securities Act, St. 1917, p. 673, and grand theft; count II charged a violation of the Corporate Securities Act; while in counts III and IV defendants were charged with the substantive offense of grand theft. Each defendant interposed a demurrer to the indictment, both general and special, which was overruled. Following the entry of not guilty pleas, the cause proceeded to trial before a jury, resulting in conviction of both defendants of the crimes charged in counts I, II and III and their acquittal of the offense alleged in count IV. Following the denial

of their motions for new trial, motions in arrest of judgment, and the pronouncement of judgment against them, defendants prosecute this appeal from the judgment of conviction and the orders denying their respective motions for new trial. The attempted appeals from the verdicts and sentences and from the orders denying motions in arrest of judgment are dismissed, for the reason that the same are not authorized by law. (Pen. Code, sec. 1237.) The cause is here presented by the appellants jointly upon one set of briefs, but in some instances their positions and contentions are several.

While not conceding that but one reasonable and logical inference can be deduced from the evidence, appellants nevertheless concede the existence of a conflict therein and recognize the limitations upon the power of an appellate tribunal to reverse a judgment upon the ground of insufficiency of the evidence when the triers of fact have resolved such evidentiary conflict against the accused. It therefore becomes unnecessary, for the present, to do other than epitomize the factual situation forming the background of this prosecution, in which, as disclosed by the evidence offered on behalf of the People, it appears that the complainant, Mrs. Jeanne Haskell, was introduced to defendant Goetz about November 21, 1935, and a few weeks later the latter introduced her to defendant Gilliland. In connection with this introduction it was testified that defendant Goetz said he wanted complainant to meet a very good friend of his, who had just come down from his ranch in Oregon; and for the purpose of such meeting defendant Goetz and complainant went to a cafe, where they partook of refreshments. At that time defendant Goetz represented to complainant that he and Gilliland had been partners in two business ventures; that Gilliland was very wealthy and was president of the W. B. Mayo Pill Company; that defendant Goetz further represented that he himself was a stockholder to the extent of approximately $6,000 in the said company (which was false) and that the company was making large profits and any investment made therein by the complainant would be very wise and profitable. That on or about January 2, 1936, the defendants sold to complainant a certificate evidencing 294 shares of the capital stock of said Mayo Company without obtaining from the commissioner of corporations of the state of California a permit so to do, and took in consideration therefor the sum of $10,000 from the complainant. In connection with this transaction it appears that on November 21, 1935, defendant Gilliland in the state of Oregon received a certificate of stock issued in his name and which was given to him under the terms of an agreement he had with the corporation. That about April, 1936, the defendants obtained the further sum of $10,000 from complainant upon representations made by defendant Gilliland that said $10,000 would be used for advertising purposes in connection with the Mayo Corporation. During all of the alleged negotiations and during the time when the sale of stock was consummated and the second $10,000 was paid, there were frequent social contacts between complainant and defendants, particularly defendant Gilliland. The complainant defendant Gilliland disagreed as to whether there was a promise of marriage between them, he insisting there was and she denying it, although admitting she had written letters to him in which she addressed him as "sweet", "precious" and the like. On January 4, 1936, the complainant, Mrs. Haskell, handed Gilliland a check for $9,936.10, which she had secured through a loan made on her home, and which check was payable to defendant Gilliland and also bore the indorsement "O.K., R. L. Goetz". In return for this money defendant Gilliland handed the complainant the stock certificate above referred to indorsed by him, but the same was never transferred out of his name on the books of the corporation. It might here be noted that a decided conflict in the evidence appears as to whether complainant actually purchased the stock from defendant Gilliland or whether she simply loaned him the money and received the certificate as security.

It appears that the second transaction was consummated about April 30, 1936, whereby a Beverly Hills bank paid defendant Gilliland approximately $10,000, the proceeds of a loan in that amount negotiated by Mrs. Haskell on certain property owned by her in the city of Los Angeles. The name of defendant Goetz does not appear on the canceled check in this transaction. Following this latter transaction Gilliland paid the complainant, Mrs. Haskell, $500, which he asserts was in payment of interest on the money she had loaned him, while she contends that it was in repayment of various smaller amounts advanced to defendant Gilliland for gambling and kindred purposes while the two were together socially. The complainant visited Gilliland at his Oregon ranch in June, 1936, and in September of the same year, but upon returning to Los Angeles was married to her present husband. Defendant Goetz was an invited guest at the announcement party and also at the wedding.

As early as September, 1936, complainant visited the office of the district attorney of Los Angeles county in connection with the moneys obtained from her by the defendants. Apparently no action was taken following the investigation instituted on that occasion. However, in June, 1938, complainant again went to the district attorney; the investigation was renewed, and the matter submitted to the grand jury, resulting in the indictment now before us.

In the main, appellants base their claims for reversal upon the alleged errors of the trial court in admitting certain evidence which it is asserted was prejudicial to their substantial rights. In this regard it is first contended that such rights of defendant Goetz were prejudiced by the rulings of the court admitting in evidence as against him testimony relating to the alleged attempt of his codefendant, Gilliland, to corruptly induce a witness to give false testimony, which said attempt was made during the course of the trial and outside the presence of appellant Goetz, but which evidence the jury was authorized by the court to consider as against both defendants. After the defendant Gilliland had concluded his testimony on direct examination and cross-examination he was recalled by the district attorney, who inquired of him as to whether, after the commencement of the trial, he did not visit the complainant's maid at the latter's home and state to her that he and his codefendant "see nothing ahead of us but the penitentiary unless we can get you or somebody else to come down and testify in our behalf"; whether the maid would testify that she knew that defendant Gilliland had spent nights at the home of the complaining witness in September, 1935; also, that the maid knew that he was engaged to complainant; that he borrowed the money mentioned in the indictment from the alleged victim; and finally, if he did not tell the maid that his codefendant Goetz "is spending a lot of money in this case, and if you will come down and testify to anything in our behalf Mr. Goetz will pay you well". Following categorical denials by defendant Gilliland that he made any of the statements attributed to him, the complainant's maid was called to the witness-stand, and after stating that defendant Goetz was not present was permitted to testify that defendant Gilliland did make such statements upon the occasion of his visit to her. Such examination of the maid was concluded by the district attorney's propounding this question: "Well, what was the condition of his eyes? Don't tell us anything else now, just the condition of his eyes at the time you looked, at the time he made the statement I have just outlined to you a moment ago." (Referring to the statement, "Mr. Goetz and I see nothing ahead of us but the penitentiary unless we can get you or somebody else to come down and testify in our behalf.") To which question the maid answered, "He just looked worried as to his eyes."

Timely, appropriate and vigorous objections were interposed to this line of testimony on behalf of appellant Goetz, who was not present at the conversation and whose authorization of or even knowledge of the visit of his codefendant was never established. But such objections were promptly overruled, motions to strike denied, and the jury advised that such evidence was to be considered by them as against both defendants. That this testimony when considered against him was highly prejudicial to appellant Goetz cannot be denied, for it involved him in an attempt to suborn perjury through the medium of bribing a witness at his trial to give false testimony. The damaging effect of this testimony to appellant Goetz was sensed by the district attorney, who read it to the jurors and laid great stress upon it in both his opening and closing arguments.

[2, 3] We have no hesitancy in saying that this testimony should not have been admitted as against appellant Goetz. While it is true, as stated in 16 C.J., 661, § 1318, that a conspiracy may continue beyond the commission of the crime to which the conspiracy relates, such as for the purpose of concealing the crime, securing the proceeds thereof, or bribing or influencing witnesses, nevertheless, there must be some

evidence showing that such activities were a part of the scheme or plan of the conspirators. The record before us is bereft of any such evidence, and is equally barren of any evidence showing that appellant Goetz was connected with or authorized the efforts to tamper with the witness. Hence it was palpable error to receive in evidence as against appellant Goetz the acts and declarations of his former alleged coconspirator made without his proven knowledge, consent or presence, and after the conspiracy charged had terminated—in fact while the case was actually on trial. As to appellant Goetz this testimony was hearsay, and its inadmissibility is so elemental in the law of conspiracy that citation of authority is unnecessary. The case of People v. Burke, 18 Cal.App. 72, 122 P. 435, 444, cited by respondent, is not here applicable nor persuasive, because in that case there was present strong circumstantial evidence tending to connect defendant with the transaction, and further, the court in permitting the jury to consider such evidence as to the defendant admonished them that "unless you are satisfied from all the evidence * * * that the defendant did cause or authorize the persuasion or disappearance of such witness, you cannot consider it as a circumstance against the defendant". The dissimilarity to the case at bar is evident.

It is next asserted that the court committed prejudicial error as to both defendants in admitting as against them evidence relating to a statement made by the defendant Goetz in the office of the district attorney shortly prior to the return of the indictment and in the absence of the defendant Gilliland. Particular objection is made to the evidence relating to that portion of the statement having to do with other alleged prior independent criminal and fraudulent acts on the part of defendant Goetz, the narrator of the statement, and all of which evidence the court permitted the jury to consider as against both defendants. In this regard it appears that on June 20, 1938, nine days before the indictment was returned by the grand jury, defendant Goetz, accompanied by his attorney, called upon the deputy district attorney who tried this case. At that time defendant Goetz made a statement consisting of interrogatories propounded by the deputy district attorney and answers given thereto by defendant Goetz, all of which was taken down by a shorthand reporter. By stipulation of counsel for defendant Goetz and the district attorney, but over objection of counsel for defendant Gilliland, who was not present when the statement was made, certain portions thereof relating to the indorsement by Goetz of a check for $9,936.10, and the receipt by Goetz of $169 from his codefendant Gilliland, together with the reason for the payment of such last-named sum, was read to the jury. When subsequently defendant Goetz took the witness stand he was interrogated concerning that portion of his statement theretofore read into the record, viz., concerning the item of $169 and the reason for its payment to him by his codefendant. The only other reference to the statement appears to be when his counsel on direct examination of Goetz asked the latter concerning certain testimony given by the witness Haskell and inquired of defendant Goetz if he had made the statements attributed to him by Haskell. With the record in this state, the district attorney on cross-examination of defendant Goetz very properly interrogated him concerning the $169 transaction about which he had been examined by his counsel on direct. In the apparent belief that the heretofore indicated references to the statement opened the door for cross-examination concerning the entire statement, the district attorney was permitted, over repeated objections, to cross-examine defendant Goetz as to other matters contained in the statement, of which the following is typical:

"Q. (By Deputy District Attorney Burgess): Now, you have made several references here to the statements that you made there in the district attorney's office, statements that you made there to the deputy in charge, Mr. Burgess, being myself. I will ask you if you did not at the same time and place tell me of some five or six other cases then pending or which had been pending in the courts against you for money that you had taken from women?

"* * *

"A. I did not tell you that I had taken any money from any women."

Then followed an interrogation of defendant Goetz by the district attorney as to whether a lawsuit had not been brought against him by the guardian of an incompetent woman to recover $300,000 illegally taken from her; whether he had not taken $38,000 away from another woman; whether he was not involved in an embezzlement charge at Santa Barbara and arrested in Florida at the instance of the district attorney of Santa Barbara County; if he was not the same Goetz charged with rape in the Los Angeles superior court, and also in the same court accused of forgery; and finally, if it was not a fact that he came to the district attorney's office after regular hours to make the statement in question in order to avoid being served with process in the lawsuit filed against him by the guardian of the incompetent woman.

[4, 5] All of the foregoing was received in evidence against both defendants. A mere reading of the same at once suggests its damaging effect upon both defendants. The prejudicial effect of the testimony cannot be exaggerated when we consider that the defendants were charged jointly with the theft of $20,000 from a woman who they claimed loaned the money to one of them because of her affection for him. This testimony could not but impress the jury that defendant Goetz had been accused of taking money from five or six other women; that an action had been brought against him by the guardian of an incompetent woman to recover $300,000 allegedly taken from her illegally; that he had mulcted another woman of $38,000; that he had been sued by still another woman for fraud in obtaining money from her; that he had been involved in an alleged embezzlement; was arrested in Tampa, Florida, at the request of a district attorney in California for illegally and fraudulently selling stock, in connection with which transaction his family made restitution in the sum of $2,200; that at one time during his minority he was charged with statutory rape for which he was committed to the Preston School of Industry at Ione; that he had been charged with the crime of forgery. In connection with the implications of criminal prosecutions, the law provides an orderly method for the introduction of such evidence when the same is properly admissible. Nor does the fact that during the voir dire examination of jurors counsel for defendant Goetz referred to his involvement in a rape-charge cure the error, because this incident furnished but a small part of the damage done the substantial rights of defendants to a fair trial conducted in proper procedural form and in accord with due process of law. Moreover, how any of the evidence was receivable as against the codefendant, Gilliland, is beyond our comprehension. As to him it was plain hearsay; yet in his argument to the jury the district attorney read the questioned testimony and vehemently predicated thereon his plea to the jury that it established both defendants as "confidence men". Not only did defendants' counsel persistently object to the introduction of this evidence and assign the asking of the questions as misconduct, but at the conclusion of the trial they made a motion to strike such cross-examination from the record, which motion was denied as to both defendants.

[6] Admission of the testimony here under inquiry was not authorized by section 1854 of the Code of Civil Procedure, which in general provides that when part of a transaction is proved the whole is admissible, because, as in the instant case, when only a part of a writing was given in evidence by one party, the other party was privileged only to inquire into "the whole on the same subject". Manifestly, the district attorney was limited in his cross-examination to the same subject of the statement that was inquired into by the direct examiner. The evidence was therefore incompetent, because it did not relate to the "same subject" inquired into on direct examination and was not "necessary to make it understood." Zibbell v. Southern Pacific Co., 160 Cal. 237, 250, 116 P. 513; Moore v. Re, 131 Cal.App. 557, 22 P.2d 45; John Breuner Co. v. King, 9 Cal.App. 271, 98 P. 1077. The cross-examination of defendant Goetz in the case at bar also exceeded the limits allowed by section 1323 of the Penal Code, which restricts cross-examination of the defendant to "all matters about which he was examined in chief". People v. Arrighini, 122 Cal. 121, 125, 54 P. 591. As was said in People v. Frank, 75 Cal.App. 74, 76, 241 P. 924, 925:

"There is no rule better understood in our criminal procedure than that a person accused of crime cannot be compelled to testify against himself. After taking the witness stand and testifying in his own behalf, he can be cross-examined as to such matters to which he testified upon direct examination, but upon no other matter. This rule, limiting the cross-examination of a defendant while a witness to such matters testified to upon his direct examination, is a general rule applicable to all witnesses. But it has been held in some cases that the rule thus limiting cross-examination is much narrower when applied to the defendant as a witness than when applied to ordinary witnesses. People v. O'Brien, 96 Cal. 171, 31 P. 45; People v. Crowley, 100 Cal. 478, 35 P. 84. The latter of these two cases quotes with approval the following language found in the former case: 'And in People v. O'Brien, 96 Cal. 171 (31 P. 45), the court say that "so far as the defendant is concerned, the court is not allowed that discretion as to the extent of the scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses."' The court also in this same case says: 'We have been referred to no case, decided since the present condition of the statutory law (section 1323, Penal Code) on the subject, which holds that the cross-examination of a defendant may be as wide as that of any other witness.'"

[7, 8] The cross-examination certainly did not constitute impeachment of defendant Goetz, because there was nothing in his direct examination which the answers to the questions objected to on cross-examination explained, qualified or destroyed the force of in any way. The rules of evidence which permit testimony in proof of other crimes in order to show system or intent do not warrant introduction of evidence having no bearing on any issue involved in the charges upon which appellants were on trial. What bearing upon the issues of the trial was contained in the question as to whether defendant Goetz had been arrested in Florida for an alleged embezzlement, or whether in 1915 he had been charged with rape or forgery; or whether he had been sued by the guardian of an incompetent woman to recover certain moneys? Regardless of what other acts of misconduct defendant Goetz may have committed, he and his codefendant were entitled to a fair and impartial trial upon the issues raised by the indictment, and that in accord with the established rules of evidence. People v. Brown, 25 Cal.App.2d 513, 77 P.2d 880; People v. Berg, 96 Cal.App. 430, 274 P. 433; People v. Anthony, 185 Cal. 152, 157, 196 P. 47. The evidence in question did not tend to establish the guilt of the defendants of the crimes for which they were on trial, but tended only to degrade defendant Goetz and to prejudice both defendants before the jury, because under the rulings of the trial judge the jury was authorized and instructed to consider all this prejudicial evidence as against both defendants. When irrelevant testimony is admitted and where, as here, it is of such a character as necessarily to be prejudicial to the defendants, a new trial must be granted. People v. Martin, 13 Cal.App. 96, 108 P. 1034; People v. Asavis, 22 Cal.App.2d 492, 71 P.2d 307; People v. Ranney, 213 Cal. 70, 1 P.2d 423; People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873; People v. Smith, 151 Cal. 619, 624, 91 P. 511. As was said in People v. Anthony, supra [185 Cal. 152, 196 P. 49]: "* * * It is a psychological impossibility for the jury to wholly eradicate the impression made by such questions from their minds in weighing the evidence as to the guilt or innocence of the defendant on the particular item charged. * * * A district attorney is charged with the public duty of seeing that the defendant has a fair trial. The jury is aware of this fact and must have assumed that he had information which justified the question. The question the district attorney asked of the defendant amounted to a charge against the defendant that he had been guilty of the offense of rape committed upon two small girls in his custody. The human mind is not so constructed that a thing of that kind can be either forgotten or overlooked by a jury."

[9] It requires no citation of authority for the assertion that statements made by one defendant outside the presence of his codefendant, not in furtherance of the alleged conspiracy and after consummation or frustration of the conspiracy, are hearsay as to the latter and never admissible. In the case now before us the statement given by defendant Goetz and reduced to writing by the district attorney, as well as the interview between defendant Goetz and the maid of the complaining witness, all transpired after the alleged conspiracy was accomplished and ended. As to defendant Gilliland there was not even the excuse for the admission of testimony based thereon that he was present upon either occasion.

[10] It would unduly prolong this already lengthy opinion to quote further and numerous other and similar occurrences in a trial, the record of which is replete with errors of law in rulings made upon the introduction of what was manifestly incompetent, irrelevant and immaterial and pure hearsay evidence. Suffice it to say, for the

guidance of the court upon a retrial, that it was also error to receive in evidence over objection as against defendant Goetz testimony relating to a conversation between defendant Gilliland and the witness John E. Haskell, husband of the complaining witness, alleged to have taken place at Reno, Nevada, outside the presence of defendant Goetz and at a time long subsequent to the consummation or frustration of the alleged conspiracy, and which conversation could not have been in furtherance of any alleged conspiracy, and in which conversation Haskell accused the defendant Goetz of stealing the money from his wife and wherein, according to the witness, defendant Goetz said, "Yes, we took $20,000 from Jeanne, but we are going to give every bit back to her." Equally inadmissible was the testimony of the witness R. P. Johnson, called to corroborate the testimony given by the aforesaid witness Haskell. Just as erroneous was the ruling by which there was received in evidence as against defendant Gilliland two conversations between defendant Goetz and the witness Haskell, one at Reno, Nevada, and the other at Los Angeles, both outside the presence of the defendant Gilliland and each occurring subsequent to the termination of the alleged conspiracy, and the subject-matter of which could not have been in aid or furtherance of the object of any alleged conspiracy. These are the conversations wherein the witness Haskell testified that defendant Goetz threatened him if he asked the district attorney's intercession in connection with the money charged in the indictment to have been taken from the witness' wife.

The action of the trial court in admitting all the evidence received at the trial as against both defendants was emphasized by the district attorney in his argument to the jury, wherein he said:

"You will recall that you went out shortly afterwards, and that upon your return to the courtroom some time later the court granted that motion, so that in so far as the evidence in chief of the prosecution was concerned, those of you who have made notes in attempting to distinguish between the evidence admissible against the defendant Goetz, or against the defendant Gilliland alone, may now forget that feature of it because of the fact that all the evidence that you have on the case of the People in chief was received as against both defendants, so that now, regardless of where the defendant Goetz was when Gilliland was doing something or where Gilliland was at the time Goetz was doing something, the evidence as to both defendants or as to either defendant or as to each defendant is admissible as against both defendants in the proof of the People's case."

[11] Although from the nature of the errors reviewed herein, a painstaking reading of the 1,400 pages of testimony would seem unnecessary, in view of the provisions of section 4½ of article VI of the Constitution, nevertheless such a review of the record shows that the evidence adduced upon the whole case was in sharp conflict and closely balanced in weight and in quality for and against the guilt of the defendants. Such conflicts are apparent on the question of whether the complainant actually purchased the stock from defendant Gilliland or whether she simply lent him money and received from him the certificate of stock as security. The evidence does show without contradiction that defendant Gilliland did procure and deliver to the complainant a policy of insurance upon his life in which the complainant was named beneficiary as his "fiancee". She accepted this policy and retained it until the time of trial, when it was produced by her and admitted in evidence as defendants' exhibit. It is also in evidence that following the second $10,000 transaction defendant Gilliland paid Mrs. Haskell $500, which he claims was for interest, but which she says constituted reimbursement for small sums advanced to him from time to time on their social outings to night clubs and other places of amusement. In June, 1936, and as late as September of the same year, the complainant visited Gilliland at his ranch in the state of Oregon.

We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. People v. Davis, 210 Cal. 540, 556, 293 P. 32. The phrase "miscarriage of justice" as used in the constitutional provision has no hard or fast definition, and as was said in People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975, "does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'"

[12] If a defendant cannot be fairly convicted, he should not be convicted at all; to hold otherwise would be to provide ways and means for the conviction of the innocent. It cannot be gainsaid that you cannot inspire or preserve respect for the law by withholding its protection from those accused of crime. While deviation from the prescribed rules of law governing trials may result in justice for the particular defendant who is before the bar, it is dangerous to the community and its citizens. As was said by Chief Justice Hughes of the United States Supreme Court not so long ago, "In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interest or privilege." When, as here, we are unable to say "whether appellant would or would not have been convicted but for the errors of the court," we must direct a reversal. People v. Degnen, 70 Cal.App. 567, 234 P. 129, 145. We do not regard the evidence in this case as sufficient to put into operation the saving grace of section 4½ of article VI of the Constitution. Even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. From our examination of the record in this case we are of the opinion that the errors complained of have resulted in a miscarriage of justice. It is quite likely that the conviction of appellants was caused by the errors that are shown by the record. From the standpoint of the prosecution, the most that can be said is that the evidence as a whole, which was legally admissible was quite evenly balanced. In venturing these observations, we speak only from the showing made by the record. It is true the jury had an opportunity to observe the demeanor of the witnesses and may have had reason to return the verdicts which were found irrespective of the errors which were committed during the trial. As to this, of course, we can say nothing. From the mere record, as we read it, the errors may very easily have turned the scale in favor of the prosecution. Appellants were denied that fair and impartial trial guaranteed by law, which amounts to a denial of due process of law. Powell v. Alabama, 287 U.S. 45, 52, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

[13] Because a new trial may ensue, we are disposed to give consideration to appellants' claim that the trial court erred in overruling their general and special demurrers to the indictment. Appellants' contention that count I of the indictment does not state facts sufficient to constitute a public offense and fails to conform to the requirements of sections 950, 951 and 952 of the Penal Code, cannot be upheld. The pleading under attack clearly charges that the acts of the defendants allegedly constituting the conspiracy all occurred "in the County of Los Angeles and State of California and within the jurisdiction of this court." Also, the indictment clearly and understandingly described the principal elements of the crimes charged and was immune from the attacks made thereon by special demurrer. For a discussion of the accusatory procedure under our system of criminal justice, see People v. Gilbert, 26 Cal.App.2d 1, 6, 7, 8, 78 P.2d 770. What we have just said applies with equal force to the attack made by demurrer on count II.

[14, 15] Appellants next assert that section 182 of the Penal Code, on which count I is based, is unconstitutional. This claim is grounded upon the contention that thereunder two different punishments are provided for the crime here charged, in that pursuant to said section a conspiracy to commit a crime denounced by the Penal Code is punishable in the same manner as would be the commission of the crime itself, which might vary from a minimum of one year to life, dependent upon the penalty

provided for the substantive offenses which forms the basis of the conspiracy; whereas conspiracy to commit a felony denounced by other statutes is punishable by imprisonment in the state prison for a maximum of two years. In the instant case it is argued that under the provisions of section 18 of the Corporate Securities Act, St. 1931, p. 950, a conspiracy to violate it would be punishable by imprisonment for a maximum term of five years. Appellants urge that said section 182 of the Penal Code contravenes section 11, article I, of our state Constitution. We are of the opinion that the Penal Code section does no violence to the rule that a law need not operate universally; that it is general in its scope if it applies to all of a certain class alike and operates uniformly upon all persons standing in the same category and upon rights and things in the same relation. In re West, 75 Cal.App. 591, 597, 243 P. 55. Appellants' apprehension of the difficulty which may arise in determining the period of imprisonment in the event of a conviction is answered in People v. Welch, 89 Cal. App. 18, 24, 264 P. 324, and People v. Yant, 26 Cal.App.2d 725, 731, 80 P.2d 506.

[16] Appellants were not prejudiced because count I of the indictment charged and the jury found them guilty of the offense of "conspiracy to violate the Corporate Securities Act and grand theft", because but one penalty could be imposed. While the pleading as to count I might be made more specific by adding the words "to commit" before the words "grand theft", the omission of the words does not warrant a reversal.

Taken as a whole, the instructions adequately and correctly advised the jury as to the law governing the issues framed by the indictment and raised by the evidence, except so far as the jury was misdirected concerning its right to receive certain evidence as to both defendants and to which errors we have heretofore given attention in this opinion.

For the reasons herein stated, the judgments and the orders denying defendants' motions for new trial are, and each of them is, reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

MARTIN et al. v. LOS ANGELES TURF CLUB, Inc.

Civ. 12510.

District Court of Appeal, Second District, Division 2, California.

May 29, 1940.

Hearing Denied July 25, 1940.

1. Theaters and shows ⚷6

Evidence *held* to authorize recovery from proprietor of race track for injuries suffered by spectator who fell when she stepped upon a bottle while descending steps in grandstand.

2. Appeal and error ⚷883

Where defendant stated that it would be satisfactory for court to give general instructions before the evidence commenced, defendant consented to such procedure and thereby waived any irregularity in instructing jury on matters of law before the taking of any evidence. Code Civ.Proc. § 607.

3. Trial ⚷220, 223

The practice of giving instructions orally without the aid of written memoranda and at times other than those which the usual practice and the code provisions sanction is not to be commended. Code Civ.Proc. § 607.

4. Trial ⚷223

The better practice is to reduce instructions to writing before delivering them to the jury, thus avoiding the possibilities of inadvertent error. Code Civ.Proc. § 607.

5. Appeal and error ⚷1058(1)

Exclusion of testimony that it was the practice of all race tracks in the state to permit sale of beer in bottles was not prejudicial error where court subsequently overruled objection to question on practice of four particular race tracks in that regard.

6. Trial ⚷296(3)

In action against proprietor of race track for injuries suffered by spectator who fell on bottle in grandstand, instruction indicating that proprietor's efforts to keep the premises clear from obstructions must be "all that they should have been, considered from a practical standpoint," though inartfully worded, was not prejudicial error where other instructions made it clear that proprietor's duty was dependent on practicability of picking up the bottles quickly and that court was not assuming that spectator fell on a bottle.

7. Trial ⚷296(10)

Instruction that there were no set rules to follow in weighing testimony of witnesses, but that it was a matter of judgment, was not prejudicial error where court further instructed the jury fully on burden of proof and credibility of witnesses.

8. Trial ⚷235(6)

An instruction that jury should view evidence of oral statements of a party against his interest, or admissions with caution, was proper. Code Civ.Proc. § 2061, subd. 4.

9. Trial ⚷236(1)

An instruction that jury had no right to arbitrarily disregard opinions of experts, but was not obliged to follow them if unreasonable and not worthy of credence, was proper.

10. Theaters and shows ⚷6

In action against proprietor of race track for injuries suffered by spectator who fell on bottle, instructions on contributory negligence and proximate cause, that negligence of leaving bottle where spectator stepped on it would be proximate, that negligence of spectator in stepping on the bottle would be proximate, and that contributory negligence was established if plaintiff's negligence contributed directly and proximately to the happening of the accident in any degree, even though slight, were correct.

11. Trial ⚷260(1)

Refusal of requested instructions was not prejudicial error where instructions were given covering the subjects requested.

12. Appeal and error ⚷1010(1)
Trial ⚷330(5)

A judgment will not be reversed for insufficiency of evidence or defects in counts of a complaint, if the judgment is sustained by one count of the complaint.

◆

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Mary C. Martin and another against the Los Angeles Turf Club, Inc., for personal injuries. From a judgment for plaintiffs, defendant appeals.

Affirmed.

George L. Greer and James V. Brewer, both of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages for personal injuries defendant appeals.

Viewing the evidence most favorable to plaintiffs (respondents), the essential facts are:

February 22, 1938, plaintiff Mary Martin with her husband, plaintiff Carl Martin, attended the races at Santa Anita race track. About 5:30 p. m. at the conclusion of the races she started to descend some steps in the grandstand. In doing so she stepped upon a bottle, fell, and received severe personal injuries. The jury returned a verdict in her favor in the sum of $6,000 and in favor of her husband for $250.

Defendant relies for reversal of the judgment upon these propositions:

First: There is no substantial evidence to sustain the judgment.

Second: The trial court committed prejudicial error in instructing the jury relative to matters of law after the opening statements of counsel and before the taking of any evidence.

Third: The court committed prejudicial error in excluding the testimony of a witness that it was the practice of all race tracks in the state to permit the sale of beer in bottles at racing meets.

Fourth: The trial court committed prejudicial error in instructing the jury on

(a) Defendant's duty of care;

(b) The weight of the evidence and burden of proof;

(c) Contributory negligence and proximate cause.

Fifth: The trial court committed prejudicial error in refusing certain instructions requested by defendant.

Sixth: The trial judge erred in submitting the second cause of action to the jury for the reason that the second cause of action did not state facts sufficient to constitute a cause of action.

[1] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence taken in connection with the inferences which may be reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments were necessarily predicated. For example, plaintiff Mary Martin testified that she slipped on a bottle. Witness Deer testified that before and after

the accident he saw "all kinds of stuff, including beer bottles, pop bottles," etc., on the steps. There can be no question that the jury was justified from this testimony in finding that plaintiff Mary Martin stepped upon a beer bottle and fell.

[2] The second proposition is also untenable. After both counsel had made an opening statement to the jury the following occurred:

"The Court: It is the practice in this department to give the jury some general instructions before the evidence commences. If there is no objection, the court will do that at this time.

"Mr. Graf: That is satisfactory with the plaintiff.

"Mr. Brewer: No objections.

"The Court: It is satisfactory to the defendant?

"Mr. Brewer: Yes."

A little later the court said:

"Before the case is over, the court will have occasion to instruct you further, no doubt. The reason that we follow this practice in this department of discussing the law before the evidence comes in is that it seems to me that it is much more helpful to you if you have these principles in mind as the testimony comes in than it is to wait until the evidence is all in and the arguments have been made. I think you should be aided by an outline of what the issues are and as to your duty in weighing the evidence on these various issues as it comes in. Also, at the close of the case, if there are any further instructions to be given, I would prefer to give them before the argument starts, in order that counsel may comment on the instructions. I think that it is a right they should have, to discuss the facts of the case in view of the law that is stated by the court, and to comment on it and discuss the law as well as the facts. So, with these preliminary instructions and with the understanding, *if there is no objection,* the court will give any further instructions that may seem to be required before the argument commences, we will start in with the testimony." (Italics added.)

[3] From the foregoing it is clear that defendant consented to the procedure followed by the court and thereby waived any irregularity in the time that the jury was instructed. In passing we call attention to the fact that a practice which seems to be growing in the superior court is that of giving instructions orally without the aid of written memoranda and at times other than those which the usual practice and the code provisions sanction. Such practice is not to be commended. In section 607 of the Code of Civil Procedure the manner in which "the trial must proceed" is set forth and it is therein provided that the court may charge the jury after the arguments.

[4] A number of appeals have come to our attention where errors in the giving of instructions are urged, which errors have resulted from the failure of the trial judge to reduce his instructions to writing prior to delivering them to the jury. It is impossible for the most skilled attorney who has carefully prepared a case to accurately orally state the rules of law without the assistance of written memoranda. This task is even more difficult for the trial judges in Los Angeles county because of the multitude and variety of actions which they are continually called upon to preside over. A judge may finish the trial of an extremely complicated malpractice suit and immediately thereafter be called upon to try a complicated probate case or a highly important criminal proceeding. It is by far the better practice to reduce instructions to writing before delivering them to the jury, thus avoiding the possibilities of inadvertent error.

[5] The third proposition is devoid of merit. After the trial judge sustained an objection to the evidence set forth in this proposition the following occurred and the witness testified:

"Q. Now these that you have mentioned, Hollywood Park, Del Mar, State Fair and Bay Meadows, tell us whether or not beer is sold in bottles at those parks at the time of the races.

"Mr. Graf: The same objection; objected to on the ground it is incompetent, irrelevant and immaterial, no proper foundation laid for the question.

"Court: Objection overruled."

It is thus evident that the question as to which an objection was sustained the trial court subsequently in substance permitted to be answered.

[6] The objection contained in paragraph (a) of defendant's fourth proposition is untenable. The trial court instructed the jury thus:

"It was the duty of the defendant to exercise the care that was required to keep its premises in a reasonably safe condition in view of the uses that were to be made of the premises by the public which was invited to use them * * * but it is guilty of negligence if it fails to use the requisite care to keep the place in a reasonably safe condition for use * * * whether the efforts, as I say, that were made by the defendant to keep these premises clear from obstructions and in a reasonably safe condition *were all that they should have been, considered from a practical standpoint.*" (Italics added.)

However in addition to the foregoing instructions, which were inartfully worded, due in all probability to the fact that they had not been reduced to writing, the trial court did instruct the jury as follows:

"You have to inquire into the danger of the situation, if you find it was dangerous, and to determine what was required, what was reasonably required of the defendant to look for and to observe these conditions and to remove them."

"The Los Angeles Turf Club itself does not sell any beer. At the same time it operated this race course, and no matter what its contract rights may have been with other people, as long as it was operating the race course and maintaining the premises, it had the duty of using that care which was reasonably required to keep the premises in a reasonably safe condition; and if, to its knowledge, conditions were created by others and were suffered to remain, I think legally there is no difference between that situation and one in which the Turf Club itself created the condition."

"Negligence in this case would consist of only two things—first, the sale of beer in bottles, where the patrons were allowed to take them up into the grandstand and different parts of the premises and set the bottles down wherever they saw fit, without at the same time taking adequate precautions to guard against injury to the patrons by reason of the bottles being scattered around. That would be one basis for a finding of negligence, if you should find that the facts supported that theory of the case."

"Another would be that although a sufficient force of men was employed to keep the premises in a safe condition, that they failed to do so, or failed to perform the duties that they were supposed to perform in that respect."

"If you should believe that Mrs. Martin stepped on a beer bottle and that it was unsafe to sell beer to patrons in bottles to be carried into the grandstand, without taking ordinarily prudent precautions to prevent injuries from the beer bottles, and if you believe that fact to be established, that is, there were no such precautions taken, you would have a right to believe that the defendant was negligent."

"The conditions that are shown here by the evidence were open and notorious. Many people, apparently, deposited bottles in different parts of the premises, at different times during the afternoon, bottles of various sorts, and they threw other things away in great quantities, so much so that the place, apparently, after any race was completed, was littered up worse than it would be after a kids' picnic. It is not contended that these conditions would not be noticed or seen by the patrons at the track. Mrs. Martin, as well as every other patron, was obliged to see what was in plain sight, that this place was cluttered up with debris and bottles."

"All you have to determine is whether the Turf Club took the necessary precautions to keep this place in a reasonably safe condition, in view of all of the circumstances attending the manner in which the patrons used the premises."

"* * * not as soon as they were deposited but as soon as it was practicable to pick them up in view of the number there were and the opportunities the men had to get through the crowd and gather them together."

"If the bottle was negligently left there and Mrs. Martin stepped on it, the negligence of leaving it there would be proximate to that accident; and if Mrs. Martin was negligent in stepping on the bottle when she should have seen it and avoided it, of course, her negligence is proximate to the accident. So that there is no use discussing at length the doctrine of proximate cause."

"This is in particular connection with the sale of beer in bottles and the bottles being taken into the stand. Now, it is clear, I think the Court has made it clear to you, that under the law if the defendant is exercising ordinary care in the management of its premises, and if it is providing a reasonably safe place in and around the grandstand for its patrons, it is not guilty of negligence."

"If you should find that the premises are not maintained or were not maintained in a reasonably safe condition, in view of all of the evidence on the subject as you have heard, and if you believe that in the exercise of ordinary care and prudence to provide a safe place for the patrons, a reasonably safe place, it would be necessary for the defendant to discontinue the practice of selling beer in bottles to be taken into the stand, you would have a right to find that the continuance of that practice was negligence."

We believe, from a reading of the foregoing instructions, the jury was not misled by any inadvertent or inapt expression of the trial court upon defendant's duty of care, nor do we believe there is any merit in defendant's contention that the instructions assumed facts and implied negligence, the trial court having stated to the jury:

"Then in anything that I may say as to the fall that Mrs. Martin is alleged to have sustained, the jurors will understand that I am *not assuming* that she fell, or that the proof will show that she fell, but only assuming that the proof may show that." (Italics added.)

"Nothing that the Court may say is to be understood as conveying any intimation as to how any question of fact should be decided, or what has been proved or not proved."

"The fact that I have assumed certain hypothetical factual situations, does not mean that I am intimating that any set of facts has been proved, or has not been proved."

[7] There is also no merit in the objection urged in paragraph (b) of defendant's fourth proposition.

The trial court said this to the jury:

"There are no set rules you and I can follow in weighing the testimony of witnesses; it is a matter of judgment."

The trial court, however, further instructed the jury thus:

"The burden of proof is upon the plaintiff to show facts constituting negligence, and that the acts or conditions which are alleged to have been negligent proximately caused her injuries."

"The burden of proof is upon the plaintiff to show defendant's negligence, that it was the proximate cause of the accident."

"Duty is upon the plaintiff, as I told you, to prove negligence."

"You know you are the exclusive judges of the credibility of witnesses, and the weight of the evidence; but you have no arbitrary power. The authority you have is a very great authority, because your decision on the facts as a rule is binding on the judge as a practical proposition. In determining the credibility of a witness, you should not do so from hastily gained impressions, but only after comparing the testimony of the witnesses with all the evidence which is corroborative of it and all that is opposed to it. You will find that often times you will not be able to determine whether a witness has told the truth, and the entire truth, until you have had an opportunity to consider all the evidence in the case, bearing upon the same points. You know that ordinarily the interest of a witness in the outcome of a lawsuit is an important consideration for you to bear in your minds—the appearance of a witness on the witness stand, his apparent willingness to tell fully and frankly everything he knows; or on the other hand to color his testimony; but you have the right to bring to bear your own judgment and your experience whatever it may be in determining whether a witness has told the truth or all the truth. There are no set rules you and I can follow in weighing the testimony of witnesses. It is a matter of judgment."

"You know, I am sure, that the preponderance of the evidence means not a greater number of witnesses, but the greater weight of testimony, testimony which, or the evidence which, when compared with the evidence opposed to it, is more convincing to your minds, carries greater conviction."

[8] It is further urged that the trial court erred in instructing the jury thus:

"Oral evidence, evidence of oral statements of a party against his interest, or admissions, are to be viewed by you with caution."

Such instruction was proper. (See sec. 2061, subd. 4, Code Civ.Proc.)

[9] Again the trial court gave the following instruction:

"Opinion evidence has been given here by doctors. That sort of evidence is permitted in a case of this sort, people who are especially skilled in the professions and especially learned are allowed to give opinions, and those opinions are to be considered as evidence. You have not any right to arbitrarily disregard them. Of course, if you think they are unreasonable and not worthy of credence, you are not obliged to follow them. You haven't any right to reject the testimony of any witness unless you have some reason to believe that the credibility of the witness has been to some extent impeached. That is, your right to judge of the credibility of witnesses is limited; it is not arbitrary, as I said before."

The foregoing was a correct instruction. Haight v. Vallet, 89 Cal. 245, 26 P. 897, 23 Am.St.Rep. 465; Rosander v. Market Street Ry. Co., 89 Cal.App. 710, 718, 265 P. 536.

[10] There is likewise no merit in the objection urged in paragraph (c) of defendant's fourth proposition. The trial court instructed the jury as follows:

"In discussing the law, the Court has to discuss the law of the entire case, and unless you find there was negligence on the part of the defendant and no negligence on the part of Mrs. Martin, that proximately contributed to the accident, you will have no occasion to consider the matter of damages at all."

"If the bottle was negligently left there and Mrs. Martin stepped on it, the negligence of leaving it there would be proximate to that accident; and if Mrs. Martin was negligent in stepping on the bottle when she should have seen it and avoided it, of course, her negligence is proximate to the accident. So that there is no use discussing at length the doctrine of proximate cause."

The trial court also instructed the jury:

"It is simply as I say, a plea that the plaintiff was negligent in some respect that contributed proximately in some degree to the happening of the accident, and it is established if plaintiff's negligence contributed directly and proximately to the happening of the accident in any degree, even though it may be a slight degree."

"The burden of proof is upon the plaintiff to show defendant's negligence, that it was the proximate cause of the accident."

The foregoing instructions are full and accurate statements of the principles of law embodied therein.

[11] Defendant's fifth proposition does not find support in the record. An examination of the instructions requested by defendant and refused by the trial court discloses that in all particulars regarding which defendant complains the court gave instructions covering the subjects requested by defendant; for example, the trial court instructed the jury on unavoidable accident as follows:

"There is such a thing as an unavoidable accident, in a legal sense there is. * * If you believe that ordinary care was used by the defendant to keep the premises in a reasonably safe condition, there would be no negligence on the part of the defendant; and if you believe that Mrs. Martin stepped on this beer bottle without any negligence on her part, her accident did not give rise to any claim of liability on the part of the Turf Club. It would be one of those things that happens where neither party is negligent, and in a legal sense, it would be an unavoidable accident."

Also on disregarding sympathy, prejudice, and bias as follows:

"It is your duty as you know to decide this case strictly upon the evidence and law stated to you by the Court, without any feeling of sympathy, or prejudice or bias."

[12] It is unnecessary for us to discuss the errors urged by defendant in its final proposition, for the reason that the rule is established that a judgment will not be reversed for insufficiency of the evidence or defects in counts of a complaint, if the judgment is sustained by one count of the complaint, as in the present case, it being conceded that the first count states a cause of action, which count in turn is supported by substantial evidence. Kains v. First National Bank of Pomona, 30 Cal.App.2d 447, 451, 86 P.2d 935.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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39 Cal.App.2d 384

PEOPLE v. CAMPANELLA.

Cr. 2123.

District Court of Appeal, First District,
Division 2, California.

June 3, 1940.

1. **Homicide** 🔑300(8)

In homicide prosecution, defendant's evidence was sufficient to entitle him to make a claim that he acted in self-defense.

2. **Homicide** 🔑300(8), 340(1)

Where defendant's evidence was sufficient to entitle him to claim that he acted in self-defense, and prosecuting attorney earnestly argued that defendant could have fled, it was prejudicial error to refuse defendant's requested instruction covering such theory, where instruction was not covered by given instructions.

3. Homicide ⟹300(9), 340(1)

In homicide prosecution, instruction that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus create a real or apparent necessity for killing, was prejudicially erroneous, where there was no evidence that defendant knew who deceased was when deceased came to the premises where the homicide took place and threatened to kill defendant.

4. Homicide ⟹300(3)

An instruction that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or "thought" create a real or apparent necessity for killing, was improper because of the use of the word "thought" perhaps by inadvertence for the word "fault".

5. Homicide ⟹254

Evidence showing offense, if any, was manslaughter, was insufficient to sustain conviction for murder in the second degree.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Charles Campanella was convicted of murder in the second degree, and he appeals.

Judgment reversed, and new trial ordered.

Daniel F. Hogan and Bernard Nugent, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary and Dennis Hession, Deputy Attys. Gen., for respondent.

STURTEVANT, Justice.

The district attorney filed an information against the defendant charging him with murder. The defendant entered a plea of not guilty. The action was tried before the trial court sitting with a jury. The district attorney conceded that the evidence did not disclose the crime of murder in the first degree, but contended it did disclose murder in the second degree. The jury returned a verdict in accordance with that contention. The defendant made a motion for a new trial which was denied. He has appealed from the judgment and from said order.

The defendant was living at 363 Page street in San Francisco and occupied a three-room apartment together with Mrs. Hattie Jensen, the estranged wife of the deceased, and her three children by another marriage. He stayed there about two months. Mrs. Jensen was out nearly all of the time and defendant was allowed to stay in the apartment by Mrs. Jensen to look after her two boys, Bobby, aged ten, and another son, aged fourteen. He also helped Mrs. Jensen with the housework. He slept in the kitchen upon a cot. The defendant is fifty years old.

The deceased, James J. Jensen, aged thirty-eight, was the husband of Mrs. Hattie Jensen, but was separated from her and lived elsewhere for about fourteen months.

On the evening of the 14th of November, 1939, at about 5:30 p. m., the deceased went to 363 Page street and entered the apartment where he found the defendant and Bobby, a son of Mrs. Jensen. The defendant was sitting in an easy chair in the living room. The deceased took Bobby into the kitchen and asked him what the defendant was doing there. He was told by Bobby that "he is helping my mother and taking care of us", whereupon deceased said that before he would let that so and so help his mother he would kill the Dago. The deceased then went into the living room and while the defendant was sitting in the easy chair grabbed defendant by the shirt collar and threw him back in the chair. At about this moment Mrs. Jensen entered the apartment. At that time deceased was leaning over the front of the chair with his hands on both sides of the chair. She said to deceased, "Here, here. What is wrong, and come out here in the kitchen where I can talk to you." The deceased went to the kitchen with Mrs. Jensen and took hold of her coat and shaking her said, "Before I will let that Dago son of a bitch have you, I am going in there and kill him." That statement was made in a loud and angry manner and the defendant testified it could have been heard a half a mile. At once the deceased ran into the living room and up to the defendant who was still sitting in the chair. Deceased struck defendant and knocked his glasses off. He grabbed defendant by the throat.

There was a short struggle. The defendant pulled out of his pocket an ordinary pocket knife, opened the blade and stabbed defendant four times while they still struggled. Three of the wounds were trivial but the fourth resulted in a stab in the neck, from which deceased bled to death some minutes later.

The foregoing is a complete summary of the matters stated. Some of the facts were testified to by the defendant, some by Mrs. Jensen, and some by Bobby Williams. No other witness was present. As it becomes necessary other facts developed at the trial will be recited.

[1, 2] From what has been said above it is clear the defendant was entitled to make a claim that he was acting in self-defense. Under a set of facts closely similar it was held that the evidence established that defense as a matter of law. People v. Sherman, 103 Cal. 409, 37 P. 388. When instructing the jury on the law of justifiable homicide, the trial court read all of section 197 of the Penal Code including the duty, in certain instances, to "decline any further struggle". But it refused defendant's request to give an instruction which was as follows: "Where one, without fault, is placed under circumstances sufficient to excite the fears of a reasonable man that another designs to commit a felony, or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant and be justified by the appearances. And, as where the attack is sudden and the danger imminent, he may increase his peril by retreat; so situated, he may stand his ground, that becoming his wall, and slay his aggressor, even if it be proved that he might more easily have gained his safety by flight." People v. Hecker, 109 Cal. 451, 462, 42 P. 307, 30 L.R.A. 403. It is not claimed that the instruction incorrectly stated the law, but it is claimed it was covered by other instructions. We have examined the record and we find no other instruction addressed to the same subject. The instruction was of particular importance. The district attorney in the examination of witnesses adduced the evidence and summing up he earnestly argued that the defendant could have left the apartment when the deceased and Bobby went to the kitchen, and again that he could have left the apartment when the deceased and Mrs. Jensen went to the kitchen, and that the defendant could have left the apartment by going down the fire escape. It is patent therefore that the defendant was prejudiced by the failure of the court to give the foregoing instructions.

[3, 4] Acting upon the request of the prosecution the trial court instructed the jury as follows: "You are instructed that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or thought (sic), to create a real or apparent necessity for killing." It is earnestly claimed by the defendant that the instruction was highly prejudicial to him and that it was not based on any evidence contained in the record. We think that contention must be sustained. Mrs. Jensen testified the defendant had "met" the deceased. She did not give any further information on that subject, nor did any other witness. The defendant testified positively that he did not know who the deceased was when he came into the apartment. There was no evidence whatever pertinent to said instruction excepting what has been set forth above, and that, we submit, is wholly silent. Under such circumstances it has been held it was error to give the instruction. People v. Orosco, 73 Cal.App. 580, 600, 239 P. 82, 90. In that case the court said: "It is urged upon us that the trial court erred in instructing the jury 'that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault to create a real or apparent necessity for killing.' The point is well taken. While the instruction was a correct statement of an abstract proposition of law, it was improperly given in the present instance, for the reason that there was not in the record the slightest evidence that appellant sought a quarrel with Rios during the series of events leading up to the latter's death." Furthermore, the instruction as given was not sound law. The word "thought" was perhaps meant to be "fault". People v. Orosco, supra.

[5] During the trial the prosecution introduced much evidence to the effect that the defendant was contented with his lodgings and unwilling to move. Evidence was also introduced that the deceased was not armed. But no witness testified that the body of the deceased was searched and no weapon was found. Nor was there any

evidence that the defendant knew he was unarmed. When the deceased returned after talking to Mrs. Jensen, the defendant testified, the deceased with one hand grabbed the defendant by the throat, and with the other hand he struck the defendant's leg. On which leg and at what place the deceased struck was not developed. After the fight was over evidence was introduced showing the defendant had been stabbed in the leg, that a hole was cut in his trousers, and that the position of the hole in the trousers and the stab in the leg coincided. The defendant did not testify the deceased stabbed him in the leg, nor that the stab was in the same place where deceased hit him. Officer Ahern testified that at the hospital in the evening after the homicide the defendant stated to him the deceased may have stabbed him in the leg or he may have stabbed himself during the fight. After the fight was over the defendant immediately went into the bathroom washed his hands and face, and changed his clothes. He also washed his knife and put it and his soiled clothes in a grip which he left in the bathroom and then he started to go to the emergency hospital. At no time did he deny he stabbed the deceased. He admitted he did and that he had used the above-mentioned knife in doing so. Having called attention to the foregoing testimony the respondent asserts, "It would appear that appellant killed, not in self-defense, but without sufficient provocation and with an abandoned and malignant heart the man who was urging and insisting that he be ejected from the comfortable room and board afforded him by virtue of his relations with Mrs. Jensen, the deceased's wife. Killing is justifiable only in defense of the life and limb, and the jury has determined that the appellant was not defending his life in this case." That contention is two-fold. The claim that the facts and circumstances introduced in evidence showed the defendant acted "with an abandoned and malignant heart" may not be sustained. People v. Elmore, 167 Cal. 205, 138 P. 989; People v. Kelley, 208 Cal. 387, 393, 281 P. 609; People v. Castro, Cal.App., 99 P.2d 374. The rest of the contention, the claim that self-defense was not in good faith tendered and maintained as a defense, rests on no facts introduced in evidence. Throughout the trial the prosecution sought to prove such theory. But the only evidence regarding the intent of the defendant was his testimony given on cross-examination. That examination was long and searching, but the defendant consistently claimed he acted in defense of Mrs. Jensen and her boys and in fear of his own life and great bodily injury. In the story as told by him there was no conflict. It follows the claim of the defendant that the offense, if any, was manslaughter, and not murder in the second degree, must be sustained.

In the case of People v. Kelley, supra, the Supreme Court modified the judgment by changing the charge from murder to manslaughter. But in that case the defendant had not presented the issue that he had acted in self-defense. In the present case that is the sole defense relied on by the defendant. As we have shown above, the refusal to give an important instruction on that subject prevented him from fully presenting that defense. He should be allowed to do so.

The judgment and order appealed from are reversed and a new trial is ordered.

We concur: NOURSE, P. J.; SPENCE,

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39 Cal.App.2d 349

MEEHAN et al. v. HUNTINGTON LAND & IMPROVEMENT CO.

Civ. 6330–6333.

District Court of Appeal, Third District, California.

May 29, 1940.

1. Vendor and purchaser ⇨37(1)

Representations, such as a vendor's statements to a purchaser concerning vendor's intention as to size of lots to be sold in the future in a subdivision and restrictions to be imposed upon future purchasers of lots, when the representations are made in good faith do not afford basis for action by purchaser to rescind contract of purchase. even though ultimately the representations are not carried out. Civ.Code, § 1572.

2. Vendor and purchaser ⇨44

In purchasers' suits against vendor to rescind contracts for purchase of lots on

ground that vendor, before purchasers executed contracts, had represented that all lots in subdivision would be at least 100 feet wide and that future purchasers would be required to build residences worth not less than $15,000, and that vendor had thereafter resubdivided the subdivision and reduced size of unsold lots and modified requirements as to cost of future residences, evidence warranted finding that purchasers, in entering into contracts, did not rely upon vendor's representations.

3. Limitation of actions ⚷197(1)
Vendor and purchaser ⚷123

Evidence that purchasers, before signing contract for purchase of lots, knew that there were discrepancies between contract and statements of vendor's salesman concerning building cost restrictions to be imposed upon future purchasers of lots in the subdivision and concerning size of lots to be sold in future, and that thereafter deeds were executed conforming to contract but not containing restrictions allegedly mentioned by salesman, and that purchasers waited five years before bringing suit against vendor to rescind contract of purchase on ground that vendor, after selling lots to plaintiffs, had resubdivided the subdivision and reduced the size of unsold lots and modified requirements as to cost of future residences warranted finding that purchasers' cause of action was barred by limitations and "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Consolidated suits by John P. Meehan and wife, by Grace K. Leonard and others, copartners doing business under the fictitious firm name and style of Kittle Manufacturing Company, by Kittle Manufacturing Company, and by John P. Meehan and others, copartners doing business under the fictitious firm name and style of Leonard Machinery Company, against the Huntington Land & Improvement Company to rescind contracts for the purchase of certain lots. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Charles H. Brock, Elza C. Mowry, and Albert E. Forster, all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The plaintiffs in these consolidated cases brought actions against the Huntington Land and Improvement Company to rescind contracts for the purchase of certain lots in two subdivision tracts placed on the market by that company, the plaintiffs claiming the right to rescind because of alleged misrepresentations and false and fraudulent promises made to the plaintiffs as purchasers by the salesman employed by the general agent in charge of the sales in the subdivisions.

It was claimed that prior to the signing of the purchase contracts, plaintiffs were shown a map of the tracts, and the sales agent told them that all of the lots in the tracts, including the lots agreed to be purchased, would be at least 100 feet in width, with certain exceptions, and that each of the lots would be restricted to a single residence which should cost or be fairly worth not less than $15,000, and that the land company would cause each purchaser of a lot to be bound by provisions contained in the contract of sale, and by appropriate deed provisions so that any residence erected thereon would cost or be worth not less than $15,000. Other representations were claimed to have been made concerning which there was no controversy.

The first count in the complaint for rescission alleged that these representations with respect to the size of the lots, and as to the cost requirement of residences were false and untrue and were known by the land company to be false and untrue when made. It was then alleged that after the plaintiffs had purchased their property, and had received their deeds, and in September 1935 (more than five years after the signing of the contracts), the land company resubdivided the tracts in question, reducing the size of the unsold lots, and modified the cost requirements with respect to the cost of residences, by reducing them from $15,000 to a lesser sum.

It was then alleged that the circumstances of the alleged fraud were not discovered until November 1935, whereupon a notice of rescission was given by the plaintiffs to the defendant company.

The second count of the complaint is identical with the first count, with the exception that in place of the statement that the defendant "represented to the plaintiffs" it is alleged that the defendant "promised to the plaintiffs", and with respect to these promises, it is alleged that the defendant company in making the promises, had no intention of performing such promises and in fact had an undisclosed intention not to perform, and in fact did not perform.

The third count reincorporated all of the allegations in the first and second counts and alleged that because of said matters there resulted a failure of consideration. The prayer was for rescission and the recovery of all moneys paid.

The answer of the defendant denied all material allegations and particularly denied that the defendant ever at any time made any false or untrue representations to plaintiffs, and likewise denied it made the alleged promises without intention of performing or with an intent not to perform them. Failure of consideration was likewise denied, and separate defenses were pleaded to the effect that the plaintiffs knew or should have known, of the matters set forth in their complaint upon receiving their contract of sale in August 1929. The defense of laches and the bar of the statute of limitations was also pleaded

The trial court found, among other things, that the salesman, prior to the execution of the contracts in question, told plaintiffs that all lots to be sold in the tract about to be subdivided would be at least 100 feet in width, and that defendant would never re-subdivide any of said lots, and that each residence erected thereon would be fairly worth not less than $15,000, which representations the court found, represented the true condition of the area represented on the map, and was the true intention of defendant as to the remainder of the entire area at the time these representations were made, which belief and intention was warranted by the information at hand, and was made without any intent to deceive or defraud plaintiffs, and was made in the honest expectation and belief that such representations would be fairly carried out.

It was admitted, and the court found, that in 1935, defendant changed its conditions as to the balance of the tract and reduced the size of the lots and permitted the building of residences thereon with less than $15,000, but found that such subsequent re-subdivision and changes were honestly believed to be necessary to prevent the area from deteriorating and that such changes were necessary to protect the investment of the lot owners, including plaintiffs, due to the general depression in real estate, which occurred between the time plaintiffs acquired their lots and September 1935, when the changes were made. The court also found that by reason of the changes the tract in general, as well as plaintiffs' lots, was thereby made more attractive and valuable for residences, and had a higher market value by reason thereof. It was also found that plaintiffs did not rely upon the representations of defendant at the time the contracts were executed. The plaintiffs received the contracts prior to their execution, and were retained overnight and read and signed, and after execution they were returned to plaintiffs, who retained possession thereof until the payments thereon were fully made, when in August 1931, the deeds were executed by defendant to plaintiffs.

The contracts and the deeds issued in fulfillment of the contracts differed from the statements and representations of the salesman in several particulars. The written instruments contained no provision against subdividing the unsold lots or that each residence would be worth at least $15,000, or that all deeds for property in the tract would contain such restrictive conditions, the deed and contract binding only the specific property covered by the particular investment.

Many other findings were made along the lines indicated above, and from such findings the court concluded and entered judgment to the effect that no untrue representations of any kind were made as to any present existing fact by defendant to plaintiffs, and all representations made by the agent as to what would be done in the future with respect to maintaining the size of the lots, and the cost of the residences thereon were believed by the agent to be true when made, and were made without intent to deceive or defraud the purchasers in any way, and the changes were actually beneficial to plaintiff.

There seems to be no contention by plaintiffs either in their complaint or at the trial, that any untrue representations were made as to any existing fact, but the action is founded upon promises and representations made with respect to future matters which defendant knew to be untrue when made. The agent who made the sales to plaintiffs testified he believed the statements he made were true, and Mr. Meehan, a plaintiff, testified that it was his then belief that when the property was sold to him defendant fully intended to follow out its representations. The president of the land company also testified that his company believed that the original size of the lots and the cost restrictions would be adequate at all times for the development of the tract and for maintaining its character as an exclusive residential tract, but because of the depression and the slowing up of sales it was then determined that certain changes should be made to prevent the tract from deteriorating to the detriment of everyone concerned. In view of this uncontradicted testimony the court found accordingly.

[1] The law is clearly settled that representations of this character, made in good faith and without intent to deceive the purchaser, and made in the honest expectation that they would be carried out, do not afford a basis for an action for rescission even though ultimately the representations are not carried out. The gist of an action for deceit or rescission under such circumstances is one made without any intention of performance. Sec. 1572, Civ.Code. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; Ayers v. Southern Pacific R. Co., 173 Cal. 74, 159 P. 144, L.R.A.1917F, 949; Benson v. Hamilton, 126 Cal.App. 331, 14 P.2d 876; Cutler v. Bowen, 10 Cal.App.2d 31, 51 P.2d 164.

[2, 3] So, also, is the finding that in entering into the contracts, plaintiffs did not rely upon the representations made by defendant, fully supported by the evidence. Mr. Meehan testified he received the contract which he took home, read over, and that Mrs. Meehan also read it over and they together discussed it. It was signed, and the next morning he returned it to the defendants. He noted that the contract did not contain a number of the provisions which he had been told would be contained in the contracts and in addition noticed certain discrepancies between the salesman's statements and the provisions in the contract, but made no complaint. Some time later, deeds were executed which conformed to the contracts, but which did not contain the restrictions which the salesman had stated would be set forth in the contracts and deeds. With knowledge of these facts plaintiffs could not wait some five years and then attempt to rescind the transactions. Ruhl v. Mott, 120 Cal. 668, 53 P. 304, Nicolaisen v. Toffelmier, 97 Cal.App. 342, 275 P. 823; Gratz v. Schuler, 25 Cal. App. 117, 142 P. 899.

Plaintiffs also attempted to show that the change made by defendant in 1935, with respect to the size of the lots and the reduction of the cost requirements of the residences to be built thereon resulted in material damage to plaintiffs' lots. As to this there was a direct conflict and the court found that the changes increased the market value of plaintiffs' property, and not only did not result in any damage but was actually financially beneficial and rendered plaintiffs' property more suitable for residential purposes.

It was also found that plaintiffs' cause of action was barred by the statute of limitations and laches. The evidence in the record, and referred to in the recital of the facts is, if believed by the court, sufficient to justify such finding.

The judgment must be affirmed. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

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39 Cal.App.2d 277

PEOPLE v. SMITH.

Cr. 3248.

District Court of Appeal, Second District, Division 2, California.

May 27, 1940.

Hearing Denied June 24, 1940.

1. Automobiles 🔑**355(6)**

Evidence, including testimony by police officers as to defendant's appearance shortly after automobile accident, and that in their opinion defendant was under influence of intoxicating liquor, supported conviction of driving a motor vehicle while under the influence of intoxicating liquor. Vehicle Code, § 501, St.1935, p. 174.

2. Automobiles 🔑**358**

Where information charged defendant with violating statute imposing duty on motorist involved in accident resulting in injury or death of any person to give information and aid, and with driving a motor vehicle while under influence of intoxicating liquor, finding that defendant was guilty of second offense was not inconsistent with finding that defendant did not commit first offense. Vehicle Code, §§ 480, 482(a), 501, St.1935, pp. 170, 171, 174.

3. Criminal law ⚿1172(8)

The giving of an instruction which related to first count of information upon which defendant was acquitted, even if erroneous, was not prejudicial.

4. Automobiles ⚿357

Requested instruction that mere fact that an accident happened and that defendant was involved therein, considered alone, does not support an inference that defendant was driving his automobile at the time thereof in an unlawful manner, was properly refused.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Charles L. Smith was convicted of driving a motor vehicle while under influence of intoxicating liquor, and he appeals.

Affirmed.

Llewellyn J. Moses and Martin S. Ryan, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen. and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was charged in an information filed by the district attorney of Los Angeles county with violation of (1) section 480 of the Vehicle Code, St.1935, p. 93, and (2) section 501 of the same code. Thereafter after trial before a jury he was acquitted of violating section 480 of the Vehicle Code and found guilty of violating section 501 of the Vehicle Code. This appeal is from an order denying his motion for a new trial.

Viewing the evidence most favorable to respondent, the facts are:

November 2, 1938, an automobile being driven by defendant collided with one being operated by Mr. Jonathan.

Defendant relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the finding upon which the judgment was necessarily predicated that defendant was driving an automobile while under the influence of liquor.

Second: Since the jury found defendant not guilty of violating section 480 of the Vehicle Code, it was an inconsistent verdict to find him guilty of violating section 501 of the same code.

Third: The trial court committed prejudicial error in:

(a) instructing the jury as follows:

"You are instructed that where unconsciousness of the defendant at the time of the alleged offense, from any cause, is relied upon as a defense, the burden is upon the defendant to establish such unconsciousness by affirmative proof amounting to a preponderance, or a greater weight, of evidence."

(b) refusing to instruct the jury thus:

"The mere fact that an accident happened and that the defendant was involved therein, considered alone does not support an inference that the defendant was driving his automobile at the time thereof in an unlawful manner."

[1] The first proposition is untenable. An examination of the record discloses that there was substantial evidence together with the inferences which the jury may have reasonably drawn therefrom to sustain each and every finding of fact upon which the judgment of guilty of violating section 501 of the Vehicle Code was necessarily predicated. For example, a police officer testified that shortly after the accident he took defendant to the west Los Angeles police station, that defendant's face was flushed, his eyes red, the pupils thereof dilated, the odor of alcohol upon his breath, and that he in the opinion of the witness was under the influence of intoxicating liquor. This testimony was corroborated by another police officer. Further discussion of the evidence is unnecessary.

[2] Defendant's second proposition is likewise untenable. There is no inconsistency between a finding by the jury that defendant did not violate section 480 of the Vehicle Code (which provides that in the event of an accident resulting in personal injury the requirements of section 482(a) of the same code must be complied with) and a finding that defendant violated section 501 of the Vehicle Code (which prohibits a person from operating a vehicle while under the influence of an intoxicating liquor).

[3] It may be conceded without deciding that the instruction set forth in para-

graph (a) of defendant's third proposition was erroneous. People v. Flannelly, 128 Cal. 83, 92, 60 P. 670. However, since the instruction related to the offense upon which defendant was acquitted, he was not prejudiced by the giving of the instruction and may not predicate error in this court thereon. People v. Collins, 118 Cal.App. 430, 431, 5 P.2d 462.

[4] It was not error to refuse to give the instruction set forth in paragraph (b) of defendant's third proposition. The facts surrounding an accident may or may not support an inference that defendant at the time of the accident was driving in an unlawful manner. This is a question for determination by the trier of fact (in this case the jury) from all of the evidence properly received.

For the foregoing reasons the order appealed from is affirmed.

We concur: MOORE, P. J.; WOOD, J.

In re NORTHCUTT'S ESTATE.

SMITH v. DEWAR.*

Civ. 12602–S.

District Court of Appeal, Second District,
Division 1, California.
June 5, 1940.

As Modified on Denial of Rehearing
June 25, 1940.

Hearing Granted Aug. 1, 1940.

1. Wills 🔑462

Under will provision directing executor to sell all of testator's "personal property" and divide the "same" between named persons, the word "same" referred to "proceeds" of the sale, which word, "proceeds", although omitted, would be understood, and the phrase "personal property" could not be construed in its technical sense as including money in bank. Civ.Code, § 14; Probate Code, § 106.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

2. Wills 🔑462

In construing a will, an omitted word may be understood and read in.

3. Wills 🔑439, 440, 441

In construing a will, testator's intention governs and is to be determined from an examination of the will itself without resort to extraneous circumstances unless necessary for an effective determination of such intention.

Appeal from Superior Court, Los Angeles County; Clemmence Brown, Judge Pro Tem.

Proceeding in the matter of the estate of Carrie L. Northcutt, deceased, between Forest G. Smith, as executor of the last will and testament of Carrie L. Northcutt, deceased, and as trustee of the testamentary trust created under the last will and testament of Carrie L. Northcutt, deceased, and Robbie Nelson Dewar. From an order of partial distribution, the executor and trustee appeals.

Order of partial distribution reversed and cause remanded, with directions.

Helen King, of Los Angeles, for appellant.

Hansen & Sweeney and E. D. Yeomans, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by the executor and trustee from an order of partial distribution. The will, which was duly admitted to probate, provides in part as follows:

"Fourth: I hereby direct that my executor shall sell all my personal property, and shall divide the same in equal shares between Mrs. Byrd Lowell Boyd and Robbie Nelson Dewar. If, however, any portion of the same is needed to pay debts or costs of administration, same shall be first deducted.

"Fifth: I give, devise and bequeath the residue of my estate, real and personal, wherever situated and however held, hereinafter termed the 'Trust Estate' to Forest G. Smith, as Trustee in Trust as follows:"

The court commissioner, acting as judge pro tempore, held that the personal property described in paragraph "Fourth" which was to be sold according to the terms of said paragraph, included money in the bank, and ordered distribution accordingly.

It is contended on appeal that such ruling was error.

The trial court construed the words "personal property" to mean and include money belonging to the deceased which was on deposit in the bank, evidently on the theory that "personal property" includes "money" by virtue of section 14 of the Civil Code, and that the words "personal property" are "technical" within the contemplation of section 106 of the Probate Code.

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* Subsequent opinion 107 P.2d 607.

[1, 2] Respondent urges such construction on appeal and in that connection argues as follows: "It should be remembered that the will in this case was drawn by an attorney at law. In fact it was drawn and prepared by appellant, who is an attorney at law." In support of the aforesaid argument respondent cites Estate of Bourn, 25 Cal.App.2d 590 at 595, 78 P.2d 193, 196, wherein, with regard to the question there considered, the court observed that, "As declared by section 106 [Probate Code], 'technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense'; and it is held generally that where the will is drawn by a lawyer whose experience and competence is beyond question, the presumption that legal terms embodied in the will are used in their legal sense is all but conclusive." In the Bourn case, supra, the controversy arose over the meaning to be given to the words "annuity or annuities", in connection with which the court held that as there used they were to be "taken in their technical sense". However, it should be noted that relevant circumstances cannot be disregarded. For example, in the Bourn case, supra, the court further observed. "Here, as pointed out by the probate court, the will and the codicils thereto (there were four of them) were drafted by a lawyer of competence and experience; * * * all of said documents were prepared with deliberation, and all legal terms employed in drafting the same selected with studied care." Manifestly a sentence, such as is incorporated in the fourth provision of the will herein, that literally requires the impossible, can scarcely be said to have been drafted "with studied care" by a lawyer of "competence and experience". Without the aid of miracles, personal property cannot be both sold and divided at the same time. The words "personal property" as used in the will in question cannot be taken in their technical sense to include money without doing violence to reason. On the other hand, by resorting to an analysis of the context of the fourth provision, it is at once evident that what is intended is simply that the personal property should be sold and the *proceeds* divided. What is intended by the use of the word *"same"* in the expression "divide the *same*", in the first sentence, would be somewhat of a puzzle but for that which follows; that is to say, the second sentence continues: "If, however, any portion of the *same* is needed to pay debts or costs of administration * * *." (Italics added.) Thus the use of the word *"same"* in the second sentence clearly indicates its intended signification in the first sentence; namely, that it was intended to mean *proceeds*. Debts were to be paid with the *"same"*; obviously this provision refers to the proceeds of the sale of the personal property referred to in the first sentence. The word *proceeds* is understood; that a word may be understood, in proper cases, by construction has never been questioned.

[3] The intention of the testator is clear, namely, that after the sale of the personal property, the proceeds of the sale are to be divided, and that money in the bank is not intended to be included in the sale. It is the intention of the testator that governs, and this is to be determined from an examination of the will itself without resort to extraneous circumstances unless necessary for an effective determination of such intention.

Other objections to the appeal, urged by respondent, are without merit.

The order of partial distribution is reversed and the cause remanded with directions to proceed in accordance with the views herein expressed.

We concur: YORK, P. J.; WHITE, J.

39 Cal.App.2d 376

PEOPLE v. KINOWAKI et al.

Cr. 3266.

District Court of Appeal, Second District,
Division 2, California.

May 31, 1940.

Hearing Denied June 27, 1940.

1. Homicide ⚿300(3)

In murder prosecution, defended on ground of self-defense, court erred in refusing to charge that a person exercising right of self-defense not only may stand his ground and defend himself when attacked, but may pursue adversary until he has secured himself from danger.

2. Homicide ⚿341

In murder prosecution, error in refusing to charge on right of one attacked to pursue adversary until he has secured himself from danger was prejudicial where the instruction was applicable to testimony given by witnesses for defense, there was marked conflict in testimony on self-defense, and doctrine of the rejected instruction was not covered in instructions actually given.

3. Criminal law ⚿784(7)

In murder prosecution, court erred in refusing to charge that where circumstantial evidence is relied upon, the circumstances must be consistent with hypothesis that the defendants are guilty and at the same time inconsistent with any other rational conclusion.

4. Criminal law ⚿762(3)

In murder prosecution, where defendants contended that alleged victim was not actually killed, referring in instruction to victim as "the person killed" and as "the deceased" was error, as making possible an inference that the court considered that victim's death was established by the evidence.

5. Criminal law ⚿761(13)

The court should not, directly or indirectly, assume the guilt of accused, nor employ equivocal phrases which may leave such an impression.

6. Criminal law ⚿761(1)

Where there is a conflict in the evidence, any assumption of a fact in dispute which must be found by the jury is an infringement of jury's province.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

S. Kinowaki, M. Inoye, and Hideichi Yamatoda were convicted of manslaughter, and they appeal.

Reversed and new trial ordered.

Hearing denied; CURTIS, J., dissenting.

Jerry Giesler, Ward Sullivan, and K. Doi, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., Burdette J. Daniels, Deputy Atty. Gen., and Buron Fitts, Dist. Atty. of Los Angeles County, and Thomas F. O'Brien, Deputy Dist. Atty. of Los Angeles County, both of Los Angeles, for respondent.

WOOD, Justice.

Defendants were charged in count I of the information with the crime of murder and in count II with the crime of assault with a deadly weapon with intent to commit murder. A jury found them guilty of manslaughter and not guilty of the charge contained in count II. They prosecute the present appeal from the judgments of conviction and from the orders denying their motions for a new trial.

At about 9 o'clock p. m. on May 21, 1938, Teruhiko Namba entered the gambling establishment in Los Angeles of which defendant Yamatoda was manager. A fight then occurred which, according to the charges of the prosecution, resulted in the death of Namba. Defendants claim that the testimony is not sufficient to establish that Namba was killed and that in any event their actions were justified on the ground of self-defense.

The record discloses a very decided conflict in the testimony presented by the parties. On behalf of the prosecution witnesses testified that Namba, who apparently was a stranger from Campo, California, went to the gambling establishment and, approaching Yamatoda, hit him on the back and said "heh!". Yamatoda pulled Namba into an office adjoining the gambling room and a fight immediately ensued in which the defendants, Namba and others took part. Several witnesses testified for the prosecution concerning the events that took place during the altercation. From their testimony it appears that as many as five men were kicking Namba as he lay upon the floor. Defendant Kinowaki beat Namba on the back with a billiard cue, defendant Inoye beat him with a chair and Yamatoda "stamped on his chest" after he had fallen to the floor. One witness saw a pistol in the hand of Yamatoda but did not see a pistol in Namba's hand. One of the witnesses attempted to stop defendants from beating Namba but Yamatoda told him to "get out". A witness upon being asked as to the appearance of Namba said, "he was dead". An objection was interposed by the defense and the court asked, "You mean that is the way Namba appeared to you?" and the witness replied, "I saw him as he was dead". A witness testified that a short time later Inoye and Kinowaki and three other men carried Namba out and that "there was something wrapped around him".

The wife of Namba testified that she last saw him at their home in Campo on May 12, 1938, on which date he left in a Dodge truck. She received a letter from him dated May 19, 1938. On his arrival in Los Angeles Namba registered at the Mikado hotel, where a suit-case and clothing identified as belonging to him were later found. A thorough search for Namba was made by his brother at various institutions and advertisements were placed in newspapers but no trace of him has been found. Namba's truck was located by his brother in a garage in Los Angeles.

Defendant Yamatoda testified that he was seated in the gambling establishment when Namba, who was a stranger to him, approached and struck him on the chest and asked, "Is this the boss?" Namba pushed a gun against his stomach but Yamatoda, according to his testimony, grabbed at his wrist and pushed the gun aside. One Ishihari came over and helped the witness subdue Namba and called for help. Thereupon others, including defendants Inoye and Kinowaki, helped in subduing him. After Namba had been subdued one Tominaga took his gun and placed it on a desk. Thereupon one Shida brought a rope and Kinowaki and Tominaga tied Namba's arms. Yamatoda then told Tominaga and Kinowaki to take Namba aside and talk to him. Yamatoda denied striking him or stamping on his chest. Yamatoda's testimony, as above outlined, was corroborated by other defense witnesses, including his two co-defendants, who denied beating Namba. Kinowaki testified that he and Tominaga at the request of Yamatoda took Namba to a room on a lower floor, Namba walking unassisted; that after he had rested about five minutes they requested him to leave and he "walked out alone".

[1, 2] Defendants contend that the court erred to their prejudice in refusing to give to the jury the following instruction: "The court instructs the jury that a person in the exercise of his right of self-defense not only has a right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger." This contention must be sustained. In People v. Hecker, 109 Cal. 451, 467, 42 P. 307, 313, 30 L.R.A. 403, it is stated: "The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense." In People v. Newcomer, 118 Cal. 263, 273, 50 P. 405, 409, it is held that, "when a man without fault himself is suddenly attacked in a way that puts life or bodily safety at imminent hazard, he is not compelled to fly, or to consider the proposition of flying, but may stand his ground, and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary". In People v. Orosco, 73 Cal.App. 580, 239 P. 82, 89, the same instruction that is now under consideration was under review and it was held that it was prejudicially erroneous to refuse to give it. In that case the court instructed the jury that the party assailed had "the right to repel force by force" and that he might defend himself from the apprehended danger "to any extent which to him is apparently necessary, acting in a reasonable manner". The reviewing court held that the giving of the last mentioned instructions did not suffice, since the principle of the refused instruction was not in fact given to the jury. In the instant case the requested instruction was applicable to the testimony given by the witnesses for the defense, and in view of the marked conflict in the testimony of the various witnesses, it cannot be held that defendants were not prejudiced by the failure of the court to give it. The doctrine of the rejected instruction was not covered in any of the instructions actually given by the court. The instructions held insufficient in People v. Orosco, supra, more nearly approached the principle of the instruction under review than any of the instructions given in the present case.

[3] The trial court also erred in refusing to instruct the jury at the request of defendants that where circumstantial evidence is relied upon, the circumstances must be consistent with the hypothesis that the defendants are guilty and at the same time

inconsistent with any other rational conclusion. Neither the proposed instruction nor its equivalent was given by the court. In People v. McClain, 115 Cal.App. 505, 1 P.2d 1085, it was held to be reversible error to refuse to give an instruction on the point covered by the instruction requested by defendants. In People v. Heuss, 95 Cal. App. 680, 684, 273 P. 583, 584, the Supreme Court, in denying the petition for a hearing withheld its approval of the action of the trial court in refusing to give an instruction on circumstantial evidence which "fell short in not including the well-approved and frequently announced statement of the law that the evidence adduced must not only be consistent with guilt, but 'inconsistent with innocence,' in order to justify a verdict of guilty". In the case now under review the prosecution relied upon circumstantial evidence to establish the death of Namba.

Defendants contend that the trial court invaded the province of the jury in giving the following instruction: "The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the person named in the information as Teruhiko Namba was the person killed by the defendant, as charged in the information, then it is immaterial whether such deceased in his lifetime went by or was known by any other name or not, or whether his full name was Teruhiko Namba or not". The same complaint is made of the giving of the following instruction: "The court instructs the jury that the acts which a defendant may do and justify under a plea of self-defense depend primarily upon his own conduct and secondarily upon the conduct of the deceased Teruhiko Namba".

[4-6] The trial court erred in thus referring to Namba. From the language used in the first instruction above quoted the jury could naturally infer that the court was of the opinion that Namba was a "person killed"; and in the other instruction Namba is referred to as "the deceased". No qualification appears in either instruction by which the jury was told that it was for them to determine whether or not Namba had in fact been killed. It is vigorously contended by defendants, with the support of substantial evidence, that Namba walked away from the gambling establishment. It is argued that the jury should have found that the prosecution had not proved the death of Namba beyond a reasonable doubt. Undoubtedly the question whether Namba is dead or alive was for the determination of the jury, and it is manifest that defendants cannot be guilty of manslaughter if he yet lives. This issue should have been given to the jury uninfluenced by any expression of the court from which it could be inferred that the court considered the death of Namba established by the evidence. As stated in People v. Williams, 17 Cal. 142, 147, the court "should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression". Where there is a conflict in the evidence any assumption of a fact in dispute which must be found by the jury is an infringement of their province. People v. Messersmith, 61 Cal. 246.

The judgments and the orders denying the motions for a new trial are reversed and a new trial is ordered.

We concur: MOORE, P. J.; McCOMB, J.

39 Cal.App.2d 382

LA PLANTE v. IBBETSON et al.

Civ. 6383.

District Court of Appeal, Third District, California.

May 31, 1940.

1. Appeal and error 🔑544(3)

An appellate court, in absence of a bill of exceptions, statement, or substitute therefor, will not consider the evidence adduced at the trial, and will confine itself to a consideration of alleged errors appearing on face of the judgment roll.

2. Appeal and error 🔑554(3)

Where appeal from portion of judgment finding secured note valid was prosecuted on the judgment roll alone, but want of consideration was sole ground for cancellation urged, and points for reversal involved evidence with respect to that consideration, judgment would be affirmed, in absence of errors appearing on face of judgment roll.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by William LaPlante, guardian of the estate of William John LaPlante, Jr., and another, against Bernard M. Ibbetson and others to cancel two promissory notes and to compel execution of a reconveyance of property covered by deed of trust given as security for payment of one of the notes. From portion of judgment finding secured note valid, plaintiffs appeal.

Affirmed.

John H. Gordon, of Los Angeles, for appellants.

Paul A. Tschirgi and Walter O. Schell, both of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to cancel two promissory notes, and to compel the execution of a reconveyance of a deed of trust given as security for the payment of one of said notes. The note so secured was executed by plaintiff William La Plante, as guardian of the Estate of William LaPlante, Jr. That note was found to be valid. The other note was found to be void. Findings and judgment were entered accordingly. Plaintiffs now appeal from the entire judgment, but in fact the appeal is only from that portion of the judgment which finds the secured note valid.

[1] This appeal is prosecuted on the judgment roll alone. "The rule is well settled that an appellate court, in the absence of a bill of exceptions, statement or substitute therefore, will not consider the evidence adduced at the trial." 2 Cal.Jur., sec. 262, p. 525; supporting the text; Maxwell v. Jimeno, 89 Cal.App. 612, 265 P. 885. In Marr v. Southern California Gas Co., 198 Cal. 278–282, 245 P. 178, 180, it is said, in referring to a record such as we have here: "We are therefore confined to a consideration of alleged errors appearing on the face of [the] judgment roll."

[2] The first cause of action in the complaint is one to cancel a promissory note, secured by a trust deed, and executed by plaintiff LaPlante as guardian. The sole ground for cancellation is that there was no valid or legal consideration for said note. The second cause of action is for the cancellation of an unsecured note executed by plaintiff LaPlante. The judgment went for plaintiff on this issue; hence, it is not involved on this appeal. The third cause of action is for an injunction, restraining defendants from assigning said notes, or taking any action in respect thereto.

The trial court found that there was a consideration for the note attacked in the first cause of action, in the following words: "That it is true that the consideration for said note and deed of trust was the release by the defendants Bernard M. Ibbetson and Alma Picou Ibbetson and a reconveyance by the trustee Gerald F. H. Delamer of a prior deed of trust, in which Mary Louise Tepoorten was the trustor, and Gerald F. H. Delamer was the trustee, and Bernard M. Ibbetson and Alma Picou Ibbetson were beneficiaries. That said note and deed of trust sued upon in the present action were approved by the Home Owners' Loan Corporation previous to being placed upon the said described property."

An examination of the points urged for a reversal clearly indicates that they all involve a consideration of the evidence adduced at the trial. A statement of certain facts not appearing in the findings is made, but as such facts are not before us, we cannot consider them. Some of them are controverted by respondent. With no record before us, it is obvious we can do nothing about it. To illustrate, it is contended that the trust deed which secured such note was executed in connection with financing under the Home Owners' Loan Act, and that defendants took bonds and money for the release of their prior lien. This is denied by respondents. No finding is made upon such facts.

We find no errors appearing on the face of the judgment roll, and accordingly the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

39 Cal.App.2d 397

OTT v. GOTFRIED.

Civ. 12587.

District Court of Appeal, Second District, Division 2, California.

June 4, 1940.

1. Appeal and error ⚷479(1)

That land involved in litigation would profit by lying idle pending final determination of litigation was not ground for granting writ of supersedeas to prevent trial of action pending outcome of petitioner's appeal from order denying his motion for change of place of trial, since the land represented a capital investment and if other party were required to take the land as a result of the litigation, she would be entitled to the benefits of its continuous cultivation.

2. Appeal and error ⚷479(2)

Trial court had a broad discretion in ruling upon motion to suspend proceedings pending the outcome of an appeal from an order denying a motion for change of place of trial.

3. Appeal and error ⚷478, 986

The District Court of Appeal was required to act on presumption that trial court acted correctly with all pleadings, affidavits, and arguments before it in denying defendant's motion to postpone trial of action pending the outcome of defendant's appeal from order denying motion to change place of trial, and trial court's action would not be disturbed in absence of clear showing of exercise of an arbitrary discretion.

4. Appeal and error ⚷986

On defendant's petition for writ of supersedeas in action involving realty, District Court of Appeal could not say that trial court acted arbitrarily in overruling defendant's motion to postpone trial of action until termination of defendant's appeal from an order denying his motion for a change of place of trial.

Action by Josephine Ott against M. A. Gotfried, wherein defendant appealed from an order denying his motion for a change of place of trial on ground of convenience of witnesses, and petitioned for a writ of supersedeas to prevent trial of the action pending the outcome of such appeal.

Petition denied.

Whitelaw & Whitelaw, of El Centro, and Kimpton Ellis, of Los Angeles, for petitioner.

August J. O'Connor, of Los Angeles, for respondent.

MOORE, Presiding Judge.

Petitioner Gotfried has asked for a writ of supersedeas. He is the defendant in an action on file in the superior court of Los Angeles county where he presented his motion for a change of place of trial. Said motion was denied notwithstanding that it was based upon the convenience of witnesses. From the order denying said motion said petitioner took his appeal to this court where the matter now rests. From the affidavits before us, we glean that petitioner filed a cross-complaint sounding in rescission.

On February 9, 1940, plaintiff moved to set the case for an early trial. The trial date was fixed for April 26, 1940. Thereafter the court made an order continuing said date of trial to May 22, 1940. Petitioner filed his application herein on May 1, for a writ of supersedeas on the ground that "petitioner herein is entitled to have his appeal from said order determined prior to the trial of said action, and that the respondent herein will not nor can she be damaged by the delay of said trial until such appeal can be so determined". Petitioner urges on behalf of his petition for a writ that no detriment can be suffered by the respondent and that to force petitioner to a trial in Los Angeles county would deprive petitioner of his right to have the case tried without the actual presence in court of his witnesses who reside in Imperial county. He further contends that for the land, which is the subject of the cross-complaint, to lie idle pending the final determination of the litigation would be of advantage to the land.

[1] We are not impressed with petitioner's contention that the land would profit by lying idle for a year or more. Land represents capital investment and if it should be determined that respondent must take back the land either by a judgment of rescission or by reason of purchase under execution, respondent would be entitled to the benefits of its continuous cultivation.

Many words have been written in the petition and in the answer relative to negotiations which have taken place between the parties with reference to the disposition of the land pending a final determination. We make no observation relative to the merits of said negotiations. Our sole concern is the advisability of suspending the trial of said action pending the outcome of said appeal from said order refusing to change the place of trial. Petitioner having purchased said land in April, 1938, remained in possession until June, 1939. During the interim a number of letters passed from the petitioner to respondent relative to the payments that were due upon the purchase price, in none of which did petitioner make mention of any fraud which apparently it is alleged to have been committed upon him by his purchase of the land. In a letter to respondent dated May 3, 1939, petitioner requested respondent to "figure out" the interest due on the notes which he would check, upon his bookkeeper's return and "will mail you a check for the interest and payment on the principal".

In his letter of May 9, 1939, petitioner advised respondent that he was endeavoring to induce the First National Bank of Holtville to "take over the balance of the contract due you so that it would make it possible to pay you off in full". On May 13, 1939, petitioner notified respondent by letter that if said bank could not take the loan because of the failure of the property as collateral for the balance, then he would pay the instalment plus interest to date of payment, adding: "We find we have paid you an enormous price for your ground." These documents do not hint at any fraud or other ground of rescission. They constitute the only evidence before us on the nature or basis of petitioner's cross-action except the affidavit of Adolph Ott which avers that defendant still maintains possession of the land by his tenants.

[2-4] Expressly withholding comment upon the nature of the case, the character and state of the pleadings, and the suit of petitioner, we merely observe that the foregoing communications and other evidence in addition to the pleadings in the case were before the calendar judge at the time the order was made denying the request for suspension of proceedings now pending in said court until the said appeal from said order should be finally determined. In making the order denying said suspension, said judge was vested with a broad discretion as he was in making said former order. Wood v. Silvers, 35 Cal.App.2d 604, 96 P.2d 366, 97 P.2d 265; Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991. We cannot assume that his order was erroneously made. On the contrary, we must act upon the presumption that he did his duty with all of the pleadings, affidavits and arguments before him. In view of the loss to be sustained by respondent alone, in the event of the success of said appeal, she assumes all the risks in declining now to consent to defer the trial of the case on its merits until said appeal be determined.

Upon the showing made before us, we cannot say that the court below has acted arbitrarily in overruling a motion to postpone the trial of the action until the termination of said appeal. Its ruling upon such motions we cannot interrupt in the absence of a clear showing that its order was arbitrarily made and made without having considered the motion of petitioner and its supporting papers.

The rule relative to continuances of the time of trial is well stated in 5 California Jurisprudence 968, which is quoted in the Estate of McCarthy, 23 Cal.App.2d 389, at 393, 73 P.2d 910, at page 912: "It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed." See Bank of America Nat. Trust & Savings Ass'n v. Harriscolor Films, 220 Cal. 383, 31 P.2d 189.

For the reasons above stated, the petition is denied.

We concur: WOOD, J.; McCOMB, J.

FEWEL & DAWES, INC. v. PRATT.*

Civ. 6324.

District Court of Appeal, Third District, California.

May 28, 1940.

Hearing Granted July 26, 1940.

1. Assignments 🔑137

In action against life insurance broker by corporate assignee of agreement to divide life insurance commissions, evidence *held* to support finding that assignor who originally executed the agreement, though not himself a licensed broker, was acting for and on behalf of licensed broker at time of execution.

2. Assignments 🔑68

Where licensed broker agreed to divide life insurance commissions to be earned in future with unlicensed assignor acting for subsequently organized corporation, to which the contract was assigned, but with which broker did not contemplate contracting, and broker thereafter repeatedly requested and accepted receipts, for commissions paid to corporation in name of assignor, broker was "estopped" by his conduct from contending that the assignment terminated the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

3. Contracts 🔑54(1)

Where licensed broker agreed to divide life insurance commissions to be earned in future with unlicensed assignor acting for subsequently organized corporation, to which the contract was assigned but with which broker did not contemplate contracting, and the only service required of assignor was his influence with prospective insurance purchaser, assignor's acts were sufficient consideration to support the agreement.

4. Insurance 🔑12

A person not licensed as an insurance broker did not "act" nor "offer to act" as an insurance broker in violation of statute requiring licenses, by merely entering into agreement with licensed broker for division of life insurance commissions to be earned in the future. Pol.Code, § 633aa, as added by St.1927, pp. 1931, 1934.

See Words and Phrases, Permanent Edition, for all other definitions of "Act" and "Offer to Act".

5. Insurance 🔑12

The statute requiring licenses for life insurance brokers or agents manifests intent merely to prohibit an individual or corporation from "acting" as agent without license, not to render a contract invalid merely because one agrees to perform acts as a broker after he procured a license. Pol.Code, § 633aa, as added by St.1927, pp. 1931, 1934.

6. Insurance 🔑12

There is a clear distinction between an "agent" who represents insurance companies and a "broker" who is merely authorized to solicit, negotiate, or procure contracts for policies independently of any direct representation or allegiance to a particular company, and the licensing statute does not purport to provide for licensing of a "broker" as distinguished from an "agent" for a life insurance company. Pol.Code, § 633a; § 633aa, as added by St.1927, pp. 1931, 1934.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Broker".

7. Insurance 🔑12

Where licensed insurance broker agreed to divide life insurance commissions to be earned in future with unlicensed assignor acting for subsequently organized corporation, to which contract was assigned, but with which broker did not contemplate contracting, and broker thereafter repeatedly made payments in accordance with the contract, he was "estopped" from denying validity of the contract. Pol.Code, § 633aa, as added by St.1927, pp. 1931, 1934.

8. Insurance 🔑12

The statute requiring licenses for one acting as agent for life insurance company was enacted for the protection of the public, and conduct constituting "acts" of an insurance broker in violation of its provisions would be void. Pol.Code, § 633aa, as added by St.1927, pp. 1931, 1934.

9. Insurance 🔑12

Where licensed broker agreed to divide life insurance commissions to be earned in the future with unlicensed assignor acting for subsequently organized and licensed corporation to which the contract was assigned, assignor acted in the status of a promoter, whose contract became valid, notwithstanding that corporation was not in existence when the contract was executed.

10. Insurance 🔑12

Where assignee of agreement to divide life insurance commissions was a duly licensed insurance broker at time of performance of agreement and at time of commencement of action to recover commissions, it was not material to the right to recover commissions that there was a lapse in the license during period after rights accrued, but there could be no recovery of commissions on policies issued during that period.

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* Subsequent opinion 109 P.2d 650.

11. Insurance ⚷12

As respects agreement of licensed insurance, broker with unlicensed assignor acting for subsequently organized and, licensed corporation to which assignor assigned contract to divide certain life insurance commissions, evidence *held* to establish that contract for division of life insurance commissions to be earned in the future was a continuing agreement, which could be terminated only by the mutual consent of all parties, and that such contract was not in fact terminated.

12. Limitation of actions ⚷53(2)

Where agreement to divide life insurance commissions to be earned in the future was in full force and no accounting for commissions had taken place, statute of limitations began to run from the date of the last item on the account, and hence did not begin to run until prospective purchaser of insurance died, or it was shown that the last policy under the agreement had been procured.

13. Contracts ⚷350(1)

Under agreement to divide life insurance commissions to be earned in the future, finding that defendant was paid $23,074.29 as commissions, making plaintiff's share of 50 per cent. amount to $11,537.14, and that plaintiff had been paid $2,687.75, leaving balance due to plaintiff of $8,849.39, was sustained by the evidence.

14. Interest ⚷67

Under agreement by licensed broker to divide life insurance commissions to be earned in the future, where it was impossible to determine when broker received the commissions, assignee of the contract was not entitled to interest on unpaid commissions received by the brokers.

15. Judgment ⚷735

An adjudication that licensed broker's agreement to divided life insurance commissions earned in the future was void, rendered in interpleader action wherein sole issue was whether broker was a trustee of interpleaded funds against which assignee of the agreement had levied execution, and whether he had violated his duty as trustee by assigning such funds to various claimants, was not "res judicata" in action by assignee to recover commissions under the contract, and did not create an "estoppel" against broker, since the judgment on which execution was issued was not subject to challenge in the former action.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata" and "Estoppel".

16. Judgment ⚷713(2), 715(1), 720, 725(1)

In applying doctrines of "res judicata" and "estoppel by judgment," if the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in second action, it is necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment, since parties are "estopped" from litigating only issues upon which that judgment depends, and the judgment does not become an "estoppel" as to all matters which might have been litigated therein, but only as to such as were actually litigated and were necessary to be determined.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel by Judgment".

◆

Appeal from Superior Court, Los Angeles County; J. A. Smith and Ruben S. Schmidt, Judges.

Action by Fewel & Dawes, Inc., against Franklin L. Pratt, for an accounting for life insurance commissions earned pursuant to contract. From a judgment for plaintiff, defendant appeals.

Modified, and as modified, affirmed.

Prior opinion, 101 P.2d 94.

Hugh Ward Lutz, of Los Angeles, for appellant.

Hulen C. Callaway and Joe Crail, Jr., both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Upon rehearing we are satisfied our original opinion in this case correctly determines the issues presented, except that certain facts to which our attention has been called require a modification of the judgment. We have also substituted reference to next to the last paragraph of section 633aa of the Political Code for the first quoted paragraph of that section. With those modifications and certain further elaborations, the original opinion is adopted as follows:

This is an appeal from a judgment rendered in favor of respondent corporation upon an action brought for an accounting of life insurance commissions earned pursuant to a contract therefor.

The appellant, a life insurance broker, had been writing insurance since 1922 for John G. Bullock, of Los Angeles. In 1928, Mr. Bullock desired to take out additional insurance to the amount of $150,000. The appellant Pratt was requested by Mr. Bullock sometime in July, 1928, to divide with his son-in-law, Mr. Fewel, commissions to be earned from the additional life insurance. Mr. Fewel was an officer of each one of the successive corporations involved in this suit.

Mr. Bullock, Mr. Pratt, and Mr. Fewel met in Bullock's office July 10, 1928, to discuss the arrangement for a division of commissions between Fewel and Pratt. Pratt objected to working with Fewel's associates and requested that he should handle his part of the agreement by himself. But Mr. Fewel refused to eliminate his business associates. Regardless of this objection, it was agreed that Pratt would divide his commissions with Fewel, each to receive fifty per cent of the earned commissions. On this same day, July 10, 1928, Fewel accompanied Pratt to the latter's office and the following writing was executed by Mr. Pratt:

"July 10, 1928

"Mr. Richard W. Fewel,
"716 South Spring St.,
"Los Angeles.
"Dear Mr. Fewel:

"This is to confirm our verbal understanding of this date that we will work together in the purchase of insurance for Mr. John G. Bullock, on the basis of an equal division of the commissions.

"Very truly yours,
"F. L. P."

At the time of the agreement to divide commissions Fewel was a partner in an insurance brokerage firm known as Universal Underwriters. He was planning the organization of a new corporation to take over his insurance business. This new organization, Moore, Fewel & Company, was incorporated July 30, 1928, and it was duly licensed as an insurance broker on August 10, 1928. Mr. Fewel was an officer and director of this company. On September 1, 1928, Mr. Fewel assigned to Moore, Fewel & Company, the new corporation, all of his interest in and to the agreement for commissions with Mr. Pratt.

None of the life insurance policies contemplated by the terms of this agreement were obtained until 1930, although it appears that Pratt received a commission in 1929 on a policy taken out in 1922, which was converted in 1929. Numerous policies of insurance were written on the life of Mr. Bullock during the years 1930, 1931 and 1932. The record shows that Mr. Pratt received $23,074.29 as earned commissions on the insurance represented by the various policies. This figure includes the commission received by Pratt in 1929 on the policy taken out in 1922. On July 31, 1930, Pratt and Fewel met in Bullock's office and the first division of commissions was then made. It appears a controversy over paying Fewel any part of the commissions then occurred on the ground that he did not have a broker's license. However, Pratt made a check to Fewel for $789.08 and took a receipt from him, signed "Moore, Fewel & Devlin, By Richard W. Fewel". Thereafter other commissions were divided, for which receipts were invariably issued by Mr. Fewel in the name of the corporation and accepted by the appellant. On February 19, 1931, Pratt made the last division of commissions with Fewel, for which a receipt in the name of the corporation was given to Pratt by Fewel. At this time Mr. Pratt claimed that he then informed Fewel the agreement should be terminated and that he would not be further bound thereby. The payments by Pratt to Fewel up to and including this last date amounted to $2,687.75. No payments were made to Fewel after February 19, 1931. Prior to that date arrangements were made between Pratt, Fewel and Bullock, whereby some of the money received as commissions was advanced to Bullock to finance premiums due. Fewel was also in debt to Bullock for money previously borrowed and some of the moneys due to Bullock were credited to the account.

Mr. Bullock died September 15, 1933. This action was commenced December 12, 1935. Judgment was entered in favor of the respondent on June 24, 1936. The findings of fact and conclusions of law determine that Richard W. Fewel was acting for and on behalf of the respective corporations of which he was an officer, and that the agreement of July 10, 1928, was properly assigned to Moore, Fewel & Devlin, Inc., Ltd.; that the agreement was a valid and enforceable contract between Pratt and the respondent corporation; that the contract was not terminated on February 19, 1931; that the cause of action was not barred by statutory provision or by laches; and that upon an accounting had the respondent was entitled to $8,849.39 general damages, and $1,993.30 interest.

About December 12, 1933, respondent levied an attachment upon certain funds held by the executors of the estate of John G. Bullock. After entry of judgment on June 24, 1936, no stay having been obtained by appellant, execution was levied by the respondent against these same funds. The executors thereupon filed an action of interpleader, and paid the moneys into court, alleging that numerous claims had been made thereto by various creditors of said Franklin L. Pratt. Respondent filed an answer and cross-complaint in this action, setting forth its claim to the interpleaded fund. The cross-complaint sets forth and alleges a prior right to the interpleaded fund for the reasons that, (1) The rights of other claimants were based on certain assignments from Pratt which constituted fraudulent conveyances, and, (2) The fund was impressed with a constructive trust and therefore no assignments could be validly made by Pratt.

The court in this interpleader action found that Fewel and Dawes, Inc., was entitled to recover said moneys subject to the right of two other claimants, who held valid assignments from Pratt. The court also found that the interest of Fewel & Dawes, Inc., existed, however, only by virtue of the levy of the writ of attachment and the subsequent levy of a writ of execution. As to the second cause of action, which was predicated on the theory of a constructive trust in the fund for the benefit of respondent corporation, the court found that no such trust existed. The findings of fact determined that the contract of July 10, 1928, was not made with or on behalf of Moore, Fewel & Company; that, on the contrary, the agreement was made with Richard W. Fewel and that it was void, as he was not a licensed life insurance agent or broker at the time of said agreement, nor at any time thereafter; that the claim for the funds in question from the estate of John G. Bullock, deceased, was properly made in behalf of Franklin L. Pratt. The judgment in this interpleader action was entered on November 8, 1937, and became final after time for appeal had elapsed. Appellant sought to introduce that final judgment as evidence in this case to establish it as res adjudicata and to create an estoppel.

[1-3] There is ample evidence to support the finding that Mr. Fewel was acting for and on behalf of Moore, Fewel & Company when he entered into the agreement with Pratt on July 10, 1928. Mr. Fewel testified that he stated to Pratt in the presence of Mr. Bullock on July 10, 1928, that he would not do business without his associates. This statement was repeated to Pratt in the latter's office on the same day and at which time Mr. Pratt executed the written agreement. If Fewel intended at the time of the agreement to act solely in his own behalf, there is no reason why he should have assigned the agreement to the corporation. If Fewel had intended to act as a broker in his own behalf he could have obtained a license for that purpose. Even though appellant did not contemplate contracting with the assignee corporation as a party to the agreement, he is, nevertheless, estopped by his conduct from contending that the assignment of the agreement by Mr. Fewel terminated the contract. The appellant not only repeatedly accepted, but he requested the execution of receipts for commissions paid to Fewel in the name of respondent's assignors. Receipts executed in this manner were received by appellant up to and including February 19, 1931. Until that date the appellant made regular division of commissions earned under the agreement. It does not appear that any objections were ever made regarding performance on the part of respondent's assignors. The only personal service called for on the part of Fewel was his influence with Mr. Bullock. He was not required to contact the insurance companies or to perform any servicing of the policies. This furnished sufficient consideration and evidence to support the agreement. Performance, to this extent, on the part of Fewel, and in behalf of the

respective assignee corporations, did not materially alter the relationship or rights as between the parties. There was no substitution of performance which would impair the rights of appellant under the agreement.

At the time of the execution of the written agreement on July 10, 1928, Fewel was not licensed to act as a life insurance broker. Moore, Fewel & Company, the first assignee, was not then in existence. The company, however, was then in the process of formation. It was organized within twenty days thereafter. The contention made by appellant that the contract is void as contrary to the express provisions of the Political Code, section 633aa, would be well taken, provided Fewel's action on and prior to July 10, 1928, constituted a violation of the provisions of the statute. The last paragraph of section 633aa, save one, upon which the appellant relies provides that: "Any person who shall act or offer to act or assume to act as a life insurance broker or agent, unless licensed by the insurance commissioner as provided in this section, or after such license granted to him has been suspended or revoked, unless proceedings are pending in the courts to review the act of the commissioner, shall be guilty of a misdemeanor." Stats.1927, p. 1931, at p. 1934.

[4] It cannot be said that Fewel was violating any of the foregoing provisions by merely entering into an agreement with Pratt for a division of life insurance commissions to be earned in the future. He did not thereby "act" as an insurance broker, nor did he thereby "offer to act" as such. The written agreement to divide commissions which was signed by Mr. Pratt constituted a binding agreement between the parties, but it did not give rise to performance on the part of Fewel of any act in violation of the statute. The evidence does not disclose any solicitation for insurance or affirmative action on his part in conflict with the statute. Mr. Bullock, the father-in-law of Fewel, was the moving party in procuring the agreement. For reasons of his own, he desired that Mr. Fewel should receive part of the commissions to be earned by Mr. Pratt. Mr. Pratt had previously written insurance for Mr. Bullock for a number of years. The evidence shows that the actual work in procuring and servicing the policies to be obtained under the agreement was to be performed by Mr. Pratt individually. In fact, there were applications for insurance from Mr. Bullock pending at the time of the execution of the contract for about $150,000. Mr. Pratt had been handling that business. The conduct of Fewel does not constitute a violation of the provisions of Political Code, section 633aa.

[5] A critical examination of section 633aa, upon the above-quoted penal clause of which the appellant relies, convinces us that the legislature merely intended to prohibit an individual or corporation from *acting* "as an agent for any life insurance company until such person shall have first obtained a license". Clearly it is not within the spirit or intention of that section to render a contract invalid merely because one agrees to perform acts as a broker after he has first procured a license as required by law. Section 1 of that act clearly states that "No person shall * * * *act as* a life, health or accident *agent of any life insurance company" until he has first obtained a license* to do so.

[6, 7] There is a clear distinction between an agent who represents insurance companies, and a broker who is merely authorized to solicit, negotiate or procure contracts for policies independently of any direct representation or allegiance to a particular company. Sec. 633a, Pol. Code; McKinney v. City of Alton, 41 Ill. App. 508. Section 633aa of the Political Code does not purport to provide for the licensing of a broker as distinguished from an "agent for a life insurance company". Fewel never agreed to act as an agent for any insurance company represented by Pratt. Mr. Pratt had no authority to appoint him as an agent for any of those companies. The contract was a mere agreement to divide his commissions with Fewel if Bullock should give him contemplated additional life insurance in a large aggregate sum. Bullock was Pratt's client. Mr. Pratt had previously written insurance for Mr. Bullock. Bullock was contemplating the procuring of additional insurance to protect him against business reverses which he had sustained. Fewel, the son-in-law of Bullock, owed him a large sum of money. Bullock was trying to save for himself one-half of the cost of the commissions. The appellant is estopped from denying the validity of that contract because he

subsequently made payments in accordance therewith.

[8] Section 633aa of the Political Code was enacted for the protection of the public. It is true that conduct constituting *acts* of an insurance broker in violation of its provisions would be void. The Real Estate Brokers' Act, St.1919, p. 1252, belongs to this same class of statutes. In concluding that the agreement under consideration was not violative of section 633aa, and that the respondent was entitled to recover commissions, we are strongly influenced by a number of California decisions wherein the licensing of real estate brokers under a similar statute was involved. In Houston v. Williams, 53 Cal.App. 267, 200 P. 55, a leading case on this point, the plaintiff, a real estate broker, entered into an agreement in writing with the defendant. The plaintiff was given the exclusive agency to sell or exchange property belonging to the defendant. At the time of this written agreement, the plaintiff was not licensed under the Real Estate Brokers' Act. At the time the plaintiff secured a purchaser under the agreement, however, he had procured a license, authorizing him to engage in the business of a real estate broker. In holding that the plaintiff was not precluded from recovering compensation for his services, the court said, 53 Cal.App. at page 271, 200 P. at page 56: "It is a reasonable construction of the act to hold that it is unlawful for any one to engage in the business of a real estate broker without having secured a license, but he is not precluded from recovering compensation for his services if he had such license at the time his cause of action arose, although his contract may have been executed prior to that time when he had no license. Herein, manifestly, the cause of action arose when plaintiff obtained a purchaser for the property, and it is not disputed that then he had the proper license, and it was so alleged in the complaint."

It is true that the court in the Houston case based its decision upon the limitation found in section 20 of the Real Estate Brokers' Act, and that the court concluded that the limitation gave plaintiff his right to maintain the action for compensation. While section 20 of that act was properly considered in determining the invalidity of the contract in question, it also appears that section indicated the time at which the invalidity arose. Section 20 provided that no action could be maintained "without alleging and proving that such person * * * was a duly licensed real estate broker or real estate salesman *at the time the alleged cause of action arose*". (Italics ours.) Obviously, the invalidity of the transaction would exist unless it were shown that the agent had a license at the time of performance. It cannot be deemed that the invalidity of the transaction arose at an earlier date, at the execution of the contract for instance. If the contract was invalid *prior to the time of performance,* the invalidity could not be cured by subsequently procuring a license. That seems to be a reasonable construction of section 20. It appears to be a fair interpretation of the legislative intent with respect to the Real Estate Brokers' Act.

In the present case we conclude that the action on the part of Mr. Fewel in becoming a party to the written agreement did not constitute acts in the capacity of a life insurance broker or agent, within the meaning of the provisions of Political Code section 633aa. The contract was not void merely because it was entered into by an unlicensed individual. The provisions of section 633aa reasonably appear to apply only to acts in furtherance of the performance of life insurance contracts, such as the solicitation or procuring of policies. Mr. Fewel did not perform such acts.

In Fitzhugh v. Mason, 2 Cal.App. 220, 83 P. 282, the validity of a contract, under the act of March 23, 1901, p. 641, entitled "An Act to regulate the practice of architecture," was in issue. The act made it a misdemeanor for any person to practice architecture without a certificate. Plaintiff was an architect and he entered into a contract of employment before obtaining an architect's certificate. The court held that a contract for the employment of an architect was not rendered illegal or void because made in advance of the issuance of a certificate, although in order to carry out the contract it would be necessary for the architect to take out his certificate.

[9] Mr. Fewel and Mr. Pratt, having entered into a valid agreement on July 10, 1928, and Moore, Fewel & Company existing as a duly incorporated and licensed insurance broker on August 10, 1928, there was nothing to prevent a valid

assignment of said agreement to Moore, Fewel & Company on September 1, 1928. As stated, no performance under this agreement took place until 1930, with the exception of the conversion of one policy by Mr. Pratt in 1929. Although Moore, Fewel & Company was not yet organized at the time of the written agreement, it seems clear that recognized authorities place Fewel in the status of a promoter whose contract would become valid and which might be assigned to a subsequently organized corporation. Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 P. 440; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Chater v. San Francisco Sugar Refining Co., 19 Cal. 219, 220.

[10] The record conclusively shows that the respective assignee corporations to which the agreement was transferred were licensed insurance brokers throughout the entire time of performance under the agreement, except as hereinafter stated. Moore, Fewel & Company was licensed from August 10, 1928, to June 30, 1930; Moore, Fewel & Devlin, Inc., Ltd., from July 1, 1930, to June 30, 1932; Moore, Fewel & Dawes from July 1, 1932, to October 6, 1933. On October 11, 1933, Moore, Fewel & Dawes, Inc., Ltd., changed its corporate name to Fewel & Dawes, Inc. There was a lapse in its license from October 6, 1933, to November 10, 1933. Performance under the agreement having come to an end with the death of John G. Bullock, and respondent being a duly licensed life insurance broker at the time of performance and at the commencement of this action, it is not material that there was a lapse in the corporation's license from October 6, 1933, to November 10, 1933. Moore, Fewel & Dawes was, however, not licensed when two policies were issued February 17, 1932. Those premiums are eliminated from the judgment.

[11] The agreement of July 10, 1928, was a continuing agreement or contract and there is nothing to show that such contract was not to exist as long as Mr. Pratt procured insurance under said agreement. The evidence shows that Mr. Bullock contemplated taking out $150,000 additional insurance at the time the written agreement was executed. Mr. Pratt had no option to terminate the contract at will. There is no evidence that the contract was terminated on February 19, 1931, as contended by appellant. The contract could only be terminated by the mutual consent of all parties. Findings number 27 and number 28 to the effect that the contract was not terminated are supported by the evidence.

The case of Pratt v. Burdon, 168 Mass. 596, 47 N.E. 419, relied on by the appellant, is based on facts entirely different from those existing in this record. The Massachusetts statute, St.Mass.1887, C. 214, § 93, provided that no broker should "act *or aid in any manner* in negotiating contracts for insurance" without first procuring a license. The defendant, Burdon, was not licensed. Knowing of two persons who desired insurance, he furnished the names and necessary information to the plaintiff, Pratt, which enabled him to write the policies of insurance. The court held that defendant's participation in procuring the business aided in negotiating the contracts, and since the statute specifically prohibited such acts without a license, he could not recover an agreed share in the premiums.

In the present case neither Fewel nor his assignees performed any acts toward procuring the policies from Bullock. They did not furnish to Pratt the name of Bullock nor any information which led to his procuring the insurance in question. Bullock was previously a client of Pratt. It was primarily Bullock's proposition to Pratt that he would carry the new insurance provided Pratt would divide his premiums with Fewel. We are of the opinion the Massachusetts case is not in point. If it be deemed to be in point, then we are not in accord with that construction of the case.

[12] Appellant failed to show that he was entitled to expenses incurred in connection with the servicing of the policies, or to reimbursement for traveling expenses. The agreement being in full force on and after February 19, 1931, and no accounting having taken place, the statute of limitations did not begin to run in favor of appellant at this time. It began to run from the date of the last item of the account. Mr. Bullock was receiving a portion of the commissions which went to pay premiums. It is true that the only proved financing of paid premiums in which Fewel directly participated occurred prior to February, 1931. However, the evidence shows that the appellant had the duty of keeping a record of

the insurance transactions, and of handling the commissions earned through the procuring of the policies. The evidence shows that sums of money were advanced to the appellant for the purpose of paying premiums as late as February, 1933. The contract between appellant and respondent being in force at that time, and appellant having made no division of commissions since February, 1931, it must be presumed that the contract was still in force. Under such circumstances the statute of limitations did not begin to run against respondent until the death of Mr. Bullock, or at least until it was shown that the last policy of insurance under the agreement had been procured.

[13] There is no merit in the contention that a proper accounting was not had between the parties. An accounting was held and the record failed to show any prejudice to appellant with the exception of the item of interest which was allowed. Respondent introduced in evidence a record containing a list of the companies, the policies and premiums and the commissions which were earned. Appellant reserved the right to check the correctness of this record, and to offer evidence of any error which it might contain. The court found that appellant was paid $23,074.29, as commissions under the agreement, and that respondent's share of fifty per cent thereof amounted to $11,537.14. The court also found that respondent's assignors had been paid by appellant on account of its share of said commissions only the sum of $2,687.75, leaving a balance due to respondent under the agreement of $8,849.39. That finding is supported by the evidence, except as hereafter stated.

It is true that the corporation Moore, Fewel & Devlin was changed in 1932 to Moore, Fewel & Dawes. The contract involved in this case was assigned to the last-mentioned corporation January 12, 1932, which was not licensed as a broker until July 1, 1932. During the interval between the date of assignment of the contract to the last-mentioned corporation and the issuance of its broker's license, Mr. Pratt procured two policies on the life of Bullock of $25,000 each and two renewals of premiums, on or about February 17, 1932, from which commissions aggregating the sum of $2,146.81 were received by Pratt. While the assignor's license was in full force during that interval, we assume that since title to the contract was then in the name of Moore, Fewel & Dawes, which was not then licensed as a broker, it would not be entitled to share in such commissions. The judgment of $8,849.39 should therefore be modified by subtracting therefrom said sum of $2,146.81.

[14] Findings numbers 24 and 25 with respect to the interest allowed are not supported by the evidence. The record fails to disclose the dates of payments of commissions to appellant. At least it is impossible to determine which dates refer to the specific times when the commissions were received by the appellant. The record therefore fails to show that respondent is entitled to interest on unpaid commissions which were received by the appellant. The judgment should also be modified by disallowing the items of interest in the sum of $1,993.30.

[15] We are of the opinion it was not the court's province in the suit of interpleader to challenge the judgment upon which execution had issued. The sole issue which was presented to the court in that cause of action was neither involved in nor determinative of the issues in the present suit. The issue before the court in that action raised the question as to whether the appellant, Mr. Pratt, was a trustee of the interpleaded fund, and, as such, whether he violated his duty as trustee by assigning that fund to various claimants. A finding that he was not a trustee of said fund for the benefit of the respondent herein did not determine the issues presented in this suit for an accounting. That former judgment, therefore, is not res adjudicata of the issues presented in this case.

[16] In support of the determination that the judgment of interpleader is not res adjudicata of the issues of this case, we quote from the opinion rendered in Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108. In discussing the principles applicable to res adjudicata and estoppel by judgment, the court said at page 561 of 95 Cal., 30 P. at page 1110: "If, however, the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as

a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. * * * The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense."

An examination of the cases cited by appellant fails to disclose any precedent for the application of res adjudicata or estoppel under the circumstances of this case.

The judgment is modified by striking therefrom the commissions on the policies and renewals of February 17, 1932, aggregating the sum of $2,146.81, and the items of interest allowed in the sum of $1,993.30. As so modified the judgment is affirmed. The respondent may recover its costs.

We concur: PULLEN, P. J.; TUTTLE, J.

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39 Cal.App.2d 418

DRUMMOND et al. v. DRUMMOND et al.

Civ. 6380.

District Court of Appeal, Third District, California.

June 5, 1940.

1. Appeal and error 🔑870(6)

Though the right of appeal from an order denying a motion for new trial has been abrogated by statute, the right to review such an order may be exercised on appeal from the judgment if the alleged error is properly presented by a bill of exceptions or otherwise. St.1915, p. 209; Code Civ.Proc. § 956.

2. Appeal and error 🔑712

Where affidavits on motion for new trial were not included in bill of exceptions and were not otherwise authenticated as having been used on that motion, the reviewing court on appeal from judgment could not resort to the affidavits for proof of any fact therein stated.

3. Appeal and error 🔑616(2)

The clerk of the trial court was not authorized to certify that no affidavits, other than those on motion for new trial which were not authenticated as having been used on motion, or other evidence were adduced on hearing.

4. Appeal and error 🔑528(4)

Affidavits on motion for a new trial are not a part of the judgment roll. Code Civ. Proc. § 670.

5. Deeds 🔑208(4, 6)

Grantees' request that deed be recorded with full knowledge of the transaction and grantor's intention to give grantees certain lots, together with their refusal to reconvey lots to grantor, furnished ample evidence of constructive "delivery" of deed and acceptance of gift. Civ.Code, § 1055.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

6. Deeds 🔑56(1)

Manual delivery of a deed to the grantee is not essential to the passing of title, and no particular form of delivery is required.

7. Deeds 🔑208(1, 6)

Delivery and acceptance of a deed may be manifested by the declarations, acts, and conduct of the parties.

8. Deeds 🔑177

Where the execution and delivery of a deed with the intention of thereby conveying title to the grantee is satisfactorily established, neither the subsequent collection of rental, the mortgaging of the property without the knowledge or consent of the grantee, nor the attempt to convey it to another person, will vitiate the grantee's title.

9. Deeds 🔑8

Where there was ample evidence of constructive delivery of a deed by grantor to his son and daughter-in-law and acceptance by them of grantor's gift of certain lots, grantor's subsequent attempt to convey lots to his wife was ineffectual and void.

10. Divorce 🔑172

In spouses' suit to quiet title to certain lots as against husband's son and daughter-in-law to whom husband had executed a valid deed, an interlocutory divorce decree which found that lots were community property and attempted to award lots to spouses in undivided shares was not "res judicata" with respect to spouses' title, where son and daughter-in-law were not parties to divorce proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

11. Judgment ⚷678(1), 707

One is not "estopped" from denying the effect of a judgment on the doctrine of "res judicata" where he was neither a party to the action in which the judgment was rendered nor privity thereto, but the estoppel created by that doctrine is available only to those who were parties to the prior action or were privity with such parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

12. Evidence ⚷318(2)

In spouses' suit to quiet title as against husband's son and daughter-in-law to whom he had executed a valid deed, a letter written by husband in which he apparently confirmed his intention as having been to divest himself of title to lots, and to convey them to his son and daughter-in-law as an absolute gift, was properly excluded as "hearsay."

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

◆

Appeal from Superior Court, Los Angeles County; Ruben F. Schmidt, Judge.

Suit to quiet title by Silvester A. Drummond and Cora M. Drummond against John T. Drummond and Pearl G. Drummond, husband and wife. From a judgment quieting title in defendants, Cora M. Drummond appeals.

Affirmed.

Cora M. Drummond, in pro. per.

John T. Drummond and Pearl G. Drummond, in pro. per.

Mr. Justice THOMPSON delivered the opinion of the court.

Cora M. Drummond has appealed from a judgment quieting title to real property in the respondents. It is contended the evidence fails to show delivery by the grantor or acceptance by the grantees of the deed of conveyance. A motion for new trial was denied.

December 29, 1933, the plaintiff, Silvester A. Drummond, then unmarried executed and recorded his deed of conveyance to lots 7 and 9, block 55 of Artesian tract of Los Angeles, to the respondents, who are his son and daughter-in-law. February 16, 1934, in contemplation of marriage, Silvester A. Drummond executed his written agreement to convey to the appellant, Cora M. Morgan, the lots in question, together with other property. They were subsequently married. Silvester attempted to convey to his wife a joint interest in the lots by his deed dated March 1, 1934. Dissensions soon arose between the spouses and the wife commenced a suit for divorce. He filed an answer and cross-complaint, also asking for divorce. November 8, 1935, an interlocutory decree of divorce was awarded Silvester. That decree determined that lots 7 and 9, above referred to were the community property of the spouses and it purported to distribute an undivided one-half interest in the lots to each of them. August 12, 1936, after an attempt at reconciliation, these plaintiffs joined in a suit to quiet title to said lots. The defendants denied the allegations of the complaint and affirmatively alleged they were "sole owners of the property", praying that title thereto be quieted in them. The court adopted findings to the effect that Silvester A. Drummond, by his deed dated December 29, 1933, voluntarily made, executed and delivered title to the lots in question to John T. Drummond and his wife Pearl, as a gift, and that the deed was duly accepted by them. The court further found that these plaintiffs had no right, title or interest in the property. A decree was accordingly rendered quieting title to the lots in these defendants. Affidavits of Cora M. Drummond and Anthony C. Kolda on motion for a new trial were filed and are found in the record. The motion for new trial was denied. From the judgment quieting title, Cora M. Drummond has appealed, but Silvester did not join therein. This appeal is presented on a bill of exceptions. The affidavits are not included in the bill of exceptions and are not authenticated as having been used on the motion for new trial.

[1-4] By the amendment to section 963 of the Code of Civil Procedure in 1915, St.1915, p. 209, the right of appeal

from an order denying a motion for new trial was abrogated. No such right of appeal now exists. Hughes v. De Mund, 195 Cal. 242, 247, 233 P. 94; Hurd v. Walker, 9 Cal.App.2d 525, 50 P.2d 1074; 20 Cal. Jur., p. 213, sec. 139; 2 Cal.Jur., p. 174, sec. 34. But the right to review an order denying a motion for new trial may, nevertheless, be exercised on appeal from the judgment if the alleged error is properly presented by a bill of exceptions or otherwise. Sec. 956, Code Civ.Proc.; Hughes v. De Mund, supra. Since the affidavits on motion for new trial are not included in the bill of exceptions, and are not otherwise authenticated as having been used on that motion, we may not resort to them for proof of any fact therein stated. The clerk merely certified that the affidavits are true copies of documents on file "which are a part of the judgment-roll". He does not certify they were used or read on the motion for new trial. Nor does he certify that no other affidavits or evidence were adduced on that hearing. He is not authorized to certify to those facts. 2 Cal. Jur. 607, sec. 329. Affidavits on motion for a new trial are not a part of the judgment roll. Sec. 670, Code Civ.Proc. In the case of Sutliff v. Dempsey, 5 Cal.App. 2d 246, 42 P.2d 677, 678, it is said: "It has been frequently held that the judge of the trial court is the only one authorized to authenticate the pleadings, proceedings and documents used upon a hearing before him, either by settling a bill of exceptions or in the manner provided by section 953a of the Code of Civil Procedure. Patterson v. Rutherford, 39 Cal.App. 647, 179 P. 704; Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685, 98 P. 1062."

We are therefore impelled to hold the motion for a new trial was properly denied.

[5] There is substantial proof to support the findings and judgment that the previous deed of conveyance of lots 7 and 9 in question to the respondents was executed, delivered to and accepted by the grantees. The evidence that Silvester A. Drummond executed and recorded his deed with the intention of divesting himself of title to the lots and of thereby making a gift of them to his son and daughter is entirely satisfactory. He testified in that regard:

"I did execute this deed. * * *

"Q. They were not present, and knew nothing about it? A. Yes sir; of my own free will and accord I did it. * * *

"Q. And did they promise you they would (deed those lots back)? A. Said they would, but never did,— * * * they said they wanted me to enjoy it. * * *

"(By the Court):

"Q. At the time you made the deed to your son and daughter did you intend to give them the property? A. Well, if I deeded the property to them and recorded it, I certainly was doing that for them. I intended to give it to them. * * * I told them I had made it for them, that I had it recorded but hadn't seen them. * * *

"Q. What was your intention at the time you made that deed? A. My intention was to give the deed to them when I saw them. I had no other thought in mind at all.

"Q. Did you at any time intend to vest title in John and Pearl Drummond? A. I did."

The deed, which was dated December 29, 1933, was recorded the following day, with an endorsement thereon, "When recorded, please mail this instrument to S. A. Drummond." The deed is also endorsed "Recorded at request of Grantee." In the record there is a distinct check after the word "Grantee" to indicate that fact. This furnishes substantial evidence of an execution and recording of the deed by the grantor with the intention to thereby convey title to the lots to his son and daughter. The grantor distinctly said that was his purpose. He saw the grantees within a few days after the execution of the deed and told them what he had done. He knew he had thereby divested himself of title to the lots for he asked them to reconvey them to him. They refused to do so, saying they wanted him to enjoy the property. It is reasonable to assume they retained the title to the lots because they knew he was about to consummate an ill-advised marriage and might lose the property. The grantor did not manually deliver the deed to the grantees, but he told them he had conveyed the property to them as a gift. There is evidence that they exercised dominion over the instrument by requesting that it be recorded. That request with full knowledge of the transaction and the intention of the grantor to give them the property, together with their refusal to reconvey the lots to him, furnishes ample evidence of constructive delivery of the deed and acceptance of the gift.

[6, 7] Manual delivery of a deed to the grantee is not essential to the passing of title. No particular form of delivery is required. Delivery and acceptance of a deed may be manifested by the declarations, acts and conduct of the parties. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Follmer v. Rohrer, 158 Cal. 755, 112 P. 544; 4 Tiffany on Real Property, 3d Ed., p. 199, sec. 1034. In the authority last cited it is said in that regard: "The crude conception of a manual delivery of the instrument as the only means of making it legally effective * * * has been superseded by the more enlightened view that whether an instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. * * * The fact that the grantor retains possession of the instrument is immaterial. * * * A declaration to such third person of an intention that the deed shall take effect would seem to be quite as effective as a manual transfer to him."

[8, 9] When the execution and delivery of a deed with the intention of thereby conveying title to the grantee is satisfactorily established, neither the subsequent collection of rental therefrom, the mortgaging of the property without the knowledge or consent of the grantee, nor the attempt to convey it to another person, will vitiate the title of the grantee. Shaver v. Canfield, 21 Cal.App.2d 734, 70 P.2d 507. The subsequent attempt of Silvester A. Drummond to deed the property to his wife March 1, 1934, was ineffectual and void.

In the present case the unqualified declarations of the grantor leave no doubt he intended to execute and record the deed as an absolute gift of the property to his son and daughter. His subsequent statement of that fact to the grantees and their refusal to reconvey the property to him constitute evidence of their entire approval and acceptance of the gift of property. The fact that the deed was recorded "at the request of the grantees" corroborates the grantor's evidence of a conveyance of title. Moreover, section 1055 of the Civil Code provides that "A grant duly executed is presumed to have been delivered at its date."

[10, 11] The introduction of the interlocutory decree of divorce which found that the lots in question were the community property of the spouses and which attempted to award the property to them in undivided shares, is not res judicata with respect to their title thereto. The grantees in the previous valid deed of conveyance of those lots were not parties to that divorce proceeding. It is a well-established rule that one is not estopped from denying the effect of a judgment on the doctrine of res judicata when he was neither a party to the action in which the judgment was rendered nor privity thereto. The estoppel created by the doctrine of res judicata is available only to those who were parties to the prior action or who were privity with such parties. Carter v. Monterey County Trust & Savings Bank, 3 Cal.App.2d 648, 654, 38 P.2d 583; 15 Cal. Jur. 97, sec. 166; 34 C.J. 973, sec. 1391; 15 R.C.L. 949, sec. 429.

The plaintiffs were not restricted in their attempt to fully examine Silvester A. Drummond regarding his intention in execution and recording his deed of conveyance to his son and daughter. He testified fully regarding that subject. All of the deeds in question and the interlocutory decree of divorce were received in evidence. The prenuptial property settlement agreement was presented to Silvester A. Drummond on his examination as a witness and he admitted that he signed the instrument. It was not offered in evidence but its contents were fully disclosed to the court as it appeared in the affidavit of Cora M. Drummond, on file, and as it is referred to in the interlocutory decree of divorce. There appears to have been no error in restricting the examination of the witness in that regard.

[12] The appellant may not complain of the ruling of the court excluding from the evidence a letter written by Silvester A. Drummond in which he apparently confirmed his intention in executing and recording the deed to his son and daughter to have been to thereby divest himself of title to the lots and to have conveyed them to the grantees as an absolute gift. This letter constituted hearsay evidence. It was offered in evidence by the attorney for the defendants, and not by the appellant. The court sustained plaintiff's objection to that letter. There was no request on the part of plaintiffs to inspect or use that letter on cross-examination of the witness.

We have examined all of the other assignments of error. Some of them are obscure and uncertain in their meaning. We are satisfied there is no merit in any of these assignments of error.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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39 Cal.App.2d 426

MANSUR v. CITY OF SACRAMENTO et al.

Civ. 6406.

District Court of Appeal, Third District, California.

June 5, 1940.

1. Constitutional law 🔑48

In determining the constitutionality of a city charter provision that, where one spouse was employed by the state or by any governmental or municipal subdivision drawing a salary paid from tax revenues, the other spouse should not be taken into employment of city, it could be assumed that provision was adopted with view of promoting and preserving general welfare. St.1937, p. 2637, § 165.

2. Constitutional law 🔑70(3)

The wisdom and social or economic soundness of a city charter provision providing that, where one spouse is employed by the state or by any governmental or municipal subdivision drawing a salary paid from tax revenues, the other spouse shall not be taken into employment of city, were matters for determination by framers of charter and by electors, rather than by the court. St.1937, p. 2637, § 165.

3. Constitutional law 🔑45, 48

If a provision of a city charter violated the Constitution, court was bound to declare provision unconstitutional, bearing in mind that, in considering the question, all doubts, if any, were to be resolved in favor of constitutionality of the provision.

4. Constitutional law 🔑45

Courts should not declare a city charter unconstitutional unless the fact of unconstitutionality clearly appears.

5. Constitutional law 🔑208(1)

When statutes attempt to distinguish between either individuals or businesses, whether for purposes of benefits or of restriction, necessity for such discrimination or classification must be made to appear, and the classification must be neither arbitrary nor capricious and must not rest upon personal, physical, or mental characteristics pertaining solely to individual to be affected, but upon the relation which such individual bears to society.

6. Constitutional law 🔑205(1)

When statutes attempt to distinguish between either individuals or businesses, whether for purposes of benefits or of restriction, mere necessity for discrimination or classification, regardless of need therefor, will not suffice to avoid constitutional mandate that neither privilege nor immunity shall be granted or withheld from any citizen or class upon terms different from those upon which they are granted or withheld from others. Const. art. 1, § 21.

7. Constitutional law 🔑208(1)

When statutes attempt to distinguish between either individuals or businesses, whether for purposes of benefit or of restriction, the classification must rest upon some substantial, inherent, intrinsic difference or distinction in the relation of the particular class toward the lives, safety, property, health, happiness, or convenience of the public, when contrasted with the relation, duties, responsibilities, position, or situation of other persons or classes toward the same matters of public concern.

8. Constitutional law 🔑205(7)
Municipal corporations 🔑215

The provision in charter of city of Sacramento that, where one spouse is employed by the state or by any governmental or municipal subdivision drawing a salary paid from tax revenues, the other spouse shall not be taken into employment of city, violates the constitutional mandate that neither privilege nor immunity shall be granted or withheld from any citizen or class upon terms different from those upon which they are granted or withheld from others. St. 1937, p. 2637, § 165; Const. art. 1, § 21; art. 11, § 11.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus proceeding by Benjamin B. Mansur against the City of Sacramento and others, to compel respondents to pay petitioner certain salary as pump operator and stationary engineer for the City of Sacramento. From a judgment granting petitioner a peremptory writ of mandate, the City of Sacramento and others appeal.

Affirmed.

Hugh B. Bradford, City Atty., of Sacramento, for appellants.

Robert M. Holstein, of Sacramento, for respondent.

GEARY, Justice pro tem., delivered the opinion of the court.

Appellants, City of Sacramento, a municipal corporation, the civil service board of said city, the members and secretary thereof, and A. O. Hoover, controller of said city, appeal from a judgment of the superior court of the state of California, in and for the county of Sacramento, granting the above-named petitioner and respondent a peremptory writ of mandate.

Respondent, Mansur, on June 16, 1939, acquired through compliance with the provisions of the civil service system of the city of Sacramento, a position on the eligibility list in the classified civil service of said city. Thereafter, on August 1, 1939, he was selected from the eligibility list by the city manager of Sacramento, for a position as pump operator and stationary engineer for said city, and upon that date entered into the performance of his duties as such. At that time, the wife of respondent was, and ever since has been, employed by the state board of equalization, and is drawing a salary from tax revenues for the duties performed by her. Respondent Mansur continued in the employment of appellant city until August 11, 1939, and at the compensation regularly fixed for his duties, earned the sum of $64.80 up to that date. Prior to June 16, 1939, and at all times subsequent thereto, section 165 of article XX of the charter of the city of Sacramento provided: "Sec. 165. Every officer or employee of the city must be a citizen of the United States and have resided in the City of Sacramento not less than one year preceding his election or appointment. In case of flood, fire, or other public calamity, the City Manager may employ on city work persons other than citizens or residents. The provision of this section regarding residence shall not apply in the case of the City Manager or of professionally trained experts. *Where one spouse is employed by the State or by any governmental or municipal subdivision drawing a salary paid from tax revenues, the other spouse shall not hereafter be taken into the employment of the City of Sacramento.* Provided, however, that this paragraph of this section shall be suspended in time of any war in which the United States is engaged." Stats.1937, p. 2637. (Italics ours.)

Pursuant to the above charter provision prohibiting the employment by the city of one whose spouse is receiving compensation from tax revenues, the civil service board of said city, refused to certify the city payroll to the city controller for approval, in so far as the same pertained to respondent. It is the contention of the civil service board that respondent's name was not properly placed upon the payroll in view of the foregoing section of the charter, and the rules of the board pursuant thereto. The city controller, in the absence of the certification of eligibility of respondent by the civil service board, and in accordance with further provisions of the charter set forth in section 43, article VIII thereof, refused to approve that portion of the payroll relating to him.

Respondent Mansur thereupon filed his petition for a writ of mandate which, after hearing, was granted. The trial court held that that portion of section 165, article XX of the charter providing—"Where one spouse is employed by the State or by any governmental or municipal subdivision drawing a salary paid from tax revenues, the other spouse shall not hereafter be taken into the employment of the City of Sacramento"—is arbitrary in its discrimination against respondent; that it is unconstitutional and void under the provisions of article I, sections 13 and 21 of the Constitution of California.

[1-4] By article XI, section 11, the California Constitution provides: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." The particular charter provision presented for consideration herein doubtless originated pursuant to the above constitutional grant of police power to municipalities and other political subdivisions. It may likewise be assumed that the provision of the charter in question was adopted with

the view of promoting and preserving the general welfare. Undoubtedly, the freeholders drawing the charter, recognizing the existing and widespread unemployment, proposed the provision in question and the same was adopted in the belief that it would contribute towards a greater distribution of employment; that by prohibiting the employment by the city of one spouse, where the other was employed and compensated from tax revenues, a greater spread of public employment would result. Whether the particular charter provision will secure the result for which it is designed, or whether its policy is wise or economically correct, are not questions presented to this court. The wisdom and the social or economic soundness of the charter provision are matters to be determined by the framers of the charter in the first instance, and lastly, by the electors. There is presented to the court, however, the contention that the particular charter provision violates the constitutional rights of respondent guaranteed by article I, sections 13 and 21 of the California Constitution. If this provision of the charter does violence to the fundamental law, it is the duty of this court to so declare, even bearing in mind, however, in our consideration of the question, that all doubts, if any there be, are to be resolved in favor of the constitutionality of the charter provisions. The rule is, of course, that courts ought not to declare such acts as the one under consideration, unconstitutional, unless that fact clearly appears. Stockton & V. R. Co. v. Common Council of City of Stockton, 41 Cal. 147, 159, and cases cited; City of Los Angeles v. Lankershim, 160 Cal. 800, 803, 118 P. 215; Matter of Application of Miller, 162 Cal. 687, 696, 120 P. 1064.

[5-8] The California Constitution, by article I, section 21, provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." A proper application of this constitutional provision may at times appear uncertain, due to the peculiar facts presented in each case. However, a consideration of the facts with the principles involved, viewed in the light of the decisions hereinafter cited, must dissolve such doubts as may have existed in the instant case. The courts of this state long ago enunciated, and numerous decisions have reaffirmed the rule that when statutes, as distinguished from the Constitution itself, attempt to distinguish between either individuals or businesses, and thus legally discriminate between them—whether for purposes of benefit or of restriction—certain facts must exist as a prerequisite thereto. First, necessity for such discrimination or classification must be made to appear. In this case the solution of the problem of unemployment is advanced as the necessity for the distinction sought to be established by the charter provision. Necessity alone, however, regardless of the dire need therefor, will not suffice to avoid the constitutional mandate that neither privilege nor immunity shall be granted or withheld from any citizen or class upon terms different from those upon which they are granted or withheld from others. In addition to necessity—and equally essential in classifying individuals or businesses as a basis for legal discrimination—is the requirement that the classification shall be neither arbitrary nor capricious. It must not rest upon the personal, physical, or even mental characteristics pertaining solely to the individual to be affected, but rather upon the relation which such individual may bear to society. Further, as stated by this court in In re Finley, 1 Cal.App. 198, 207, 81 P. 1041, 1045, per McLaughlin, J., the classification "must rest upon some substantial, inherent, intrinsic difference or distinction in the relation of the particular class toward the lives, safety, property, health, happiness, or convenience of the public, when contrasted with the relation, duties, responsibilities, position, or situation of other persons or classes toward the same matters of public concern." Pasadena v. Stimson, 91 Cal. 238, 250, 27 P. 604; Ex parte Jentzsch, 112 Cal. 468, 474, 44 P. 803, 32 L.R.A. 664; Rauer v. Williams, 118 Cal. 401, 408, 50 P. 691; Matter of Application of Miller, 162 Cal. 687, 698, 124 P. 427; In re Raleigh, 177 Cal. 746, 751, 171 P. 950; Mordecai v. Board of Supervisors, 183 Cal. 434, 438, 192 P. 40; Martin v. Superior Court, 194 Cal. 93, 100, 227 P. 762; In re Gatsios, 95 Cal.App. 762, 766, 273 P. 826. Bearing in mind the foregoing essentials to a lawful classification, it becomes apparent at once that the charter provision in question here wholly fails to meet those sound essentials required to overcome the

plain mandate declared in article I, section 21 of our Constitution. What is there "of an inherent, intrinsic difference or distinction" about a married couple, one of whom receives compensation from public revenue, the other from employment by the City of Sacramento, and other public employees or the public generally? They suffer the same hardships, entertain the same hopes, are stirred by similar ambitions, and faced with similar economic problems that confront the vast majority. They are called upon to meet like duties of citizenship, and no legal reason is shown why their rights as citizens should be abridged as so clearly attempted here. Rauer v. Williams, supra. That the attempted classification is purely arbitrary, artificial and contrary to our fundamental law is clearly evidenced.

In view of the foregoing, it is unnecessary to determine whether the charter section is likewise violative of article I, section 13 of the California Constitution. The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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39 Cal.App.2d 407

PEOPLE v. PUSTAU.

Cr. 3288.

District Court of Appeal, Second District, Division 1, California.

June 5, 1940.

1. Indictment and Information 🔑143, 154

A defendant, failing to interpose demurrer to or motion to quash indictment when arraigned for plea thereon, may attack sufficiency thereof only for lack of jurisdiction in court or failure of pleading to state facts sufficient to constitute public offense.

2. Indictment and Information 🔑117

The sufficiency of indictment must be tested in light of averments therein.

3. Perjury 🔑19(2)

A perjury indictment, alleging that defendant knowingly gave certain false and material testimony before grand jury under oath, stating such testimony in detail, and pointing out wherein it was false, was sufficient as advising defendant of charge in such manner as to enable him to prepare defense properly. Pen.Code, § 950.

4. Perjury 🔑11(2)

Perjured testimony is material when it could have properly influenced tribunal before which case was being heard on issues involved.

5. Perjury 🔑25(5)

An indictment for perjury in testifying before grand jury during investigation of charges of bribery and corrupt misconduct of public officers *held* sufficient as against contention that facts alleged to have been testified to were immaterial. Pen.Code, § 68.

6. Criminal law 🔑386

In trial for perjury in testifying before grand jury during investigation of charges of bribery and corrupt misconduct of public officers, evidence of conversation, heard over dictaphone, in hotel room and telephone conversation heard on extension telephone was admissible, though listeners and transcribers did not see persons speaking, where defendant admitted his presence and shorthand reporter testified that he was familiar with defendant's voice.

7. Criminal law 🔑731

It is jury's function to find facts and apply law as given by court to them.

8. Perjury 🔑37(1)

On perjury trial, it is court's duty to instruct jury as to what facts would show materiality of false testimony.

9. Criminal law 🔑1168(1)

In perjury trial, defendant was not prejudiced by court's submission to jury of materiality of false testimony as fact question, where much of such testimony was material as matter of law.

10. Perjury 🔑34(1)

Perjury must be proved by testimony of two witnesses or one witness and corroborating circumstances, but this simply means that there must be positive testimony as to facts absolutely incompatible with accused's innocence. Code Civ.Proc. § 1968; Pen.Code, § 1103a.

11. Perjury 🔑33(8)

To convict of perjury, testimony proving state of facts contrary to that sworn to by accused or absolutely incompatible or physically inconsistent with his evidence is sufficient.

12. Perjury ⚷33(1)

Every assignment of perjury charged in indictment need not be established, but sufficient proof of one of them will sustain conviction.

13. Perjury ⚷33(1)

Evidence *held* sufficient to sustain conviction of perjury in testifying before grand jury during investigation of charges of bribery and corrupt misconduct of public officers. Code Civ.Proc. § 1968; Pen.Code, §§ 68, 1103a.

14. Criminal law ⚷829(3)

In perjury trial, refusal of defendant's offered instructions that criminal intent is vital element in perjury, that intention to swear falsely is necessary, and that defendant's testimony must have been not only false, but given with knowledge of its falsity, *held* not error, in view of instructions given.

15. Perjury ⚷37(3)

In perjury trial, instructions need only advise jury fully and fairly as to kind, quality and degree of proof necessary to convict defendant of such offense.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Carl Pustau was convicted of perjury, and he appeals.

Affirmed.

John A. Holland, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

WHITE, Justice.

From a judgment of conviction upon an indictment charging him with the crime of perjury, and from an order denying his motion for a new trial, defendant prosecutes this appeal. The perjury is alleged to have been committed by defendant in the course of his testimony given before the grand jury of Los Angeles county. The indictment reveals that at the time of defendant's appearance before it as a witness, that body was engaged in an inquisition and investigation into charges concerning the alleged asking and receiving of a bribe in violation of section 68 of the Penal Code and also the asserted wilful and corrupt misconduct in office of certain public officers of Los Angeles county.

Summarizing the facts, so far as they appear to be germane to the issues now presented to us, it appears that during the 1937 session of the California state legislature, the then speaker of the assembly introduced certain legislation by which county supervisors, by a four-fifths vote, were empowered to transfer drainage districts within the county to flood control districts, whereupon the latter became liable for all the outstanding bonds and obligations of such drainage districts. The act became effective August 27, 1937. Stats.1937, ch. 641, p. 1761. On August 30, 1937, a proposal for such a conveyance of drainage districts in Los Angeles county failed of passage before the board of supervisors, three members of that body voting for, and two against the same. Later, however, on December 1, 1937, a similar proposal carried by a vote of four of the five supervisors. About April, 1939, the state senate then in session caused to be published a legislative investigative report, commonly referred to as the "Philbrick Report" (Senate Journal, April 4, 1939, pp. 1086–1150), which purported to contain the result of an investigation into alleged official misconduct in the state. Certain pages of that report were devoted to what was denominated "drainage district legislation" and specifically mentioned a secretary to one of the Los Angeles county supervisors. Upon the publication of such report, the board of supervisors of Los Angeles county, on April 12, 1939, requested the grand jury to investigate the charges therein contained with reference to officials in Los Angeles county. It was in conformity with such request that the grand jury proceeded to inquire into the possible passing of a bribe and also wilful and corrupt misconduct in office by public officials.

The pertinent portions of appellant's testimony before the grand jury were: That he had not discussed the transfer of drainage districts in Los Angeles county with the speaker of the assembly and did not tell one J. P. Dunn, a private investigator, on November 1, 1937, that he, the speaker, and the aforesaid supervisorial secretary, were negotiating for such transfers on behalf of certain railroads; that said Dunn had placed a dictaphone in a certain hotel room during a conference between defendant, the assembly speaker and the supervisor's secretary, for the sole purpose of checking up on appellant and seeing that he stayed honest and not to check up on the other two present; that on November 8, 1937, when appellant and the aforesaid speaker and secretary came together about 1 o'clock in a room in the aforesaid hotel, the speaker was very full of liquor and after he had greeted the supervisor's secretary the former indulged in some loud obscenity and began to holler, "I will do anything Carl" (appellant) "says if he will give me another drink," and by this time the supervisor's secretary left in disgust, and that constituted all that was said and all that occurred in the room at that meeting. Appellant further testified before the grand jury that during such meeting no mention whatsoever was made of drainage districts, and that the assembly speaker said nothing whatever about a railroad company nor mentioned an officer of one of such companies. That during that meeting no mention was made of $2,500 or any other sum; that the supervisor's secretary did not say, "Well, so am I, Mose" (addressing the assembly speaker) "particular who I shake hands with, but if you have something in the palm of your hand, I am not so particular," nor anything to that effect. Finally, appellant further testified that shortly after the meeting Mr. Dunn showed appellant what purported to be a transcript of the conversation between appellant, the speaker and the supervisor's secretary in the hotel room, and that such transcript contained no reference to a drainage district or to any $2,500 fee, and that it contained no reference to any discussion of any drainage district matter, but only "a part of a lot of kidding and obscene words of two men that had met, one drunk and the other sober * * * who was trying to get out of a predicament as fast as possible."

At the trial the purported transcript of the conversation that occurred in the hotel room, as taken down by a shorthand reporter by means of a dictaphone, was read to the jury, and the same contained matter directly refuting portions of appellant's testimony before the grand jury, of which the following is illustrative:

"Supervisor's secretary: Well, anyhow, Mose" (the assembly speaker), "they had this drainage thing all worked out once, but your people were not ready. It is not time to open it up again—we should wait until next year—

"Assembly speaker: It has got to be within thirty days—anything Carl" (referring to defendant, Carl Pustau) "says is O. K. with me.

"Supervisor's secretary: Does this mean going back to the original deal—if so, it cannot be done.

"Appellant: I don't think that is exactly right—it must be done within thirty days—how can it be worked out, Leo?" (Supervisor's secretary.)

"Assembly speaker: I trust Carl and he can work it out—whatever he says is O. K. with me.

"Supervisor's secretary: Well, I think we can work it out, if Carl is ready we can work it out.

"Appellant: O. K., but Mose, you should understand on county business it is not going to be so easy to do.

* * * * *

"Supervisor's secretary: As far as we are concerned, I think it should be next year—your fees are no good after thirty days—if nothing happens between now and thirty days, Mose, you would have your fees reissued—

"Appellant: What do you think can be done in thirty days, Leo?

"Supervisor's secretary: I will have to check it—the Board will not try to open it up again now—they think we should wait until next year and keep it in the budget—

"Appellant: Do you think a year from now, Leo, would do anybody any good, without some assurances?

"Assembly speaker: I am not going to keep the fee open for another year—I will tell you something—ah nuts—what the hell—

* * * * *

"Supervisor's secretary: Who do you represent, Mose—are you retained by the Santa Fe?

"Assembly speaker: No, I represent the (loud whispers) U. P.—I represent Jeffers—let it go at Omaha—

* * * * *

"Appellant: Mose, shall I tell him the $2,500.00 is ready? Shall I tell him O. K.? He is expecting to hear it, you know—

"Assembly speaker: Yes, absolutely Carl—it's O. K.—

"Appellant: You understand that Leo?

"Supervisor's secretary: O. K. Carl,—let's shake hands on it, Mose—

"Assembly speaker: I am particular who I shake hands with—

"Supervisor's secretary: Well, so am I, Mose, but if you have something in the palm of your hand I am not so particular."

The foregoing, though but a brief summary of the circumstances surrounding the alleged perjury, furnishes, we feel, a sufficient factual basis for consideration by us of the attack made upon the judgment by appellant.

[1-5] As a first ground of appeal it is urged that the indictment is defective in that it does not allege facts sufficient to show that any crime of perjury had been committed. Because appellant failed to interpose a demurrer or motion at the time he was arraigned for plea upon the indictment, his attack upon the sufficiency of the pleading is limited to lack of jurisdiction in the court or the failure of the pleading to state facts sufficient to constitute a public offense. People v. Bryon, 103 Cal. 675, 677, 37 P. 754; People v. Kinsley, 118 Cal.App. 593, 596, 5 P.2d 938. In epitomizing his argument on this point appellant says: "All of the facts set forth in said indictment were immaterial and redundant to any issue in the case and that at no place in said indictment was it shown that said Carl Pustau knowingly made any statement to said grand jury that was false." In the course of his argument appellant resorts to testimony taken at the trial and to matters not testified to at the trial, but which he claims are of public record in Los Angeles County, such as the acquittal of the supervisor's secretary and the dismissal as to the speaker of the assembly of bribery charges contained in an indictment returned against them as the outgrowth of the grand jury inquisition in connection with which appellant gave his testimony—from all of which, argues appellant, it must be assumed that there was no misconduct on the part of county officials or any violation of section 68 of the Penal Code, and therefore appellant's testimony could not constitute material matter. The argument is fallacious. The sufficiency of an indictment must be tested in the light of the averments therein contained. The pleading here in question sets forth the substance of the controversy or matter in respect to which the offense was committed, before whom the oath alleged to be false was taken; that the person before whom it was taken had authority to administer it; coupled with proper allegations of the falsity of the matters on which the perjury is assigned. Where, as here, the indictment sets out that the defendant under oath knowingly gave certain false testimony; that the testimony so given was material, and then sets forth in detail such testimony, and points out wherein it was false and untrue, the indictment is sufficient, because such allegations advise the defendant of the charge against him in such a manner as to enable him to properly prepare a defense thereto. Pen.Code, § 950; People v. Carnicle, 137 Cal.App. 324, 325, 31 P.2d 216; People v. Low Ying, 20 Cal.App.2d 39, 41, 42, 66 P.2d 211. The test of materiality is met when it can be said that the testimony could have properly influenced the tribunal before which the case was being heard, upon the issues involved. People v. Albert, 91 Cal.App. 774, 267 P. 587; In re Braynard, 52 Cal.App. 631, 199 P. 576. The pleading before us meets that test, as is evidenced from a mere reading of the asserted dictaphone transcript contained therein of the conversation in the hotel between appellant, the assembly speaker and the supervisor's secretary, in conjunction with the averments contained in the indictment as to the nature of the inquisition in which the grand jury was engaged.

[6] Appellant's contention that the court erred in admitting into evidence the conversation in the hotel room which was heard over a dictaphone, written down in shorthand and later transcribed, cannot be sustained. The main objection urged to this testimony is that the dictaphone listener and transcriber did not see the persons whose voices he recorded. But there are other ways of identifying voices than by seeing the speaker. People v. Schultz, 18 Cal.App.2d 485, 488, 64 P.2d 440. Further, appellant readily admitted his presence at the conference in question, as did the other two participants therein, and the shorthand reporter testified he was familiar with the voice of appellant. Manifestly no prejudice occurred to appellant by reason of the trial court's ruling in this regard. What we have just said is equally decisive of appellant's objection to the introduction in evidence of a telephone conversation between appellant and the assembly speaker on November 19, 1937, which conversation was transcribed by the witness Handy while listening to it on an extension telephone. This conversation tended to prove that appellant was discussing the drainage district transaction, contrary to his denial thereof in

his testimony before the grand jury, and which transaction was then under investigation by the grand jury.

[7-9] Appellant next assigns as error the fact that the court did not rule upon the materiality of the evidence, but left it to the jury to determine as a question of fact the materiality of the alleged perjured testimony. It is true that the function of the jury is to find the facts and apply to them the law as given by the court; and on a trial for perjury it is the duty of the court to instruct the jury as to what facts would show material testimony (People v. Lem You, 97 Cal. 224, 228, 32 P. 11), but we have no hesitancy in saying as a matter of law that much of the allegedly perjured testimony was material. When, therefore, the trial court left to the jury the determination of the materiality of the facts which they found in connection with the false testimony, the substantial rights of the defendant were not prejudiced, but as a matter of fact he thereby received more favorable consideration at the hands of the trial court than that to which he was entitled. Of this he cannot be heard to complain, nor is it ground for reversal, for if the jury were led to the erroneous belief that they could decide upon the materiality of the evidence and had decided that it was not material, the defendant would have obtained an acquittal to which he was not entitled.

[10, 11] A reversal is also urged upon the ground, as stated by appellant, "that the people failed to show any corroboration of any of the allegations in the indictment". It is elementary that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances. Code Civ. Proc. § 1968; Pen.Code, §§ 1103a. This, however, simply means that it is necessary to have positive testimony as to the facts that are absolutely incompatible with the innocence of the accused. People v. Porter, 104 Cal. 415, 38 P. 88; 20 Cal.Jur. 1023. Testimony proving a state of facts contrary to that sworn to by the accused, or absolutely incompatible or physically inconsistent with his evidence, will be sufficient. People v. Chadwick, 4 Cal.App. 63, 87 P. 384, 389; People v. Casanova, 54 Cal.App. 439, 202 P. 45; People v. Follette, 74 Cal.App. 178, 240 P. 502. The rule is thus stated in People v. Casanova, supra [54 Cal.App. 439, 202 P. 47]: "The statute respecting the quantum of evidence necessary in perjury cases will be satisfied, if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged."

[12, 13] It not being essential that every assignment of perjury charged in an indictment be established, but that one sufficiently proven will sustain a conviction, we shall not here discuss the corroborative evidence on each assignment, but shall set forth a few of these assignments and point out the direct and corroborative evidence establishing the same. Appellant's testimony before the grand jury that he and the speaker of the assembly never discussed the transfer of any drainage districts in Los Angeles county nor was such matter discussed at any time by any persons present in the hotel room on November 8, 1937, is directly refuted by the witness Handy's notes of the conversation between appellant and those present in the hotel room and corroborated by the supervisor's secretary, who testified at the trial of appellant that the latter told him "the matter of the drainage districts was going to be discussed" at the meeting at the Clark Hotel. This witness further testified that at such last-mentioned conference there was conversation "pertaining to the transfer of the drainage districts" and that his best recollection was that appellant brought the subject up at that time. Appellant testified before the grand jury that he did not, on or about November 1, 1937, tell the witness Mr. Dunn in effect or in substance that in conjunction with the speaker of the assembly and the supervisor's secretary he was negotiating on behalf of several railroads in connection with the transfer of liabilities from drainage districts in Los Angeles county to the flood control district, and that three railroads were interested in securing the transfer of these drainage districts to the flood control district. The witness Dunn testified directly to the contrary. Appellant's testimony before the grand jury that the witness Dunn put the dictaphone equipment in the hotel room for the sole purpose of checking

up on appellant was directly contradicted by the witness Dunn, who testified that when he questioned the accuracy of appellant's statements the latter replied that he would prove them and would arrange a meeting with the speaker of the assembly and the supervisor's secretary, and that Dunn might select a place and put sound equipment in the room in order to hear the discussion. Appellant further testified before the grand jury that following the meeting in the hotel room on November 8, 1937, the witness Dunn showed him on that same afternoon what purported to be a transcript of the conversation which had taken place in the room, and that such transcript did not contain any reference to a drainage district or to any $2,500 fee or to any discussion of any kind between appellant and the speaker of the assembly or the supervisor's secretary concerning a drainage district, and that it contained only "a lot of kidding and obscene words". This is positively and directly refuted by the transcript of the conversation at the hotel room taken by the witness Handy and also by the latter's testimony that about two hours after he had taken these notes he, the witness Dunn and appellant were present in Dunn's office, at which time Handy read the notes to appellant and Dunn, and that at appellant's suggestion an insert was made in the transcript. Also, further corroboration is contained in the testimony given by Mr. Dunn. With reference to appellant's testimony before the grand jury to the effect that he had not discussed with the speaker of the assembly the matter of a transfer of drainage districts to the flood control district and that the assembly speaker never told him what project he was interested in or what his business was with the supervisors of Los Angeles county, it might be noted that upon his own direct examination at the trial appellant admitted that the assembly speaker told him that he had some clients that would give a $2,500 fee in the matter of the flood control transaction in which the county board of supervisors would be interested. Appellant further testified at his trial that he and the witness Dunn had discussed the matter of having both the assembly speaker and the supervisor's secretary meet appellant so that they could continue with the business that the speaker wanted to take up with the supervisor's secretary, and that the former told appellant he wanted to talk over this drainage matter with the supervisor's secretary. The record presents further corroborative evidence which need not here be detailed. The statutory requirements affecting a prosecution for perjury were met by abundant direct or positive evidence and corroborating circumstances absolutely incompatible with the innocence of the accused.

[14, 15] Finally appellant contends that the trial court erred in refusing to give to the jury five instructions offered by him. The gist of appellant's complaint in this regard is that the refused instructions contained a statement to the effect that criminal intent is a vital element in perjury, that the intention to swear falsely is necessary and that such testimony must not only be false, but must have been given with knowledge that it was false. We say without hesitation from a reading of all instructions given that the jury were clearly, understandingly and unerringly admonished, and must have understood, that they must be convinced beyond a reasonable doubt before they could find the defendant guilty that he knowingly, willfully and in violation of his oath testified falsely as to the matters material to the grand jury's inquisition. The jury were further advised that such conviction must be based upon the testimony of two witnesses or one witness and corroborating circumstances; and further, the jury were admonished that before they could convict appellant it was necessary for them to be convinced beyond a reasonable doubt that at the time of giving such testimony he knew the same to be false and gave such testimony wilfully and for the purpose and with the intent of deceiving and misleading the grand jury. From a reading of all the instructions given, we are impressed that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before appellant could be convicted of perjury. This is all the law requires. People v. Kelly, 70 Cal.App. 519, 524, 234 P. 110; People v. Alston, 139 Cal. App. 575, 576, 34 P.2d 759; People v. Bolton, 215 Cal. 12, 22, 8 P.2d 116; People v. Jordan, 24 Cal.App.2d 39, 74 P. 2d 519; People v. Curtis, Cal.App., 98 P.2d 228; People v. Macken, 32 Cal.App. 2d 31, 89 P.2d 173. A reading of the

transcript, including the instructions, impresses us that the learned trial judge painstakingly and zealously guarded the rights of appellant. The latter had a fair and impartial trial—in fact, the trial judge displayed to the defense unusual consideration and patience.

For the foregoing reasons, both the judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

39 Cal.App.2d 390

FARMERS AUTOMOBILE INTER-INSURANCE EXCHANGE v. CALKINS et al.

Civ. 2455.

District Court of Appeal, Fourth District, California.

June 3, 1940.

1. **Fraud** 🔑50

The presumption is always against fraud and the presumption approximates in strength that of innocence of crime.

2. **Fraud** 🔑58(1)

One who seeks relief from fraud must allege and prove it by clear and satisfactory evidence, and mere suspicion of fraud is not sufficient.

3. **Insurance** 🔑646(3½)

In insurer's action to cancel an automobile liability policy on ground of alleged misrepresentation of insured in application, burden of proving alleged misrepresentation was upon insurer.

4. **Insurance** 🔑146(3)

An application for automobile liability policy and the policy which were prepared by insurer would be strictly construed against it.

5. **Insurance** 🔑285½

Where insured in application for automobile liability policy represented that his "occupation" was that of rancher and that his automobile was used for business and pleasure, and it was shown that over a period of three years insured had worked a total of 47 hours and 14 minutes as volunteer fireman and received less than $100 for such services, insured's statement concerning occupation was not a "misrepresentation" tending to defraud insurer, so as to warrant cancellation of policy, since word "occupation" as commonly understood signifies a vocation, calling, trade, or the business which one principally engages in to procure a living or to obtain wealth, and does not include an isolated or temporary adventure in another line of endeavor.

See Words and Phrases, Permanent Edition, for all other definitions of "Occupation" and "Misrepresentation".

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the Farmers Automobile Inter-Insurance Exchange against G. F. Calkins, wherein defendant filed a cross-complaint. From a judgment for the plaintiff, defendant appeals.

Reversed.

Lasher B. Gallagher, of Los Angeles, for appellant Calkins.

A. J. Getz, of Los Angeles, for appellant Johnson.

Fred A. Wilson, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from a judgment canceling a policy of insurance issued by plaintiff to G. F. Calkins under date of August 28, 1934, because of fraud, misrepresentation and concealment on the part of Calkins in making his application for the policy protecting him against liability on his automobile.

In his application Calkins stated that his occupation was that of "Rancher", and in answer to the question, "For what purpose is car used?", he replied that his automobile was used for "Business and pleasure". It is admitted that these statements were warranties. The policy contained a provision that it should be void if the insured "concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the insured or his agent shall make any attempt to defraud the Exchange either before or after the loss".

The trial court found that Calkins warranted and represented to plaintiff that his occupation was that of rancher and that the automobile was used by him for business and pleasure as such rancher; that Calkins was in fact an agent and employee of the Fontana County Fire Protection District (hereafter called the district) and was a fireman employed by that district; that he used his automobile as such public agent and employee of the district; that on June 8, 1935, while using his automobile as such fireman in responding to a fire call, it came into collision with an automobile driven by defendant Johnson, causing both property damage and personal injuries for which Johnson recovered judgment against Calkins and the district; that on July 8, 1935, plaintiff notified Calkins that it had cancelled and rescinded the policy and tendered him the premium he had paid. The numerous other findings need not be particularized.

On October 3, 1935, Johnson commenced an action against Calkins and the district in which he sought to recover damages for his injuries. He alleged that in driving the automobile at the time of the accident, Calkins was the agent, servant and employee of the district acting within the scope of his employment. This was admitted in the answers. The judgment which Johnson recovered against both defendants has long since become final. This judgment has not been paid. Johnson instituted an action against the district and others to compel the district to pay the judgment, or, the officers of the district to levy a tax sufficient to raise the money to pay it. He has been successful in that proceeding. Johnson v. Fontana County Fire Protection District, Cal.Sup., 101 P.2d 1092.

In the Johnson case just cited the Supreme Court considered and decided two questions of law that are important here. (1) That the district falls within the classification of a "district established by law" so that under the provisions of the former section 1714½ of the Civil Code (sec. 400, Vehicle Code, St.1935, p. 152) it is liable for the negligent use of an automobile in the performance of its governmental functions; and, (2) that the district was estopped by the judgment against it in the Johnson damage action to deny that Calkins was its employee and on its business at the time Johnson was injured.

In reaching these conclusions the Supreme Court reviewed the organization of the district under the act of the legislature (Stats.1923, p. 431; amended, Stats.1925, p. 671; amended, Stats.1931, p. 1599) authorizing its creation and government.

In 1928 the board of supervisors of San Bernardino county appointed five citizens to act as a board of fire commissioners of the district, having, generally, powers of management of its affairs. This board seemingly continued to function until after the accident in which Johnson was injured although all authority of law for the existence of such a board had been removed from the statute by the amendment of 1931 (Stats.1931, p. 1599) which vested the management of the affairs of the district in the board of supervisors of San Bernardino county where such powers have remained ever since.

It would appear that the board of fire commissioners appointed Earl B. Reeves as chief of the fire department of the district. When that appointment was made does not appear. Reeves appointed Calkins a volunteer fireman probably in 1933. Neither Reeves nor Calkins were appointed by the board of supervisors nor did that body ever authorize anyone to appoint either of them. As Calkins was not appointed a volunteer fireman of the district by anyone possessing authority to make such an appointment it would seem to follow that he was never an actual and qualified volunteer fireman of the district who could become its agent and employee; that whatever service he performed in connection with fires in the district was a community service as a volunteer citizen who was interested in the welfare of the district and its property owners. This is strongly suggested by the Supreme Court in the Johnson decision above cited. It was there held that, because of the estoppel of the judgment in the Johnson damage action, the district could not, in that case, maintain that Calkins was not its employee at the time of the accident.

Counsel argue two questions: (1) Was Calkins the agent, servant or employee of the district at the time Johnson suffered his injuries? (2) Was the notice of rescission of the policy signed by a duly authorized agent of plaintiff and was the tender of the premium to Calkins sufficient?

Because of the view we take of the case we do not consider answers to these questions necessary. Therefore, we will assume, without holding, that both questions should be answered in the affirmative.

It should be observed that plaintiff sought cancellation of the policy issued to Calkins because of his fraud, concealment and misrepresentations by stating in his application that his "occupation" was "rancher" and that his automobile was used for "business and pleasure", without disclosing that he was employed as a volunteer fireman by the district and used his automobile in that employment.

[1-3] There is strong presumption of innocence of fraud and the burden of proving these allegations rested heavily on the plaintiff. As was said in Everett v. Standard Acc. Ins. Co., 45 Cal.App. 332, 187 P. 996, 998: "The presumption is always against fraud. This presumption approximates in strength that of innocence of crime. Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26. One who seeks relief from fraud must allege it, and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient."

[4] We should also observe that we are considering an application for insurance and an insurance policy which were prepared by plaintiff and which must be strictly construed against it. As was said in Witherow v. United American Ins. Co., 101 Cal.App. 334, 281 P. 668, 670: "We are considering an instrument which we are justified in assuming was prepared by the insurance carrier and under which it is attempting to escape liability under its insurance policy and work a forfeiture of the same. 'It is well established that conditions which provide for a forfeiture of the interest of the assured, or [other persons] claiming under the policy, are to be strictly construed against the insurance company, and, if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, the interpretation shall be adopted which is the most favorable to the assured, or, in this particular case, to the beneficiary in the deed of trust.' Welch v. British American Assur. Co., 148 Cal. 223, 113 Am.St. Rep. 223, 7 Ann.Cas. 396, 82 P. 964, 965. In the case before us the court is not required to give any more liberal interpretation to the language of the mortgage clause than its strict construction requires."

The only representations made by Calkins concerning his occupation and the purpose for which his car was used were contained in his application for insurance. He there stated that his occupation was "Rancher" and that he used his car for "business and pleasure" not "for business and pleasure purposes *as such rancher*" as is alleged in the complaint and as is found by the trial court. The italicized words find no support in the record.

[5] The sole question necessary for our decision is this: Were the statements made by Calkins, that his occupation was that of rancher, and that his car was used for business and pleasure, untrue; and in making them did he conceal material facts that misled and tended to defraud plaintiff?

The answer to this question depends on the generally accepted definitions of the word "occupation".

"'Occupation,' * * * as understood commonly, will signify a vocation, calling, trade,—the business which one principally engages in to procure a living or to obtain wealth." State v. Austin Club, 89 Tex. 20, 33 S.W. 113, 115, 30 L.R.A. 500. It has been repeatedly held that a person's principal business and chief means of obtaining a livihood is his occupation; that the term as generally understood, does not include an isolated or semi-occasional and temporary adventure in another line of endeavor. See Union Mutual Acc. Assn. v. Frohard, 134 Ill. 228, 25 N.E. 642, 10 L.R.A. 383, 23 Am.St.Rep. 664; Love v. State, 31 Tex.Cr.R. 469, 20 S.W. 978; Kenny v. Bankers' Acc. Ins. Co., 136 Iowa 140, 113 N.W. 566; Village of Dodge v. Guidinger, 87 Neb. 349, 127 N.W. 122, 138 Am.St.Rep. 494; Everson v. Gen. Fire & Life Assur. Corp., 202 Mass. 169, 88 N.E. 658; Supreme Lodge v. Baker, 163 Ala. 518, 50 So. 958; Evans v. Woodman Acc. Assn., 102 Kan. 556, 171 P. 643, L.R.A. 1918D, 122; Industrial Commission of Ohio v. Roth, 98 Ohio St. 34, 120 N.E. 172, 6 A.L.R. 1463; People v. De Rose, 230 Mich. 180, 203 N.W. 95; Union Health & Acc. Co. v. Anderson, 66 Colo. 195, 180 P. 81; Central Business Men's Assn. v. Faith, 8 Cir., 8 F.2d 325; Benefit Assn. v. Secrest, 239 Ky. 400, 39 S.W.2d 682.

In Everett v. Standard Acc. Ins. Co., supra, the court said: "The word 'occupation' means the principal business in which a man engages." This case must be considered as controlling on the question before us. There the insured represented to the insurer that his occupation was "superintendent of the West Redlands Company, a mutual irrigation company", and also "an orange grower with supervising duties only". It was proved that occasionally he performed small tasks of repairs on the water distributing system and that "he did some manual labor in and about the groves and around his home place" consisting of light work. The insurance company was held liable on the policy because the occupation of the insured was correctly stated and the fact that he occasionally did small jobs involving manual labor did not change the nature of his occupation.

The uncontradicted evidence shows that Calkins received 14 calls consuming a total of 20 hours and 4 minutes in 1933, 12 calls consuming 12 hours and 36 minutes in 1934, and 17 calls consuming 14 hours and 34 minutes in 1935, or a total of 47 hours and 14 minutes used in duties as a fireman in three years. He received one dollar and twenty-five cents for the first hour, and one dollar for each additional hour or fraction thereof. It would seem that he received less than $100 for his services as fireman during the three-year period.

Calkins testified that his occupation during the years 1933, 1934 and 1935 was that of rancher. There was no evidence contradicting this testimony. It seems to us that it would have been a gross misrepresentation if, in his application for insurance, he had given his occupation as volunteer fireman.

It was incumbent on plaintiff to prove untrue the statement in the application that Calkins' occupation was that of rancher. This it failed to do for the evidence of Calkins on that subject stands uncontradicted. He answered the next question in the application by giving the information that he used his car for business and pleasure. This was not proven to be untrue. If he had the business of occasionally acting as volunteer fireman, and if he used his car in that business, his answer would still be true. He was not asked on what kind or kinds of business he used it.

Had plaintiff desired to know each particular business in which the automobile was used, such questions could have been included in the application. This was not done. The failure to inquire into that subject indicates an entire lack of interest in it. In fact certain rules of plaintiff introduced in evidence support this supposition because those rules do not specify the use of Calkins' car by a volunteer fireman among the uses which were not acceptable for insurance.

The only evidence in the record indicating that the use of the car as a vehicle for a volunteer fireman was not acceptable to the insurer is the evidence of one of its officers which was received over the strenuous objections of defendants. In Everett v. Standard Acc. Ins. Co., supra, it was held that such evidence was inadmissible.

We find nothing in the record to indicate that Calkins' statements that his *occupation* was that of *rancher* and that he used his automobile for *business and pleasure,* were false. In fact all the evidence shows them to be true. It follows that the findings are not supported by the evidence and that the judgment cannot be sustained.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

CARROLL v. CARROLL et al.*

Civ. 6345, 6346.

District Court of Appeal, Third District, California.

June 5, 1940.

Rehearing Denied July 5, 1940.

Hearing Granted Aug. 2, 1940.

1. Insane persons 🔑26

In action to cancel note and trust deed on ground that they were void because executed by plaintiff prior to entry of judgment restoring her to capacity after adjudication that she was a person of unsound mind, whether plaintiff was in fact competent as of date of execution of note and trust deed was immaterial, if she was at that date an incompetent within the meaning of the statute providing that after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, until his restoration to capacity. Civ.Code, § 40.

2. Insane persons 🔑26

One against whom an affidavit of insanity was made out and filed in superior court, and who was thereafter found to be incompetent, made a ward of the psychopathic department of the court, and placed in a sanitarium, was an "incompetent" within the statute providing that after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, until his restoration to capacity. Civ.Code, § 40; Pol.Code, § 2167b.

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* Subsequent opinion 108 P.2d 420.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompetent".

3. Insane persons ⚷26

The fact that proceedings to have a person declared an incompetent were carried on under the Psychopathic Parole Act, rather than under the statute dealing with apprehension of insane persons, was not a controlling factor in determining incapacity as coming within the statute providing that after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, until his restoration to capacity. Civ.Code, § 40; Pol.Code, §§ 2167b, 2168.

4. Insane persons ⚷72

Where one is adjudged an incompetent and comes within the statute providing that after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, until his restoration to capacity, such person is incapable of making a valid contract. Civ. Code, § 40.

5. Insane persons ⚷29

Under statute providing that a judgment is not effective for any purpose until entered, note and trust deed executed by one after hearing and judgment restoring her to capacity, but before entry of the judgment, were void, since the judgment became effective only upon entry. Civ.Code, § 40; Code Civ.Proc. § 664.

6. Judgment ⚷538

Ordinarily a judgment is not effective until entered. Code Civ.Proc. § 664.

7. Insane persons ⚷66, 79

Where note and trust deed were void because executed by one, previously determined to be of unsound mind, before entry of judgment restoring her to capacity, rescission was not necessary. Civ.Code, § 40.

8. Contracts ⚷136

The only defense available in case of a void transaction is one of estoppel.

9. Insane persons ⚷66, 79

One who executed note and trust deed without knowledge that she did so because of her husband's fraud and coercion, and who received no part of the consideration. and who repudiated the note and trust deed immediately on discovery of their existence, was not "estopped" to have them declared void on ground that at the time that she executed them, judgment had not been entered to restore her to capacity after it had been judicially determined that she was a person of unsound mind. Civ.Code, § 40; Pol.Code, § 2167b.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

10. Insane persons ⚷66, 79

Where wife, who executed note and trust deed without knowing that she was doing so because of the fraud and coercion of her husband, received no part of consideration secured by the note and trust deed, she was under no equitable duty to offer restoration as condition of having note and trust deed canceled and her title quieted because of the fact that they were void in that at time she executed them judgment restoring her to capacity after adjudication that she was a person of unsound mind had not yet been entered. Civ.Code, § 40; Pol.Code, § 2167b.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Catherine M. Carroll against Raymond A. Carroll, the Prudential Insurance Company of America, the Thomas Mortgage Company, the Title Insurance & Trust Company, H. B. Thomas, as substituted trustee, and H. B. Thomas, individually, to cancel a note and trust deed and to recover a money judgment against Raymond A. Carroll. From the judgment in so far as it held that the note and trust deed were valid, and from an order appointing a receiver, the plaintiff appeals.

Judgment, in so far as appealed from, reversed with directions, and order reversed.

Charles E. McGinnis and C. C. Caswell, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, John Q. Adams and Arch H. Vernon, all of Los Angeles, for respondents.

PER CURIAM.

This action was brought for the purpose of canceling a note and trust deed executed in favor of respondent. Appellant also sought a money judgment against her husband who was a party defendant in the same action. Judgment was rendered in favor of appellant and against her husband on the demand for a money judgment. There is no appeal from that part of the judgment. This appeal is taken from that part of the judgment rendered in favor of the respondents and which concluded that a valid note and trust deed was executed. During the pendency of this action, no restraining order or temporary injunction having been issued against the foreclosure and sale of the premises covered by said deed of trust, and default having taken place thereunder, the trustee, upon demand of the beneficiary, sold said premises, at which sale the respondent, beneficiary under said trust deed, became the purchaser thereof for $23,000. Upon acquiring title under this sale, the respondent gave notice and demanded rentals from the tenant occupying the premises. The tenant being in doubt as to the ultimate right to the rentals, refused to make payments. Approximately one year later respondents made a motion for appointment of a receiver. This motion was granted and a receiver was appointed for the purpose of collecting the rents. Appellant contends that there was an abuse of discretion and a lack of jurisdiction in the appointment of a receiver, and appeals from that order.

This appeal raises the question as to the validity of a note and trust deed executed subsequent to a judgment of restoration to competency but prior to the entry thereof by the clerk.

The evidence in this case discloses that the husband of appellant had, through fraud, coercion, and the exercise of undue influence, preyed upon the weakness of appellant, Mrs. Carroll, for a number of years prior to the execution of the note and trust deed in question. Mr. Carroll had induced his wife, by the procuring of the execution of various instruments and conveyances, to relinquish control to him of over one-half of a million dollars worth of property belonging to Mrs. Carroll. Of this amount, Mr. Carroll failed to account for $422,297.05, and appellant was granted a judgment against Mr. Carroll for this latter sum of money.

During the month of April, 1929, trouble arose between Mr. and Mrs. Carroll, culminating in the shooting of Mr. Carroll by the appellant. Mrs. Carroll contended that her husband was once again seeking her signature to the execution of an instrument. On April 17, 1929, an affidavit of insanity was made out and filed in the superior court of Los Angeles county against the appellant. Mrs. Carroll was found incompetent and made a ward of the psychopathic department of the court and was placed in a sanitarium near Los Angeles. Shortly thereafter, Mr. Carroll instituted guardianship proceedings, and on May 24, 1929, the court having found Mrs. Carroll incompetent and unable to handle her property, appointed the Security First National Bank of Los Angeles as her guardian. On August 8, 1929, Mrs. Carroll was paroled into the custody of her husband and confined in her home until the latter part of October. Mr. Carroll caused a petition which was signed by Mrs. Carroll to be presented to the court, asking that appellant be declared restored to competency. This petition was filed August 15, 1929. The court held a hearing on August 22, 1929, and on this same day made its judgment of restoration, adjudging the appellant restored to competency as of the date of filing the petition for restoration to competency. This judgment was not entered until September 5, 1929. The Security First National Bank, as guardian of appellant's property, received pay for performing its duties as guardian up to and including September 18, 1929, and was not discharged until February 23, 1930. Mrs. Carroll remained under parole of the psychopathic department of the court until her discharge October 24, 1929.

The evidence discloses that appellant's husband had attempted to procure a loan on the property in question some time in June of 1929. It appears that the petition to execute a deed of trust went off the calendar at that time and the property was not encumbered. Mr. Carroll continued to carry out his plan to encumber the property, however, and after the filing of the petition for restoration on August 15, 1929, he procured Mrs. Carroll's signature to a letter dated August 21, 1929, and addressed to the Thomas Mortgage Company. This letter referred to the loan that was to be given upon the property in question and directed that part of the $20,000, the amount of the loan, was to be delivered to the Security First National Bank of Los Angeles, upon completion of the transaction. The Thomas Mortgage Company was an agent of the

Prudential Insurance Company, respondent herein, and beneficiary under the deed of trust. The property in question was held in the names of Mr. and Mrs. Carroll as joint tenants, and may be referred to as the Los Palmas property.

On August 23, 1929, the day after the hearing and judgment of restoration the appellant was taken to the office of the Thomas Mortgage Company by Mr. Carroll. There the parties met with an officer of the mortgage company, and the note and deed of trust upon the Los Palmas property were executed. The promissory note in the sum of $20,000 was made to the order of the Prudential Insurance Company and was signed by Raymond H. Carroll and Catherine M. Carroll. A letter dated August 27, 1929, and signed by Mrs. Carroll authorized and instructed the Thomas Mortgage Company to pay the full proceeds due upon the loan to Mr. Carroll. The trial court found that the defendant below, Raymond Carroll, received all of the proceeds from this loan and that at no time did the appellant, Mrs. Carroll, receive any of the moneys from the loan. The court also found that respondents did not participate in or have any knowledge of any fraud or coercion practiced upon appellant by Mr. Carroll, and that the property in question was the separate property of appellant subject to the deed of trust thereon, securing the note for $20,000 in favor of respondent, the Prudential Insurance Company. The court found that appellant did not ascertain that she had signed a note and trust deed in favor or respondent until about the 29th day of January, 1931, at which time she received a notice in which demand for interest was made upon her. It was found that appellant did renounce, repudiate and rescind the note and trust deed upon that same day.

Appellant takes the position that the note and trust deed having been executed prior to the entry of judgment restoring her to capacity that such note and trust deed was void under section 40 of the Civil Code.

Section 40 provides as follows: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. * * *"

It is contended by appellant that the judgment of restoration to capacity, within the meaning of section 40, was not effectual until the entry thereof on September 5, 1929. In support of this contention the provisions of section 664 of the Code of Civil Procedure are relied upon. The provisions of section 664 in so far as bearing upon the question before us provide as follows: "If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. *In no case is a judgment effectual for any purpose until so entered.*" (Italics ours.)

[1] Respondents concede that one under guardianship for incompetency cannot make a valid contract providing that the incapacity has been judicially determined within the meaning of section 40 of the Civil Code. It is also conceded that the disability of the incompetent to contract within the meaning of that section remains until a restoration to capacity. Respondents take the position, however, that appellant was not an incompetent within the meaning of section 40 of the Civil Code, and that no evidence was introduced indicating she was under any disability to contract. It is also contended that even though it may be deemed that appellant was an incompetent within the meaning of such section that the judgment of restoration to competency signed August 22, 1929, removed appellant's disability to contract as of the date of the filing of her petition on August 15, 1929, and that the note and trust deed executed on August 23, 1929, were valid, even though the judgment of restoration to competency was not entered until September 5, 1929. If appellant was an incompetent within the meaning of section 40 of the Civil Code, it should be kept in mind that we are not concerned with competency as a question of fact as of the date of the execution of the note and trust deed. The disability arises out of the judicial determination of incapacity.

[2, 3] We are of the opinion that appellant was an incompetent within the meaning of section 40 of the Civil Code, and that the proceedings having been carried on under the Psychopathic Parole Act, section 2167b, rather than under section 2168 of the Political Code, are not a controlling factor in determining incapacity as coming within section 40 of the Civil Code. It must be remembered that the court appointed the Security First National Bank of Los Angeles as guardian of the property of appellant on the 21st day of May, 1929, shortly after she was made incompetent, made a ward of the psychopathic department of the court, and placed in a sani-

tarium. The cases cited by respondents for the proposition that commitment for insanity or incapacity does not judicially determine incapacity within the meaning of section 40, are not concerned with guardianship proceedings. An examination of those cases discloses the fact that a guardian had never been appointed or that guardianship proceedings had not been instituted prior to the execution of the contracts in question.

In Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794, the question as to the application of section 40 of the Civil Code was presented to the court. There, as in the present case, the individual was adjudged an incompetent and a guardian of his person and estate was appointed. There was no adjudication of insanity. It was contended that section 40 of the Civil Code applied only to insane persons, since the latter portion of that section permits the discharge and restoration to competency by means of a certificate from the medical superintendent of the asylum to which the patient has been committed. In answer to this contention the court stated in its opinion at page 604, of 206 Cal., at page 799 of 275 P., as follows: "But evidently this section of the code was not intended to be so restricted. Section 1764, Code of Civil Procedure, authorizes the appointment of a guardian of the person and estate of an insane person, and also of one who is merely incompetent. It seems evident that the term incompetent is intended to include not only the insane, but also those who are afflicted with less serious derangements of the mind. The adjudication of mental incapacity therefore applies to both the insane and the incompetent, regardless of the character or degree of the mental derangement. No further evidence of mental incapacity is required under our statute while such a decree remains in full force and effect."

The case of O'Brien v. United Bank & Trust Co., 100 Cal.App. 325, 279 P. 1048, decided a few months after the Supreme Court decision in the Hellman case, involved the same question as to the application of section 40 of the Civil Code to one who had been adjudged incompetent and over whom a guardian had been appointed.

The court held that an agreement between an incompetent person and another, to open a survivorship account with a bank, after a guardian was appointed, is void under section 40 of the Civil Code. It was determined the incapacity to contract continued until his restoration to competency. It was held that the application of section 40 to the incompetent was not affected by the fact that the judicial determination thereof was had pursuant to sections 1763–1767 of the Code of Civil Procedure, which deal with persons who are insane or from any cause are mentally incompetent. We conclude that under the authority of the last two mentioned cases, appellant herein was an incompetent within the meaning of section 40 of the Civil Code, and that the note and trust deed, if deemed to have been executed prior to restoration to capacity, were void.

[4] As stated in the Hellman case, supra, one adjudicated an incompetent, and coming within the application of section 40, thereby becomes incapable of making a valid contract, and it is deemed to be void. It is stated in that opinion that this conclusion follows not because the individual is unable, unassisted, to properly care for his property, but because the decree of incompetency is notice to the world of his incapacity to make a valid contract.

The appellant was not restored to capacity by any certificate of discharge as provided for by section 40, and consequently no presumption of legal capacity in appellant at the time of the execution of the note and trust deed was established unless the judgment of restoration became effective prior to the entry thereof on September 5, 1929. The validity of the note and trust deed is therefore dependent upon the force and effect of the provisions of section 664 of the Code of Civil Procedure. The fact that the judgment of restoration restored appellant to mental competency as of the date her petition was filed, August 15, 1929, is not a controlling factor unless the judgment rendered on August 22, 1929, is not effected by the specific provisions of section 664, which provides, "In no case is a judgment effectual for any purpose until so entered." Section 664 of the Code of Civil Procedure was amended in 1907, providing that "In no case is a judgment effectual for any purpose until so entered," and consequently cases decided prior to this amendment can have no bearing upon the effect to be given this provision.

[5, 6] The argument of respondents in support of the contention that the judgment of restoration became effective prior to the entry thereof is forceful, but an ex-

amination of the cases leads us to the conclusion that the law is otherwise in this jurisdiction. We agree with the proposition that under some circumstances an order or decree takes effect from the time it is pronounced, but conclude that ordinarily a judgment is not effective until entered. The case of Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 P. 1127, relied upon by respondents is cited in 14 California Jurisprudence at page 937, and does support the contention that an order or decree takes effect from the time it is pronounced. The statement at page 937, which is supported by the citation of the Fresno Estate case, supra, clearly indicates, however, that this last-mentioned rule of law is quite limited in application. The quotation from page 937, reads as follows: "However, under some circumstances an order or decree undoubtedly takes effect from the time it is pronounced and the failure of the clerk to file the papers or enter the judgment does not delay or defeat the operation of the court's pronouncement. Thus, decree of divorce in a default case, where findings are unnecessary, is rendered when it is pronounced and entered in the minutes, and it may be entered in the judgment book after the death of one of the parties."

The Fresno Estate case simply involved the validity of an order discharging a guardian, and the court held that the validity of such an order did not depend upon the day of its entry. No findings were necessary, nor were any made. This case certainly does not, as contended for by respondents, hold that section 664 of the Code of Civil Procedure is not applicable to a judgment of restoration to competency. The character of a judgment of restoration to competency is quite different from an order discharging a guardian. Moreover, it appears that the court in the Fresno Estate case intended a clear distinction to be made between orders made in open court and judgments or decrees. This distinction is disclosed by the language used at page 598 of 172 Cal., at page 1133 of 157 P., in the Fresno Estate case. Speaking for the court, it is stated by Justice Melvin as follows: "There is nothing in Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, in conflict with this conclusion. The court was there concerned with the question: 'When is an order of partial distribution "taken" within the meaning of section 473, Code of Civil Procedure'? It was held that it was only 'taken' when duly entered. This court carefully limited the effect of the decision in that case, for Mr. Justice Shaw, who delivered the opinion, said: 'Nor are we concerned with the effect of an announcement of a decision or order against one who was then present.'"

The case of Barbee v. Young, 79 Cal.App. 119, 249 P. 15, cited by respondents, does quote, with approval from Fresno Estate Co. v. Fiske, supra, but also definitely indicates the distinction intended in the decision of the Fresno Estate case. In Barbee v. Young, supra, it was held that an order granting a motion for new trial became effective at the time of its pronouncement. The court compares the order granting the motion for a new trial with the order made in the Fresno Estate case, discharging the guardian. At page 125 of 77 Cal.App., at page 17 of 249 P. of the Barbee case the necessity of the entry of judgments, as distinguished from orders of court,—is pointed out in the following language: "The case of Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, relied upon by petitioners, is commented upon in the opinion in the case of Fresno Estate v. Fiske, supra, and the distinction pointed out that the court in the Brownell Case was dealing with the entry of judgments. In the Brownell Case we find the following: 'The word "taken," as used in section 473, is, as we think, used in the same sense as the words "render" or "rendition," when used with reference to a judgment. The word "rendered" is appropriately used in reference to a judgment or decree, *but not to a proceeding or order*. The phrase in question embraced judgments, orders, and proceedings, and the word "taken" was adopted as a term alike applicable to either or all of them, and having relatively the same meaning as "rendition."' (Italics ours.) These words which we have quoted were used after the reference made by the court to the provisions of the Code relative to the making and filing of findings before a judgment could be entered. As stated in Fresno Estate Co. v. Fiske, supra, the applicability of what was decided in the Brownell Case is likewise apparent here. We are dealing with an order of court made in open court which required nothing further on the part of the trial judge."

In Consolidated Const. Co. v. Pacific Elec. Ry. Co., 184 Cal. 244, 193 P. 238, the question arose as to the effect to be granted an order of dismissal which had been signed by the judge but not entered until after application had been made asking that the order of dismissal be vacated. At page 250 of 184 Cal., at page 240 of 193 P. of the opinion, the following language indicating the necessity of entry of judgments in order to become effective, is as follows: "In fact, strong reasons may be urged why the effective character which an order of dismissal under section 581 assumes, upon its mere entry in the minutes, is an exception to the general rule that judgments must be entered in the judgment book before they become effective as judgments (sections 664 and 668, Code Civ.Proc.), and that the exception should not be extended beyond the particular case provided for by the statute."

The question of the validity of an order of dismissal was again presented to the court in Egan v. McCray, 220 Cal. 546, 31 P.2d 1041, and the language used by the court in the Consolidated Construction case, supra, referring to the entry of judgments, was quoted with approval at page 547 of 220 Cal., 31 P.2d 1041 of the Egan case, supra. Section 664 of the Code of Civil Procedure is commented upon in the case of Ross v. O'Brien, 1 Cal.App.2d 496, 498, 36 P.2d 1108. In declaring the force and effect to be granted that section of the code, the following language appears at page 499 of 1 Cal.App.2d, at page 1109 of 36 P.2d of the opinion: "The general rule applicable is expressed in section 664, Code of Civil Procedure, which provides that 'in no case is a judgment effectual for any purpose until * * * entered.'"

We conclude that under the general rule of law in this jurisdiction that the effect of judgments and decrees is controlled by the clear and specific provision of section 664, and that such judgments are not effectual for any purpose until entered. It is our opinion that the judgment restoring appellant to competency comes within the general rule of law and was not effective for any purpose until entered. The character of the judgment in question compels us to place such judgment within the provisions of section 664, and no sound reason appears calling for the application of the exception to the general rule. It follows that the note and trust deed having been executed prior to the entry of judgment of restoration to capacity, that such note and trust deed were void, having been executed by an individual within the meaning of section 40 of the Civil Code, whose incapacity had been judicially determined but who had not been at the time of the execution of the note and trust deed in question restored to capacity, nor discharged from guardianship. Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794; O'Brien v. United Bank & Trust Co., 100 Cal.App. 325, 279 P. 1048.

[7-10] The note and trust deed executed by appellant, as stated, were void, and consequently rescission was not necessary. This is not the case of a voidable contract but one which is entirely void, and it is no defense that the complaint fails to state a cause of action for rescission. The only defense available in the case of a void transaction is one of estoppel. That equitable defense is not made, nor does it appear that the actions of appellant gave rise to any estoppel. We further conclude that as appellant received no part of the consideration secured by said note and trust deed she was under no equitable duty to offer restoration. The court found that appellant had received no part of the consideration paid by respondent.

The action to cancel the note and trust deed and to quiet title to the property covered by the trust deed was proper.

That portion of the judgment from which this appeal was perfected is reversed, and the trial court is directed to ascertain the amount of rent which has been collected by the receiver and to render judgment in accordance with this opinion quieting title in appellant free from the encumbrance of the note and trust deed in question. It is further ordered that the order appointing receiver be, and the same is, hereby reversed.

39 Cal.App.2d 404

MARSHALL v. PHILLIPS.

Civ. 11906.

District Court of Appeal, Second District, Division 1, California.

June 5, 1940.

Rehearing Denied July 2, 1940.

Hearing Denied Aug. 1, 1940.

1. Action ⚷25(2)

A complaint seeking to recover property to which plaintiff was allegedly entitled under a property settlement agreement, and praying in the alternative for a money judgment, stated a cause of action in claim and delivery, and not an action for specific performance, enforceable in equity.

2. Courts ⚷23

A provision of a post-nuptial property settlement contract authorizing divorced wife to obtain an order of the court for the payment of counsel fees and court costs immediately upon the filing of an action to enforce the terms of the agreement was not sufficient to confer jurisdiction upon the court to enter such an order, since jurisdiction cannot be conferred by contract.

◆

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Kathleen E. Marshall against James Macaulay Phillips to recover certain property to which plaintiff was allegedly entitled under a property settlement agreement. From judgment for the plaintiff, defendant appeals.

Reversed, with direction.

W. Stuart Smith, of Santa Barbara, for appellant.

Schauer, Ryon & McMahon, of Santa Barbara, for respondent.

DORAN, Justice.

It appears from the complaint in the within action, filed in the superior court, that under date of February 20, 1936, plaintiff and the defendant executed an agreement by the terms of which the settlement of their rights in and to real and personal property therein described was attempted. Later, to-wit, on August 31, 1937, another agreement was executed by the parties, which provided in part as follows: "Whereas, the parties hereto have been divorced from one another and have each remarried; and, * * * Whereas, circumstances of the First Party have changed and Second Party is agreeable to modifying said agreement of the 20th day of February, 1936, in certain particulars to conform to First Party's present circumstances, Now Therefore, said agreement of the 20th day of February, 1936 is hereby superseded by the terms of this agreement * * *." By the terms of the latter agreement, "First Party", appellant herein, agreed among other things to forthwith deliver to "Second Party", respondent herein, certain property mentioned therein and described as items under the general heading of "Furniture: Living Room; Bed Room; Miscellaneous".

The above-mentioned agreement is set forth in full in plaintiff's complaint and is followed by the allegation that defendant (appellant herein) failed and refused to deliver certain of the articles referred to in said agreement, which articles are alleged to be of the total value of $166.80.

The dates of the interlocutory and final decrees of divorce do not appear anywhere in the record.

The complaint prays for a "return of said property" or "in lieu thereof" judgment for $166.80. The complaint also prays for an order to show cause why defendant should not pay plaintiff's counsel fees and costs, a remedy which the contract purports to create for plaintiff's benefit.

The trial court issued the order to show cause, and upon the hearing, ordered defendant to pay plaintiff $150 attorney's fees and $22 costs, from which order defendant appeals.

Appellant attacks the court's jurisdiction on the ground that plaintiff's complaint sets up merely a claim and delivery action. On the other hand, respondent's brief recites that "This is not an action for specific performance, nor an action for claim and delivery, but an action to enforce the terms of a post-nuptial property settlement agreement, which agreement is specifically enforceable in a court of equity."

[1] Respondent's contention cannot be sustained, for in no sense can the action be classified among those actions of which a court of equity will assume jurisdiction and specifically enforce. But whatever claims respondent may assert in that regard, the action, as appellant points out, clearly is an action in claim and delivery. In either case the court was without jurisdiction.

[2] The fact that by the terms of the contract in question the parties agreed that "* * * Second Party * * * at her option may, on proper notice to First Party, obtain an order of the court for the payment of counsel fees and court costs immediately upon the filing of said action or actions, as shall be necessary to enforce the terms of this agreement" is of no significance. Jurisdiction cannot be conferred by contract.

The order appealed from, therefore, is reversed, with direction to dismiss the action.

We concur: YORK, P. J.; WHITE, J.

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39 Cal.App.2d 355

PRUDENTIAL INS. CO. OF AMERICA v. BECK et al. (MARXEN, Intervener).

Civ. 11291.

District Court of Appeal, First District, Division 1, California.

May 31, 1940.

Hearing Denied July 30, 1940.

1. Fraudulent conveyances 🔑51(1)

A debtor's transfer of property made entirely exempt by statute cannot be held fraudulent as to creditors, and, in absence of express statutory restrictions, a debtor has absolute power over exempt property and may not only sell, exchange, or assign such property for consideration, but may give it away not only to his wife and children but to strangers.

2. Fraudulent conveyances 🔑51(1)

A creditor has no right or interest in his debtor's exempt property, and mere fact that a general fraudulent conveyance statute has been enacted does not change the rule, since, so far as exempt property is concerned, there are no creditors within meaning of such a statute, and the fact that a debtor who has assigned exempt property has died does not change the rule.

3. Fraudulent conveyances 🔑51(1)

Where exempt property is assigned or otherwise transferred, the transferee may retain it as against claim of transferor's creditors, notwithstanding that intent of transferor was to place it beyond reach of and to defraud his creditors.

4. Exemptions 🔑50(1)

The purpose of statute exempting from execution or attachment all money and benefits growing out of life insurance, if annual premiums paid do not exceed $500, is to protect beneficiary as well as insured, and the statute exempts proceeds of an insurance policy in hands of beneficiary from debts of insured. Code Civ.Proc. § 690.19.

5. Fraudulent conveyances 🔑51(4)

Where insured's creditors could not, at the time that insured assigned life policies or at any time during insured's life time, have reached insured's interest in policies because of statute exempting from execution or attachment money or benefits growing out of life insurance, if annual premiums paid do not exceed $500, the creditors could not, after insured's death, complain of the assignment, irrespective of whether assignment was made with or without consideration or while insured was solvent or insolvent. Code Civ.Proc. § 690.19.

6. Executors and administrators 🔑46
Exemptions 🔑50(1)

Where a life policy is payable to a named individual, its proceeds do not pass through insured's estate, and in such event provisions of statute exempting from execution or attachment all money or benefits growing out of life insurance, if annual premiums paid do not exceed $500, compel, without limitation, the exemption from liability for insured's debts, and those of the beneficiary, of insurance benefits to extent that annual premiums do not exceed $500. Code Civ.Proc. § 690.19.

7. Exemptions 🔑14

The benefits of statute exempting from execution or attachment all money and benefits growing out of life insurance, if annual premiums paid do not exceed $500, are not limited to insured's widow and children. Code Civ.Proc. § 690.19.

8. Exemptions 🔑148

In proceeding between insured's administrator and assignees of life policies which were assigned by insured after insured had substituted his executors, administrators, or assigns as beneficiaries, where administrator claimed that assignments were fraudulent as to insured's creditors, and assignees claimed that proceeds of policies were exempt from attachment or execution and that insured could not be guilty of making a fraudulent conveyance thereof, assignees established a prima facie case by proving that premiums on policies totaled less than $500 annually and were not required to prove that insured did not have other insurance. Code Civ. Proc. § 690.19.

9. Fraudulent conveyances ⚷51(4)

Where insured under life policies, in exercise of a right reserved under policies, substituted his executors, administrators, or assigns as beneficiaries and thereafter assigned the policies to assignees, and premiums on policies totaled less than $500 yearly, assignees were entitled to proceeds of policies as against insured's administrator, who claimed that assignments were fraudulent as to insured's creditors, since proceeds of policies were exempt from attachment or execution and insured could not be guilty of making a fraudulent conveyance or transfer of such property. Code Civ.Proc. §§ 690 et seq., 690.19.

WARD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Interpleader suit by the Prudential Insurance Company of America against Louis Beck and others, to determine who was entitled to the proceeds of certain insurance policies issued on the life of Samuel Beck, deceased, wherein Edward H. Marxen administrator c. t. a. of the estate of Samuel Beck, deceased, intervened. From a judgment for intervener, defendants Evelyn Corbett and Albert A. Albeck appeal on the judgment roll.

Reversed.

Benjamin P. Riskin, of Hollywood, and Al Mason, of Los Angeles, for appellants.

Stoner & Gardner, of Los Angeles, for respondent.

PETERS, Presiding Justice.

Evelyn Corbett and Albert A. Albeck appeal on the judgment roll from a judgment in favor of intervener, Edward H. Marxen, administrator with the will annexed of the estate of Samuel Beck, deceased, determining that the proceeds of certain insurance policies on the life of Samuel Beck should be used to pay the debts and costs of administration of the Beck estate. It is appellants' contention that it should have been adjudged that the proceeds of such policies belonged to them.

The facts giving rise to this controversy are as follows: Two policies of life insurance were issued by The Prudential Insurance Company of America on the life of Samuel Beck, one on November 20, 1933, and the other on December 4, 1933, each in the sum of $1,000. Both policies named Louis Beck, the brother of the assured, as beneficiary. Approximately two years later, in the exercise of a right reserved to the insured under the terms of the policies, the insured changed the beneficiary, substituting for his brother, his executors, administrators or assigns. About two months thereafter, he assigned the policies, one to Evelyn Corbett and the other to Evelyn Corbett and Albert A. Albeck, these two to share equally in the proceeds of the latter policy. Six and a half months later Samuel Beck died.

Louis Beck, the beneficiary first named in the policies, and Evelyn Corbett and Albert A. Albeck, as subsequent assignees, made claim to the proceeds of the policies. The insurance company filed an action in interpleader naming Louis Beck, Evelyn Corbett and Albert A. Albeck as defendants, and, upon deposit of the proceeds of the policies with the court, was discharged from liability. Just prior to the trial, the administrator of the estate of Samuel Beck, deceased, who theretofore had filed an answer, filed a complaint in intervention, alleging that certain enumerated assets of the estate were of "practically no value except what may be recovered by the intervenor for said estate in this action"; that the time for filing claims against the estate had not elapsed; that specified claims in excess of the amount deposited with the clerk by the interpleader had been filed; that the change of beneficiary, designating the executors, administrators or assigns, made the policies payable to the estate and not to the brother, Louis Beck; that the assignments to appellants were brought about by undue influence and deceit practiced upon decedent by the appellants at a time when he was mentally incompetent, representations having been made to him that Evelyn Corbett had advanced moneys for his use and benefit and that Albert A. Albeck had performed certain legal services for which he was entitled to compensation, to secure which compensation and repayment of advances, it was necessary that decedent make the aforesaid assignments; that such representations were untrue. The intervener further alleged that the assignments were made without consideration and at a time when Samuel Beck was indebted to various parties, and that they were made with intent to hinder, delay and defraud these creditors by preventing the proceeds of the policies of insurance from being applied toward payment of legitimate claims against him; that appellants received the assignments with knowledge of Samuel Beck's insolvency and that their purpose was to assist him in defrauding his creditors.

By these pleadings two issues were presented to the trial court: first, whether Evelyn Corbett and Albert A. Albeck were guilty of fraud in the securing of the assignments. The trial court made no direct finding on this issue. Secondly, the trial court was called upon to decide whether Samuel Beck, the owner of the two policies, was guilty of making a fraudulent transfer in assigning the policies. The trial court found that because Beck was insolvent at the time of the assignments, and because the assignments were gratuitously made when he knew he was about to die, they were in fraud of creditors, and, therefore, void. It is from a judgment based on these findings and conclusions that this appeal is taken.

Appellants' first contention is that under section 690.19 of the Code of Civil Procedure the proceeds of the two policies were exempt from attachment or execution, and that as to such exempt property the owner thereof cannot be guilty of making a fraudulent conveyance. With this contention we agree.

Section 690.19 of the Code of Civil Procedure provides: "All moneys, benefits, privileges, or immunities, accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, or if they exceed that sum a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole annual premiums paid."

[1] The legal issue can be simply stated: Can a debtor, in possession of exempt property, ever be guilty of making a fraudulent conveyance or transfer of property made exempt by statute? Respondent in support of the judgment cites several cases which hold that an assignment of an insurance policy, being property, may be set aside if made in fraud of creditors. Most of the cases cited, however, did not involve insurance policies made exempt from attachment or execution by statute. See notes 6 A.L.R. 1173, and 106 A.L.R. 596, validity and effect as against creditors of change of beneficiary or assignment of insurance policy from estate to individual. It seems quite clear to us that, under basic and well settled principles, no transfer of property made entirely exempt by statute, can be held to be fraudulent as to creditors. In the absence of express statutory restrictions a debtor has absolute power over exempt property—he may not only sell, exchange or assign his exempt property for a consideration, but he may give it away, if he sees fit, not only to his wife and children, but to strangers. To hold otherwise would make the exemption laws operate to the detriment rather than to the benefit of the debtor. These principles, supported by authorities from many states, are set forth in 25 Corpus Juris, pages 106, and 107, §§ 182 and 184.

[2, 3] It is urged by respondent, however, that these basic concepts have no application where the gift of the exempt property is made by the debtor while insolvent. The complete answer to this argument is that creditors have no rights and no interest of any kind in the exempt property of their debtors. The mere fact that a general fraudulent conveyance statute has been enacted does not change the rule. So far as exempt property is concerned there are no creditors within the meaning of such a statute. These principles are so well settled that citation of the many cases establishing them would unduly lengthen this opinion. The cases are collected in 24 Am.Jur. 259, § 109; 27 Cor.Jur. 438, 439, §§ 62 and 63. The mere fact that the assigning debtor had died in no way changes the rule. According to the weight of authority, where exempt property is assigned or otherwise transferred "the transferee may retain it as against the claim of the transferor's creditors, notwithstanding the intent of the debtor was to place it beyond the reach of and to defraud his creditors". 25 Cor.Jur. p. 125, § 218, where many cases are cited to support the text.

[4] Section 690.19 of the Code of Civil Procedure exempts from execution or attachment *all* moneys, benefits, privileges or immunities, accruing or in any manner

growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars. That the purpose of the section is to protect the beneficiary as well as the insured is indicated by decisions that the insurance proceeds in the hands of the beneficiary, to the extent that the annual premiums have not exceeded $500, are exempt from execution for debts of the beneficiary. Holmes v. Marshall, 145 Cal. 777, 79 P. 534, 69 L.R.A. 67, 104 Am.St.Rep. 86, 2 Ann.Cas. 88; 12 Cal.Jur. p. 340. The plain meaning of the unqualified language of section 690.19 is also to exempt such proceeds in the hands of the beneficiary from the debts of the *insured*.

[5] If a conveyance or transfer is fraudulent it must be fraudulent when it is made. It can hardly be contended that at the time the assignments were made, or at any time during Samuel Beck's lifetime, the creditors could reach the interest of Beck in the policies. To so hold would be to completely abolish the exemption. His subsequent death could not create a cause of action that did not exist prior to his death.

There are apparently no cases directly in point in California dealing with property made exempt by the various subdivisions of section 690 of the Code of Civil Procedure. There are many cases, however, holding that "the doctrine bearing upon conveyances made to hinder, delay, and defraud creditors has no application to the creation of a homestead" and that "it has long been the rule that a gift, sale, or pledge of any part of a homestead cannot, under any circumstances, be with intent to defraud a creditor not having a lien upon the premises, *for a creditor is not entitled to complain of the transfer by the debtor of an asset which he could not have reached, had the debtor retained it*". (Italics ours.) Montgomery v. Bullock, 11 Cal.2d 58, at page 62, 77 P.2d 846, at pages 848, 849, where many cases are cited. These principles are decisive of the present appeal. Had the debtor retained the policies the creditors could not have reached them prior to his death. They cannot complain, therefore, of a transfer made prior to death, whether such transfer was made with or without consideration, or while solvent or insolvent.

[6, 7] There is nothing in section 660 of the Probate Code, cited by respondent, that in any way affects this case. That section provides that in probate, exempt property, in the discretion of the court, may be set aside to the widow and minor children. Section 690.19 of the Code of Civil Procedure contains no such limitations. Where a policy is payable to a named individual, its proceeds do not pass through the estate of the insured. In such event the provisions of section 690.19 compel, without limitation, the exemption from liability for the insured's debts and those of the beneficiary, of insurance benefits to the extent that the annual premiums do not exceed $500. The benefits of this section are not limited to the widow and children.

[8, 9] Respondent contends that it was not shown or found that the premiums on all policies on the life of Samuel Beck did not exceed $500 annually. The court did find, however, that the premiums on each of the policies herein were $4.32 a month. The appellants were not required to prove the absence of other insurance. Having proved that the premiums on their policies totaled less than $500 annually, they established a prima facie case.

There is nothing in the case of Bryson v. Manhart, 11 Cal.App.2d 691, 54 P.2d 778, so heavily relied upon by respondent, contrary to the views herein expressed. In that case $200,000 of insurance purchased by the insured with embezzled funds was payable to his estate. Thereafter, while insolvent, the insured named his sister as beneficiary. After his death it was held that the administrator of the insured's estate could reach the proceeds for the benefit of the person from whom the moneys had been embezzled, and that the naming of the sister was, in effect, a fraudulent conveyance or transfer of assets. The court referred to a number of decisions in support of its conclusion that where insurance is payable to the estate of the debtor and he changes the beneficiary while insolvent, his creditors in the event of his death insolvent may reach the proceeds of the policies. The only unpaid creditor was the aunt of the decedent from whom the money had been embezzled. The case is not in point for two reasons. In the first place, there is no reference at all in the opinion to section 690.19 of the Code of Civil Procedure. The question of whether any portion of the proceeds of the policies was exempt was not mentioned or discussed. In the second place, the court emphasized that the defrauded person could trace the embezzled funds into the insurance policies. At page 696 of 11

Cal.App.2d, 54 P.2d at page 781, the court stated: "Plaintiff is entitled to pursue the property fraudulently transferred and to force an accounting thereof from defendants."

For the foregoing reasons the judgment appealed from is reversed.

I concur: KNIGHT, J.

WARD, Justice (dissenting).

I dissent.

The facts are briefly but fairly stated in the majority opinion. Any additional facts will be hereinafter set forth. On the trial of the case two issues were presented, namely, did the assured make an assignment of his life insurance policies with the intention of defrauding his creditors, and assuming proof of such purpose, may an exemption (Code Civ.Proc., sec. 690.-19), arising from such fraud, be claimed? The court found that the assignments were made when the assignor was insolvent and were "made with the intention to hinder, delay and defraud his creditors". No question of the sufficiency of the evidence to support such findings of fact is raised.

Appellants, relying entirely upon the exemption statute (Code Civ.Proc., sec. 690.19, supra), say in their opening brief: "Unless it can be said that the proceeds from life insurance with annual premiums of less than Five Hundred Dollars ($500.00) are not exempt from execution, the judgment of the trial court should be sustained, but if the contrary is true then the judgment cannot be sustained." However, in order to show that they should not reap the benefit of this exemption based upon fraud, it will be necessary from time to time to refer to the fraudulent assignments to them.

Appellants contend that "the benefit of the exemption statute is not confined to honest debtors and is not lost by dishonest conduct of the debtor in attempting to defeat his creditors".

It is held in the majority opinion that: "According to the weight of authority, where exempt property is assigned or otherwise transferred 'the transferee may retain it as against the claim of the transferor's creditors, notwithstanding the intent of the debtor was to place it beyond the reach of and to defraud his creditors'. 25 Cor.Jur. p. 125, § 218, where many cases are cited to support the text." An examination of these citations indicates that the decisions generally refer to homestead matters, and that when a debtor is permitted to defraud creditors, it is countenanced upon the broad theory that first consideration should be given the debtor's dependents so that they will not be thrown upon the government for support. Many of the cases enlarge this doctrine to include the debtor.

The underlying benevolent purpose of the provisions of Code of Civil Procedure section 690.19, supra, is found in Probate Code, section 660, wherein it is provided that the decedent's surviving spouse and minor children may, in the discretion of the court, have set apart to them all or any part of the property exempt from execution. In other exemption statutes, we find restrictive provisions as to the amounts exempt, with reference to wages, certain designated property, and in some instances for a specified period of time the use of livestock and mechanical materials, shares in homestead associations, stock in building and loan associations, money received as a pension, also life and health insurance benefits. Code Civ.Proc., secs. 690–690.25. These exemptions and the restrictions thereon are primarily for the benefit of debtors and their dependents, such as a wife or child, but not for strangers, and advantage thereof may not be taken by those who through fraud assist, even innocently, in hindering and delaying the rights of creditors.

The manifest purpose of the legislature in enacting exemption clauses respecting property ordinarily subject to execution would not be served if the benevolent design could be defeated through the perpetration of a fraud. Estate of Crosby, 2 Cal.2d 470, 41 P.2d 928. The exemption from the claims of creditors of the proceeds of a policy of life insurance is for the purpose of securing to the dependents of the assured upon the maturity of the policy some degree of maintenance and this to fulfil to that extent the moral duty of protection and support which he owes to his family. "All the statutes bearing on the exemption of life policies or their proceeds seem based on the theory that, in the absence of an expressed contrary intent, the object of an ordinary life insurance policy should be considered as the protection of insured's family after his death, and that this object and desire is laudable and in accordance with public policy. They provide, in substance, that the proceeds of life insurance policies taken out for the benefit of certain classes of beneficiaries shall be free from the claims of creditors; but in some states insurance in excess of certain specified amounts, or procured while the insured was insolvent, is declared not exempt." 7 Cooley's Briefs on Insurance, 2d Ed., 6508.

The courts, in an endeavor to protect the debtor and his dependents, have sought to sustain the rule as above set forth, and at times may have extended the construction to be given the provisions of exemption statutes. The widening of the scope of such statutes to permit a debtor to defraud, may find support in the "weight of authority", but I believe such weight to be contrary to sound legal reason and the true spirit of the law as evidenced by cases cited hereafter.

A debtor may assign or transfer exempt property for a valuable consideration, or he may in good faith give it away, even to strangers, *unless specifically restricted by statute.* 25 Cor.Jur., pp. 106, 107, §§ 182, 184. At the time of the assignment of the insurance policies herein, the specific restriction is found in Civil Code, section 3439: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." This provision does not apply when the transfer or assignment is made for the benefit of creditors (Brainard v. Fitzgerald, 3 Cal.2d 157, 44 P.2d 336), which is not the fact in this case. Civil Code, section 3442 provided "that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors". Shiels v. Nathan, 12 Cal.App. 604, 108 P. 34. The fraudulent intent of the transferee is immaterial (Tobias v. Adams, 201 Cal. 689, 258 P. 588; Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947), likewise the intent of the transferor is of no substantial consequence (Wright v. Salzberger, 121 Cal.App. 639, 9 P.2d 860; Atkinson v. Western D. Syndicate, 170 Cal. 503, 150 P. 360), although in the present case the court found that Samuel Beck *was insolvent, without sufficient assets to meet his obligations; that he knew that he had but a short time to live and that the assignment was made to defraud his creditors.* A person is presumed to intend the natural consequence of his voluntary acts. Code Civ.Proc., sec. 1963, subd. 3.

In Navassa Guano Co. v. Cockfield, 4 Cir., 253 F. 883, 886, 6 A.L.R. 1168, the court said: "When he sought to change the beneficiary, he knew that death was near, and that the proceeds of the policy, if not transferred, would soon be paid to his executors; and he was therefore chargeable with the results of his action, even if he lacked the intention of defrauding his creditors. In short, we are convinced that the transaction under review was fraudulent as to creditors and must be so adjudged."

In Walter v. Hartman, Tenn.Sup., 67 S.W. 476, 479, the court said: "Up to the time of the assignment the assured had a valuable property right in the policy, which he could transfer in a legitimate manner, and of which fraud could be predicated if the transfer were fraudulent in fact or in law. In other words, the insured had a valuable property right in this chose in action while he lived, and which would have passed to his personal representatives upon his death, for the benefit of his creditors, unless it had been disposed of in some lawful manner by the assured while living." See Gould v. Fleitmann, 188 App.Div. 759, 176 N.Y.S. 631.

In McKown's Estate, 198 Pa. 96, 47 A. 1111, a husband made a life insurance policy payable to his administrators, executors or assigns. During insolvency he assigned the policy to his wife. The claim of the wife was rejected as in fraud of his creditors.

In Pope v. Carter, 210 Ala. 533, 98 So. 726, 727, the court said "Proceeds of policies so carried by the husband, payable to his estate, and transferred to his wife by a change of the beneficiary named in the policies made after the husband has become insolvent, without valuable consideration, are subject to the claims of the husband's creditors existing at the time of such transfer. Such transaction is subject to all the rules governing fraudulent conveyances."

Holden v. Stratton, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018, cited by appellants, is not in point. In that case the assured was alive and claimed the proceeds of a life insurance policy exempt from liability for his debt. In the instant case the assured is dead, and cannot claim an exemption if any existed; the claim here is by two strangers.

The majority opinion holds that "no transfer of property made entirely exempt by statute, can be held to be fraudulent as to creditors". This assignment was not entirely exempt. Exemption statutes have been enacted as protective measures, for the debtor alone, as in the case of those dealing with tools and implements of a mechanic necessary to carry on a trade. When the necessity to carry on the trade ceases, as for instance by the death of the mechanic, the purpose of the protective exemption no longer exists. During the life of a mechanic, if solvent, his tools or implements may be disposed of in any manner that he may designate, but if insolvent, and the disposition thereof be made with intent to defraud creditors, then the benevolent protective provision of exemption no longer has application, and the property is subject to execution by the creditors. Ionia County Savings Bank v. McLean, 84 Mich. 625, 48 N.W. 159. A second classification pertains to the benevolent guarding or shielding of the interests of dependents. In other words, certain exemptions are operative during the life of the debtor, and other exemptions apply only after the debtor's death, at which time the benefit of the exemption, as outlined in section 690.19, may be claimed by and is available only to the "surviving spouse and minor children". Probate Code, sec. 660, supra. These appellants do not come within such classification. In other words, two possible exemptions might arise under the law and the facts in this case, namely, the exemption after death, which could be claimed only by the widow or minor children, and the exemption before death, which might be waived by the debtor or by the failure of the creditor during the life of the debtor to take advantage of the assignment.

A conveyance of personal property, otherwise exempt, may under certain circumstances be construed as a waiver. In Kay v. Furlow, 178 La. 637, 152 So. 315, a practicing attorney, after giving a chattel mortgage on his law library and office furniture, defaulted in the payments. On a hearing for injunction, the attorney claimed exemption upon the theory that the library was necessary to his livelihood. At page 317, the court said: "Defendant, in consenting to the mortgage, by necessary implication, waived his exemption, otherwise he would not have been granting a mortgage at all, but only a mere sham. The implied waiver, as appears from the authorities cited, is a valid waiver. The waiver, as we have seen, does not violate public policy." 25 Cor.Jur., p. 107, § 185; p. 114, § 196; 11 Ruling Case Law, p. 544, § 61. The general rule that a debtor's waiver of exemption is against public policy grows out of the principle of protection for the family. However, when the family is not involved, the waiver may exist either expressly or impliedly. Particularly is this true if the transfer is made, not in good faith, but with fraudulent intent. 22 Am.Jur., pp. 100, 101, §§ 131, 132.

It should be noted that while it is proper, legal and effective in good faith to assign a life insurance policy, any right of exemption in connection therewith is a statutory right to be enjoyed by the person directly affected and benefited. The privilege of exemption is personal and the rights thereto rest primarily in the debtor. The right of exemption is not vendible or assignable. 22 Am.Jur., p. 90, § 119. Considering the purported purchase of the right of exemption, the court in Eberhart's Appeal, 39 Pa. 509, 80 Am.Dec. 536, 539, said: "It comes into existence only by the act of the debtor, and the time and form of his act necessary to give it vitality are regulated by legal rules: Bowman v. Smiley, 7 Casey 225 [31 Pa. 225, 72 Am. Dec. 738]; McAfoose's Appeal, 8 Casey 277 [32 Pa. 276, 277]. If he do not claim the exemption he waives it. That is, the right of exemption, a merely abstract right as it exists in the statute, becomes a vital, personal, effectual privilege, when the debtor asserts it timely. But waived by him, no one else, however he may claim under the debtor, can set it up to hinder the creditor." See Murdy v. Skyles, 101 Iowa 549, 70 N.W. 714, 63 Am.St.Rep. 411.

Before death, the exemption applies only to the surrender value of the policy. The policies herein were never surrendered; hence the debtor did not claim the exemption. There is a proper time to claim an exemption and a proper mode to follow. A debtor, not having claimed the exemption during his lifetime, waived the right as to that period. 22 Am.Jur., p. 103, § 135. If there was no waiver by reason of failure to claim the exemption, then the debtor waived by assignment. In Wyman v. Gay, 90 Me. 36, 38-39, 37 A. 325, 326, 60 Am.St.Rep. 238, the court said: "Exempted property is a personal privilege of the debtor. He may waive it, and certainly does waive it when he conveys it to another. His interest in the property is then gone. * * * The plaintiff also sues to recover $345.52, the agreed value of two policies of insurance on the insolvent's life, conveyed by him to the defendant in fraud of the insolvent law, and thereby converted to his own use. The same defense as to the chattels is interposed. Rev. St. c. 49, § 94, is invoked. That section exempts all such policies where the annual premium is less than $150, meaning on each one, from 'attachment and from all claims of creditors, during the life of the assured.' This statute means to allow the assured such property, while he holds it, free from the claims of creditors; but when he sells it for cash, he will have received its equivalent, and the purchaser will hold an investment—a security—that is just as much a part of his estate as a bond or promissory note would be. So, when the insured assigns his policy in payment of a debt, the policy becomes assets in the hands of a creditor, and he should not thereby be permitted to gain a fraudulent preference in his own favor over other creditors of the same debtor. When the assured parts with his policy, he places it without the protection of the statute. It then becomes the same as any chattel, and the title goes to the assignee in insolvency, rather than to work a fraud. Any other doctrine might be made to thwart the equality of creditors, and make it possible for a dishonest debtor to give his property to a single creditor. He might take his entire assets, and procure numerous policies of insurance, with annual premiums of not over $150 on each as in this case, and appropriate the whole of them to a favored creditor."

"A reasonable construction should be given to the statute, and not one which would pervert its benevolent design, and enable gross frauds to be perpetrated under color of law." In re Baldwin, 71 Cal. 74, 78, 12 P. 44, 46. "But exemption laws are not intended to aid individuals to avoid payment of their honest debts and should not become a means of enabling them to escape their obligations arising after they have ceased to come properly within the purview of the exemption statute." 22 Am.Jur., pp. 4-5, sec. 4.

The majority opinion relies in part upon homestead exemptions, citing Montgomery v. Bullock, 11 Cal.2d 58, 77 P.2d 846. Though somewhat analogous, homestead exemptions and insurance exemptions are not identical. The homestead exemption feature refers to real property and is controlled by division 2, part 4, title 5, chapter 1 of the Civil Code; the personal property exemptions are covered by part 2, title 9, chapter 1 of the Code of Civil Procedure. See Civ. Code sec. 1240, Code Civ.Proc. 690 et seq.

Appellants also call attention to Montgomery v. Bullock, supra, and contend that as regards exemption provisions there is no distinction between homesteads and insurance policies. The distinction appears in the decision at page 62 of 11 Cal.2d, 77 P.2d at page 848: "As the doctrine bearing upon conveyances made to hinder, delay, and defraud creditors has no application to the creation of a homestead, the homestead here was not invalidated by reason of the pendency of plaintiff's tort action, and it was exempt from execution or forced sale in satisfaction of the judgment for damages later obtained by plaintiff in said action." Unless a judgment is obtained before the declaration, a homestead is exempt from execution. Civ. Code, secs. 1240, 1241. It seems reasonable to conclude that more strict rules should prevail to protect the home of a debtor and his dependents, than to protect a debtor who, having no dependents, parts with his property with the dishonest intention of benefiting one creditor to the disadvantage of others.

Under section 690.19, supra, the claim of exemption must be made upon execution. Exemption privileges, somewhat like mechanics' liens, are personal rights granted by the legislature. Mills v. LaVerne Land Co., 97 Cal. 254, 32 P. 169, 33 Am. St.Rep. 168; Burr v. Peppers Cotton Lumber Co., 91 Cal.App. 268, 266 P. 1025. It was never intended that a debtor with intent to defraud, should be permitted to barter, sell or assign the exemption personal to himself or his dependents.

Appellants, seeking to secure to themselves the benefit of this exemption, contend that the assignments having been made of the policies, the assignees stood in the assignor's shoes and were entitled to all the benefits, privileges and immunities accruing to the insured. Beaumond v. Prudential Insurance Co., 5 Cal.App.2d 632, 43 P.2d

820. As stated before, there is no doubt that an assignment of an insurance policy may be made, but, if made to defraud, may not prevail against those related to the assured through affinity or consanguinity, or against bona fide creditors.

An exemption is not a vested right (Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396), but rather a favor granted through humanitarian motives to the dependents of a debtor. It is dependent upon the will and reasonable discretion of the legislature. Exemption laws are based upon a public policy of the state, which seeks not only to protect the debtor and his family, but the welfare of its citizens against the debtor or his family becoming a burden upon the public. Such statutes are to be liberally construed so as to effectuate the benevolent purpose intended. Estate of McManus, 87 Cal. 292, 25 P. 413, 10 L.R.A. 567, 22 Am.St.Rep. 250; Holmes v. Marshall, 145 Cal. 777, 79 P. 534, 69 L.R.A. 67, 104 Am.St.Rep. 86, 2 Ann.Cas. 88; Estate of Crosby, supra.

It is necessary to plead an exemption. In the present case, appellants, in the answer to the pleading in intervention, alleged that "the proceeds of said policies are not subject to execution or the claims of any creditors of said deceased". "The established rules as to pleadings in general are applicable to actions involving claims to exemptions or to actions for interference with exemptions. While a debtor should not be deprived of his right of exemption through a technical following of statutes pertaining to pleading, in pleading the exemption it is generally insufficient merely to state that the property is exempt, since such statement is but a conclusion of law. The debtor should set forth specifically the facts essential to his claim." 22 Am.Jur., p. 118, § 156. Assuming that, in the absence of a special demurrer, the pleading may have been good, nevertheless it is not clear from the pleadings or the findings whether appellants claim upon the theory that, prior to his death, they stood in the assignor's shoes, or whether they claim as the representatives of a widow or children. When considered in determining what interest, if any, appellants obtained through the assignment prior to the death of Samuel Beck, and in connection with the findings pertaining thereto, the question is worthy of consideration. The findings show that the policies were issued on November 30, 1933, and December 4, 1933; that they were assigned to appellants on October 29, 1935, and October 30, 1935. Samuel Beck died on April 13, 1936, less than three years after the issuance of the policies. Insurance Code sections 10151 and 10152, St. 1935, pp. 638, 639, relate to the value of life insurance policies on default of premium payments after three years. At the time of the assignments, the surrender or intrinsic value would have been practically nil. The finding of the court "that it is true that prior to the death of the said Samuel Beck, the said Evelyn Corbett represented to Samuel Beck that Albert A. Albeck would accept the sum of Fifty ($50.00) Dollars and that said Albert A. Albeck did represent to said Samuel Beck that he would accept the sum of One Hundred Twenty-five ($125.00) Dollars in full and complete payment of all sums alleged to be owing to him by the said Samuel Beck and that Albert A. Albeck did offer to re-sign said policies of insurance to the said Samuel Beck upon the payment of said sum. That before said sum could be paid and the policies re-assigned to said Samuel Beck, he died", is indicative of appellants' valuation of the policies prior to the death of Samuel Beck as compared with the amount deposited in court by the Prudential Insurance Company of America, a corporation, interpleader herein namely, $2,064.32. In other words, it may be assumed that appellants' interest in the assignments made in contemplation of impending death was not based upon the then valuation, but upon the valuation after death.

The findings do not negative possession of other insurance. If appellants' rights depend upon an exemption statute, they should have proven all matters required to bring them within such statute, including the fact that premiums on all insurance did not exceed $500. If the premiums did exceed that sum, appellants, if entitled to anything would be entitled only to a pro tanto exemption. Code Civ.Proc., sec. 690.19, supra. The majority opinion holds that appellants established a prima facie case. Though prima facie evidence is presumptive in character, I am unable to agree with the finding that "each of said policies required the payment of premiums in the sum of * * * $4.32 a month" is presumptive evidence that the premiums of *"any* life insurance" policy (section 690.10, supra), that might have been theretofore or thereafter taken out on the life of Samuel Beck did not exceed five hundred dollars. (Italics added.) It was incumbent upon appellants to prove that each of them belonged to the class entitled to the exemption, and that the property was in fact exempt. Briggs v. McCullough, 36 Cal. 542. The court did not find on this question specifically, and it does not appear that the question was presented as an issue in the pleadings, except that, in the answer of appellants "to pleading in intervention designated as answer" by the administrator, it is alleged "That the total amount of annual premiums paid under said policy of insurance was a sum greatly less than Five Hundred ($500) Dollars per year and the proceeds of said policies are not subject to execution or the claims of any creditors of said Deceased", but this allegation is simply to the effect that the policies are not subject to execution or the claims of creditors and does not directly raise the issue that appellants may claim the benefit of this particular exemption clause.

In Delanoy v. Delanoy, 216 Cal. 23, 27, 13 P.2d 513, 514, the court said: "In order to warrant the reversal of a judgment for failure to find on an issue, it must be shown by the record on appeal that evidence sufficient to sustain a finding for the complaining party was introduced. 24 Cal.Jur., 947, § 189. No such record has been presented. We must assume, therefore, that, had a finding been made on the issue, it would have been adverse to appellant." 5 Corpus Juris Secundum, Appeal and Error, § 1790, p. 1200.

An insurance policy is property. Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431; Dixon Lumber Co. v. Peacock, 217 Cal. 415, 19 P.2d 233; Pope v. Carter, supra. The pecuniary value thereof may be assigned upon the theory that the insurer has promised to pay an amount upon compliance with the terms of the policy. Certain interests may vest immediately, but the ultimate interests of the payee, beneficiary or assignee do not vest until the termination of the period of the policy.

A life insurance policy is exempt only when the facts are within the terms of section 690.19. In the instant case Beck was an insolvent and the rights of his creditors could be ascertained, and to that extent had become established before the insurance policy as property was transferred. A claim in a probate proceeding, though it may be contested by interested parties, is when allowed an acknowledged debt and is equivalent to a qualified judgment in an action such as is here presented. Prob.Code, sec. 713. A life insurance policy is a chose in action and liable for the payment of the debts of the party to whom issued. Catchings v. Manlove, 39 Miss. 655. A voluntary transfer of a chose in action, without consideration, for the purpose of defeating creditors is fraudulent. Burton v. Farinholt [Kenan], 86 N.C. 260; Ætna Nat. Bank v. Manhattan Life Ins. Co., C.C., 24 F. 769.

In Ionia County Savings Bank v. McLean, supra, 84 Mich. at pages 629, 630, 48 N.W. at page 160, the court said: "The argument is not sound that because he could insure his life under this statute for the benefit of his wife and daughter, therefore he can assign a policy which was not taken out for their sole benefit, and thus place it beyond the reach of creditors. The distinction between the two is obvious. He might have transferred this, like any other property, to his wife or children without consideration, when solvent; but when, being insolvent, he transferred it without a valuable consideration, it was subject to the payment of his debts, and the assignment was void." Friedman v. Fennell, 94 Ala. 570, 10 So. 649. Whatever rights the assignees may have obtained prohibiting the insured from further changing the policies by naming other beneficiaries, or in prohibiting him from hypothecating the policies for a loan or otherwise, terminated upon the death of the insured. In re Estate of Miller, 121 Cal. 353, 53 P. 906, wherein certain statements, mere dicta, are claimed to be contrary to the theory adopted herein, is dissimilar in that in the Miller case no claim was made that anyone had been defrauded. In that case the widow was the one entitled to the exemption. Estate of Crosby, supra.

After the death of the assured, whether designated as the assignees or beneficiaries, appellants herein, if they were entitled to anything at all, became entitled to receive all advantages accruing under the terms of the policies. Though designated as assignees, after the death of

Samuel Beck they occupied the position of beneficiaries as that term is used and understood in any ordinary insurance policy.

Appellants, occupying the position of beneficiaries, fall "within" the holding in Bryson v. Manhart, 11 Cal.App.2d 691, 54 P.2d 778. In that case there was a fraudulent change of beneficiary; in the present case there was a change of beneficiary through fraudulent assignments. It should be noted, however, that the Bryson case was decided without reference to exemption statutes. There a public administrator sought to recover from the estate of an insured decedent the proceeds of certain insurance policies. The aunt of the decedent on behalf of herself and as trustee for certain relatives had entrusted to her nephew a sum of money to be invested and reinvested in their behalf. Before the funds were so entrusted to the nephew, he carried but one insurance policy, the value of which was $4,000. Subsequently his insurance was increased to $200,000, carried in approximately thirteen policies, with his wife as beneficiary. Upon the wife's death, the nephew's estate became the beneficiary until the nephew's sister was so designated. The evidence indicated that about four months later the nephew committed suicide. A claim was filed by the aunt against his estate and approved by the public administrator and the court, covering the amount due from the nephew. At the time of the death of the wife and thereafter, the sister of decedent had knowledge of the impoverished financial condition of her brother. The insurance companies paid the amounts due under the policies and the proceeds were deposited in five different banks under fictitious names. The sister repaid certain loans made to her brother by friends, made good some worthless checks and settled certain claims against decedent. The trial court held in favor of the sister and her husband. On appeal, the court at pages 696 and 697, of 11 Cal.App.2d, 54 P.2d at page 780, said: "A review of the evidence leads unerringly to the conclusion that at the time of the transfers of property and changes of beneficiary the decedent was hopelessly insolvent and that the trial court's findings that the transfers and changes of beneficiary were not made to defraud creditors are not supported by the evidence. This conclusion must be reached upon a consideration of the evidence in a light most favorable to defendants." "In view of the facts as set forth above, it is clear that the transfers of the real estate and personal property are void. The transactions are covered by section 3439 of the Civil Code * * *. The contention of plaintiff that creditors may recover proceeds of insurance policies paid as the result of fraudulent changes of beneficiary by the insured while insolvent must be upheld."

Appellants call attention to Truelsch v. Northwestern Mutual Life Ins. Co., 186 Wis. 239, 202 N.W. 352, 38 A.L.R. 914, and liken it to the Bryson case. There is a similarity of facts, but in the Truelsch case the purpose of the cestui que trustent was to trace money into a trust fund. There is no inconsistency in the two cases. In the Bryson case, plaintiff was a public administrator who sought the proceeds of insurance policies to pay a claim approved by the probate court. In the Bryson case, in support of its conclusion, the appellate court quoted, in some instances extensively, from Pope v. Carter, supra; Continental Nat. Bank v. Moore et al., 83 App. Div. 419, 82 N.Y.S. 302; Navassa Guano Co. v. Cockfield, supra. I agree with the conclusions there reached. The court in the Bryson case also distinguished North British, etc., Ins. Co. v. Ingalls, 109 Cal. App. 147, 292 P. 678, by calling attention to the fact that in that case there was no change of beneficiary and that the insured was not insolvent at the time of his death.

Appellants stress the decision in Hoeft v. Supreme Lodge Knights of Honor, 113 Cal. 91, 45 P. 185, 33 L.R.A. 174, in which the plaintiff wife sued to recover an insurance benefit under a certificate of defendant lodge issued in her name at the request of her insured husband. The lodge paid the amount covered by the certificate into court. It appeared that a certificate originally named the insured's wife as the beneficiary. The wife died and a certificate in his children's favor was issued. Subsequently, on the remarriage of the husband, he surrendered the certificate in his children's favor, and had one issued designating his second wife as the beneficiary. Children, the issue of the first marriage contested upon the ground that the change was made by their father as the result of fraudulent representations, etc., made to him by the second wife. The children had no standing in court. They did not seek through probate proceedings to have any property set aside for their use or benefit. They did not stand in the position of creditors as did the administrator in the present case.

The conclusion reached in the majority opinion is the result of an adherence to a rule established by weight of authority as the outgrowth of the desire of courts in early decisions to protect the needy. Subsequently language used without mature consideration of all the possible contingencies that might arise has been aborted so that today the dishonest debtor may by reference to a few sentences in legal text books justify his dishonesty. Pursuing the subject further, however, it is apparent that legislatures in order to correct the evil have enacted express statutory restrictions, as in this state by Civil Code, division 4, part 2, title 2.

Benevolent exemption statutes, enacted to protect an impoverished debtor or his wife and children to live and eke out an existence, should not be extended in scope to assist a deceased debtor, with no dependents, in the perpetration of a fraud upon his innocent creditors. I am convinced that factually and legally this judgment should be affirmed.

HUDDY v. CHRONICLE PUB. CO.

S. F. 16338.

Supreme Court of California.
June 14, 1940.

Rehearing Denied July 12, 1940.

1. Automobiles 🔑242(6)

In action against newspaper company for injuries in collision with automobile driven by company's district manager, the burden in the first instance was upon plaintiff to establish prima facie case of manager's employment at time and place of accident before it was incumbent upon company to offer evidence in opposition thereto. Code Civ.Proc. §§ 1958, 1960.

2. Automobiles 🔑244(26)

In action against newspaper company for injuries sustained in collision with automobile driven by company's district manager, plaintiff initially established prima facie case with reference to issue of employment at place of accident by establishing that there was affixed to windshield of manager's automobile a "Press Car" card bearing owner's name, car number and signed authorization of circulation manager which was to be used by newspaper employees only while on duty, and that there were piled up in automobile several bundles of newspapers tied in manner in which such newspapers were usually wrapped for delivery to newsboys and carriers. Code Civ.Proc. §§ 1958, 1960.

3. Evidence 🔑595

An inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side.

4. Evidence 🔑595

An inference is not dispelled as a matter of law if evidence offered in opposition is conflicting, vague or uncertain, or is weakened by contradictions or improbabilities.

5. Automobiles 🔑244(26)

In action against newspaper company for injuries sustained in collision with automobile driven by company's district manager, to dispel the inference of employment at time and place of accident which inference was established by plaintiff, it was necessary for evidence produced by company, not only to be clear, positive, and uncontradicted, but also not open to doubt. Code Civ.Proc. §§ 1958, 1960.

6. Automobiles 🔑245(30)

In action against newspaper company for injuries sustained in collision with automobile driven by company's district manager, which automobile had affixed to windshield a "Press Car" card bearing owner's name, car number and signed authorization of circulation manager which was to be used by employees only while on duty, and which automobile contained several bundles of newspapers tied in manner in which such newspapers were usually wrapped for delivery to newsboys and carriers, whether manager was acting for company at time of accident was for jury. Code Civ.Proc. §§ 1958, 1960.

7. Trial 🔑235(4)

An instruction that jury could find in accordance with inference which they might reasonably make from circumstantial evidence, notwithstanding direct evidence to the contrary, was proper, since the jury need not accept as true all direct evidence offered in opposition to an inference, but if direct evidence is not clear, positive, uncontradicted, and is not free from doubt, may reject it.

8. Appeal and error 🔑1060(1)

In action against newspaper company for injuries sustained in collision with automobile driven by company's district manager, asking circulation manager if company did not require district manager to carry insurance on his automobile was not prejudicial error, where question of whether witness should answer question was argued without presence of jury, objection thereto was sustained, and question was not answered, and action against district manager had been dismissed.

9. Witnesses 🔑270(2)

In action against newspaper company for injuries sustained in collision with automobile driven by company's district manager, permitting plaintiff's attorney to examine witnesses for company as to their diligence in ascertaining whereabouts of district manager was not error, where material issue was whether he was acting for company at time of accident, and his testimony was extremely vital. Code Civ.Proc. § 2061, subd. 6.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Violet Huddy against the Chronicle Publishing Company to recover damages for injuries sustained in an automobile accident. From a judgment for plaintiff, defendant appeals.

Affirmed.

Superseding opinion in 94 P.2d 56.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

R. G. Partridge, of San Francisco (Wallace O'Connell, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

In this action plaintiff sought to recover judgment for personal injuries suffered by her when an automobile in which she was riding as a guest in the city of San Francisco was struck by a Hupmobile sedan driven by Donald O'Brien, an employee of the Chronicle Publishing Company. It was alleged in the complaint that the proximate cause of the collision was the negligent operation of said Hupmobile sedan by Donald O'Brien, and that at the time of said accident said automobile was being operated and driven by him as the agent, servant, and employee of the Chronicle Publishing Company. Before trial the case against O'Brien was dismissed without prejudice. A motion for a nonsuit and for a directed verdict made by defendant was denied. At the close of an eight-day trial, a verdict was returned by the jury against the Chronicle Publishing Company in plaintiff's favor in the sum of $3,231. From the judgment entered thereon, the defendant Chronicle Publishing Company has appealed.

The accident occurred between 11:10 and 11:30 p. m. on the night of January 28, 1937, on Potrero avenue just south of its intersection with Twenty-fourth street. Appellant does not deny that the proximate cause of the collision was the negligent operation of the automobile by O'Brien. Appellant does deny that O'Brien, who was employed by it in its home delivery department, as manager of district N, was engaged at the time of the accident in any service for the Chronicle Publishing Company, and insists that there is not sufficient evidence in the record to support the implied finding of the jury that he was at the time and place of the accident acting within the scope of his employment.

Appellant relies upon the fact that the employment of O'Brien as district manager in the home delivery department required him to perform specific work in connection with the distribution of the Chronicle newspapers to carriers under him in a specified district and during certain specified hours, and that the accident happened outside the limit of O'Brien's district and at a time that his regular duties in connection with the distribution of Chronicles to his carriers did not require him to be at work. At the outset it may be admitted that O'Brien was not engaged at the time of the accident in his regular duty of delivering papers to the carriers in his district for distribution by them on their regular routes. His regular duty in this regard did not require his presence at the appellant's plant until about 3 a. m. each morning when he received the bundles of newspapers which came down the chute to the sidewalk at the Fifth street entrance to the Chronicle building. In order to deliver the papers to the twenty carrier boys under him, it was necessary for him to own a car, and he was paid $30 per month as allowance by the Chronicle for the use of his car. He usually completed his deliveries by 6:30 a. m. and his time was his own until a short time prior to 3 p. m. when he was required to report to the city circulation manager in charge of the district managers employed by the home delivery department to go over with the city circulation manager any details which were necessary to his work, such as giving notice of "stops" and new subscriptions. He was then through with the regular routine duties connected with the distribution of the papers until the next morning at 3 a. m. The accident, as before noted, occurred between 11:10 and 11:30 p. m. and outside the limits of his district.

Respondent while admitting that O'Brien was not performing the specified work of delivering papers to the carriers in his own specified district and during the specified hours which this particular duty required, points out that his duties were not limited merely to the delivery of the newspapers to the carrier boys and reporting to the city circulation manager, but included any act which he might deem desirable for the betterment of the service, such as visiting the carriers under him to school them in their duties, or to encourage them to secure new subscribers, as each district manager had to maintain a certain production record throughout the month. District managers occasionally supervised the collection by the carriers, and if any carrier was delinquent, his district manager was "supposed to go into the matter with him". The duties of the district manager also consisted in picking up, at the end of each month, the newspapers which had not been sold by the carriers and returning them to the Chronicle so that each carrier could receive credit for the newspapers so returned. It should be noted with reference to the duty on the part of district managers of picking up "returns" and delivering them to the Chronicle that it was necessary that the newspapers be picked up and turned in on a certain stipulated day when a special man was on duty at the plant for the purpose of checking them in, and if they were not returned at the end of the month at the stipulated time, they could not be returned until a month later, and no credit would be given to the carrier boys until the following month.

[1] It is respondent's position that O'Brien, at the time of the accident, was either engaged in attending to one of these duties which were in fact as much a part of his employment at his regular routine duty of delivering the home delivery papers to his carriers within his district, or that he had been pressed into special service to deliver "extra" bearing news of the settlement of the longshoremen's strike, which had been tying up the port of San Francisco, to the Bayshore dog tracks, and was on his way to the Bayshore dog tracks when the accident happened. Only O'Brien himself could testify directly as to the mission on which he was engaged at the time and place of the accident, whether he was in fact engaged in a personal mission of his own, or engaged in performing a service for the Chronice Publishing Company. It appears that he was removed from the emergency hospital to St. Mary's hospital, and that he thereafter left the state without returning to his employment with the Chronicle Publishing Company. A letter was afterwards received by the city circulation manager from Nevada, but the letter was not preserved, and his whereabouts were apparently unknown at the time of the trial. It is obvious that in the absence of the testimony of O'Brien, plaintiff was necessarily limited in attempting to prove the issue of his employment at the time and place of the accident, to proof of facts and circumstances from which an inference of his employment could logically and reasonably arise, and the defendant was likewise limited to proof of facts and circumstances which would logically and reasonably disprove any inference of such employment, the burden in the first instance being upon the plaintiff to establish a prima facie case before it was incumbent upon the defendant to offer evidence in opposition thereto.

[2] The first question to be asked and answered, therefore, is whether plaintiff has initially established a prima facie case with reference to this issue of employment. Section 1958 of the Code of Civil Procedure states that, "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect," and section 1960 of the same Code states that, "An inference must be founded: 1. On a fact legally proved; and 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." Two facts were definitely and positively proved and established by plaintiff which in our opinion reasonably warrant the deduction therefrom that O'Brien at the time and place in question was engaged in performing a service for the Chronicle Publishing Company. First: There was affixed to the windshield of O'Brien's car a "Press Car" card, bearing the owner's name, the car number and the signed authorization of the circulation manager of the Chronicle Publishing Company, which card according to the testimony of said circulation manager, himself, was to be used by Chronicle employees only while on duty. Second: There was piled up on the rear seat of the Hupmobile and on the floor to the level of the rear seat, four or five bundles of Chronicle newspapers of approximately 100 copies to the bundle, tied around with hemp rope in the manner in which said newspapers are usually wrapped for delivery to the various newsboys and carriers around the city.

The first fact, "legally proved", upon which respondent justifiably relies to warrant the inference of employment of O'Brien by appellant at the particular time and place was the fact that at the time of the accident, O'Brien was displaying on the lower right-hand corner of his windshield a "Press Car" card on which, under the words, "Press Car", appeared the words, "San Francisco Chronicle". Four witnesses, one of whom was Mr. Neish, an employee of the Chronicle, testified that they had seen this "Press Car" card in the lower right-hand corner of the windshield of the Hupmobile immediately after the accident, and although the card disappeared after the accident, the fact that it was being displayed by O'Brien at the time must be accepted as an established fact. Mr. Neish, who arrived at the scene of the collision immediately after it occurred, testified that he noticed the "Press Car" card and looked at the name on it to identify the driver of the Hupmobile sedan. He stated that the card displayed by O'Brien, in addition to the words, "Press Car, San Francisco Chronicle", also bore the car number, the owner's name and the proper authorization. A "Press Car" card was introduced in evidence and identified by Mr. Neish as being similar to the card which he saw displayed on the windshield of the Hupmobile sedan. This card is a white card, 10 inches by 5 inches, printed on heavy white cardboard.

This "Press Car" card, according to the testimony of Mr. Gilroy, circulation manager of the Chronicle, was the official sign put out by the Chronicle and was issued to its employees under strict orders that the signs were not to be used except when the employees were on duty. Appellant attempted to prove that the use of the card was restricted to the immediate vicinity of the Chronicle building, being furnished to the drivers who delivered its newspapers to enable them to secure parking space there. This attempted limitation of the use of the "Press Car" card to the immediate vicinity of the Chronicle building was offset by the testimony of Mr. Maguire, the news vendor for the Examiner at the corner of Twenty-fourth street and Potrero avenue, who testified that he frequently saw cars with such signs pass his corner. It should be here stated that although the appellant has consistently spoken of this "Press Car" card as a "sticker" thereby giving the impression that it was permanently attached, and that it was on the car at all times irrespective of whether the driver was or was not on company business, there is not an iota of evidence in the record to indicate that such card was in fact permanently attached to the windshield of O'Brien's car, whether by pasting or by any other means. None of the witnesses who testified to seeing the card was able to remember how it was attached. We have examined the "Press Car" card, which was introduced in evidence as an exhibit and identified as being similar to the card displayed by O'Brien, and there is nothing whatever in the make-up of said card to indicate that it was intended to be permanently affixed. It may be said parenthetically that the fact that the "Press Car" card disappeared after the accident and could not be found might be some indication that the card was not firmly pasted on the windshield.

The second foundational fact upon which respondent justifiably relies as giving rise, in conjunction with the display of the "Press Car" card, to the inference that O'Brien was engaged in a service for the benefit of the Chronicle Publishing Company is the fact that at that time he was transporting four or five or more bundles of Chronicle newspapers tied up with hemp rope as if for delivery. There is some question as to whether the papers contained headlines relative to the settlement of the longshoremen's strike and bore the word, "Extra" across their face, or whether they did not, but in view of the overwhelming testimony of at least three disinterested witnesses, including Mr. Neish, the Chronicle employee, there can be no question that in fact there were several bundles of Chronicles tied up with hemp rope in the rear of O'Brien's car at the time of the accident. These bundles of newspapers disappeared after the accident. Mr. Nicolini, a drayman, who was standing at the corner of Twenty-fourth street and Potrero avenue, having just bought an Examiner from the news vendor there when the collision occurred, testified that he looked in the rear of the Hupmobile sedan after the accident through the right-hand door which was open and saw four or five bundles of Chronicle newspapers across the back seat tied with hemp rope and that there were stacked on the floor behind the front seat other bundles to the level of the rear seat. One of the bundles on the floor was broken open. He testified that the headlines on all the papers were identical and had the word "Extra", the name, "Chronicle", and "something about the stevedores going back to work". Mr. Hansen, who was employed in the Purity store at the corner of Twenty-fourth street and Potrero avenue, testified that he saw bundles of newspapers in the rear of the Hupmobile sedan, tied with a rope in bundles of about a foot and a half high, and stated that there were some loose ones on the floor. He looked in through the rear window and saw they were Chronicles but did not notice whether or not the word "Extra" was on the front page. Mr. Gray, a municipal railway motorman, testified that he had gone over to the Hupmobile after the accident, and had noticed that the rear fender "was lower down than usual" over the rear wheel. Mr. Neish, the Chronicle employee, testified that there were a few papers spilled on the street and there were papers inside the car that were partially tied up. He stated that they were tied up loose with rope. His testimony was: "The papers were on an angle in the back of the car, and they were loose. The rope had not been cut, but they were just loose papers. It slid out from under the tie of the rope." He had not examined the papers as to dates and did not notice any headlines on the papers with reference to the marine strike being settled. Mr. Lown, who examined the Hupmobile the next morning at the garage to which it had been towed, testified that he found no bundles of newspapers in the car and no rope, that there were no newspapers on the rear seat but there were a number of newspapers scattered on the floor in the rear which bore various dates just previous to the accident. From the presence of such a large quantity of newspapers in the car of its employee, it seems quite reasonable and logical to infer that such employee was engaged in performing a service for his employer.

We are of the opinion that these two facts, "legally proved": the existence of the "Press Car" card on the windshield of the automobile which the Chronicle employee was driving at the time, and the presence of such a large quantity of Chronicle newspapers as he was transporting at the time, are quite convincing proof of the active engagement of such employee in the service of the company, and makes the inference that he was so engaged seem logically much more reasonable than the contrary inference that he was not so engaged.

While it was not possible for the respondent in the absence of O'Brien to positively establish the exact errand on which O'Brien was engaged at the time, and we do not deem this necessary in view of the fact that his duties, other than his routine duty of delivering papers to his carriers, were not limited to any particular time and place, two plausible explanations have been suggested. While appellant has offered evidence which is quite convincing, and if believed by the jury would have compelled the conclusion, that the second explanation of O'Brien's errand was not the correct one, nevertheless, no evidence at all has been offered to disprove the first explanation. In the absence of such proof, appellant has failed to overcome and dispel the inference which constitutes respondent's prima facie case with reference to the issue of employment.

[3, 4] In Engstrom v. Auburn Automobile Sales Company, 11 Cal.2d 64, 77 P.2d 1059, 1063, it is stated that "an inference is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt even though such evidence is produced by the opposite side. * * * Of course, if the opposition evidence is conflicting, vague, or uncertain, or is weakened by contradictions or improbabilities, an inference is not dispelled as matter of law." With this rule in mind, we shall discuss the evidence with reference to the service on which O'Brien was engaged at the time.

The first explanation suggested is that O'Brien was engaged in some duty connected with a pickup of the "returns". As before noted, there is evidence in the record that one of the duties of a district manager was to pick up and return at the end of the month newspapers which had not been sold by the carriers and that they had to be returned at a special time to be checked in. The day of the accident was Thursday, January 28th, and the next day, Friday, the 29th, according to the records of the Chronicle Publishing Company was O'Brien's day off. Usually the district managers picked up the "returns", which took two or three hours, in the morning, but they could be picked up at night. O'Brien was "a good employee and the company was pleased with his work". Mr. Tennant, city circulation manager, and O'Brien's superior, stated that he had observed him on various occasions around the office at odd hours and that it was a fair statement that he seemed quite wrapped up in the newspaper business and enthusiastic about his job. On the evening in question, Thursday, January 28th, he had seen O'Brien at the office when he, Tennant, left at 6:15 p. m. If the testimony of Mr. Lown that the newspapers which he found on the floor of the Hupmobile the next morning after the accident bore various dates just previous to the accident be accepted as proof that these same newspapers were among those present in the car at the time of the accident, the deduction seems reasonable therefrom that O'Brien at the time of the accident was engaged in his duty of picking up "returns". This seems particularly reasonable in view of the fact that it was so close to the end of the month and the next day was O'Brien's day off. No proof was offered by the appellant which would disprove this explanation such as proof from its employment records that none of the carriers delivering papers within O'Brien's district lived outside the district, or that the "returns" for the month had already been collected and turned in.

There was also found by Mr. Lown in the glove compartment of the Hupmobile a book of subscription bills, a pad of deposit slips of the Bank of America, having printed at the top "The Chronicle Publishing Company, Carriers Account, at San Francisco-Main Office, Branch No. 66, Deposited by Route No. —", and also a rubber stamp bearing this notation, "Pay to the Order of Bank of America, For Deposit to the credit of The Chronicle Publishing Company, Carriers' Account, 66". However, as it is quite probable that these articles were kept by O'Brien in the compartment at all times, their mere presence would not be sufficient to give rise to an inference that he was on his way to contact a carrier with reference to his collections. The same criticism, however, is not applicable to the presence of the large quantity of newspapers, tied up in bundles, as it does not appear reasonable that in the absence of some task for his employer, he would be carrying them around in his car.

The second explanation is that O'Brien was pressed into service to deliver extras bearing news of the settlement of the longshoremen's strike to the Bayshore dog tracks. This explanation is based primarily upon the testimony of Mr. Nicolini that the newspapers which he saw in the rear of the Hupmobile bore the headlines "Extra" and contained news about the stevedores going back to work. That he was endeavoring to reach the Bayshore dog tracks before the races were over and the "crowd broke" would afford some explanation of his erratic driving and breakneck speed, as the races usually closed around 11:10 and 11:15 p. m. While O'Brien's routine job permitted him to leave the Chronicle building at 3 p. m. there is no testimony as to the time he actually did leave the building on the night in question, and the testimony of the city circulation manager was that O'Brien was there when he left at 6:15 p. m. Potrero avenue is on the direct route to the Bayshore dog tracks. While the appellant denied using "relays" or extra men to deliver their bundles of papers when their regular delivery men were not available there was testimony of the Examiner news vendor at the corner of Twenty-fourth street and Potrero avenue that infrequently the Chronicle newspapers had been delivered to the Chronicle news vendor at the same corner by other than the regular delivery man. There was also the testimony of the regular man, Mr. Lund, who had charge of the sales at the Bayshore dog tracks that he was busy with his regular delivery service on the night in question and that it would have been impossible for the office "to get hold of him" on the phone to ask him to get extras from the plant for distribution if any had been published that night. The fact that plaintiff was on her way home from the dog tracks, having attended the last race, and had already reached Twenty-fourth street which is about a mile from the dog tracks does not necessarily prove that no attempt was being made by the appellant to reach the dog track patrons. The races did not close at the same time every night and anyone leaving the Chronicle building would not know whether or not the tracks had closed until he reached them. If O'Brien had stopped for reasons of his own on the way to the dog tracks, as intimated by the testimony of Mr. Neish who testified that he first saw O'Brien's car pulling out from a parking space at Eighteenth street and Potrero avenue at which corner a beer parlor was located, he could have left the Chronicle building with sufficient time to reach the dog tracks before closing time if he had not stopped. It appears from this brief résumé that the explanation that O'Brien was on his way to deliver extras to the Bayshore dog tracks is a reasonable one. Besides the testimony of Mr. Nicolini that he actually saw extras in the rear of O'Brien's car, saying "something about the stevedores going back to work", is we think amply sufficient to support the inference that O'Brien was transporting extras to the Bayshore dog tracks, unless such inference was dispelled by clear, positive evidence, not open to doubt, produced by the appellant. Engstrom v. Auburn Automobile Sales Company, supra.

The appellant claims to have produced evidence which as a matter of law completely dispels any inference that O'Brien was delivering extras to the Bayshore dog tracks at the time in question. This proof is the testimony of their press foreman, Mr. Wooster, testifying with reference to the pressroom records of the night in question to the effect that the first edition published that night which was an extra and which contained any news with reference to the settlement of the strike, was the CCCC edition which bore "Extra" across its face, and in large letters the words "End of Strike in Sight", and that the press for the CCCC edition was not started until 12:04 a. m., which was obviously after the accident had occurred. Both the Chronicle and the Examiner for that evening were late in being delivered to the news vendors at the corner of Twenty-fourth street and Potrero avenue, and the Examiner edition which arrived immediately after the accident contained headlines announcing the end of the strike. The appellant admits that the strike had in fact terminated, but alleges that on this particular occasion they were "scooped" by the Examiner, although they offered no explanation for the "scoop" which concerned a matter of great public interest and of which the settlement was no secret. There was also offered in evidence by the appellant the testimony of Mr. McCarty, head of the street sales department of the Chronicle, who had charge at the Fifth street entrance of the Chronicle building of the delivery of the bundles of newspapers to the delivery men, and whose duty included checking out to the district men under him the bundles of newspapers to be delivered by them to the news vendors. Mr. McCarty's testimony was to the effect that no notation of any papers being delivered to O'Brien on that night appeared in the little black book which was his own personal record and in which he kept track of the bundles delivered to the district men. He also denied that he ever employed home delivery men for use in the street sales department even in an emergency.

Certainly this testimony, if accepted as true, compels the conclusion that O'Brien was not engaged in delivering strike extras. Obviously, however, the jury did not accept it at its face value, and we cannot say as a matter of law that its rejection was wholly unwarranted. In testifying with reference to the printing of the various editions on that particular night, Wooster testified that the times of printing the various editions were as follows:

C	5:26	to	6:10 p. m.
CC	8:06	to	8:40 p. m.
CC*	9:27	to	9:40 p. m.
CCC	10:25	to	11:15 p. m.
CCCC	12:04	to	12:11 p. m.
CCCC*	1:29	to	2:24 a. m.
CCCC**	2:30	to	3:58 a. m.

[5, 6] Seven newspapers bearing these edition identification marks were introduced in evidence by the Chronicle as a complete file of all the editions printed that night. It was explained that the "Cs" applied to regular editions and the "C-stars" were editions in which "replates" or pages different from the regular edition were inserted. Wooster admitted that after a certain edition had gone to press and had been partially printed and had then been stopped for new and additional news, the newspapers carrying the additional news could bear the same designation with which the edition had started. In other words, newspapers containing the identification marks of the same edition might contain different news and headlines. Although the press record referred to in his testimony by Wooster contained no record of a newspaper designated as CCC*, which is the identifying mark which an edition containing strike news prior to the CCCC edition would bear, nevertheless, in the CCCC edition introduced in evidence there appears on an inner page an insert labeled CCC*, which is an indication that the pressroom record for that night was not complete. Likewise, upon cross-examination, in looking at his pressroom record for March 4, 1938, Wooster stated positively that no paper labeled CCCC**** had been printed, but such a paper bearing this identification mark was produced by the attorney for the respondent. This accumulated evidence was sufficient to show that the records of the pressroom, which would ordinarily be

assumed to be correct, were not necessarily infallible. Likewise, Wooster admitted that the time of the different editions going to press did not in fact necessarily correspond with the edition identification marks which actually appeared on the newspapers themselves. To dispel the inference of employment, it was necessary for the evidence produced by appellant not only to be clear, positive and uncontradicted, but not open to doubt. In this regard, we think the language used by the court in the case of Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518, 520, is applicable. The court there said: "The evidence introduced by the appellant made out a complete defense if full credence was given to it by the trial court; but the court was not bound thus to unreservedly accept it, even if uncontradicted. The court saw and heard the witnesses testify, and with this advantage, not enjoyed by us, it was for it to determine the degree of credence to be accorded to this testimony. It is not essential that the credulity of the court should correspond with the positiveness with which a witness testifies." In view of the positive testimony of Nicolini that the several bundles of newspapers with which O'Brien's car was loaded at the time of the accident bore the caption "Extra" across their face, and contained news with reference to the stevedores going back to work, in which testimony he was not shaken, considered in conjunction with the showing that the records of the pressroom of the Chronicle with reference to the printing of the various editions were not so definite or infallible as to preclude the possibility of error as to the time the edition bearing the strike news came off the press, we are satisfied that the evidence produced by the appellant does not as a matter of law dispel the inference of employment established by respondent as her prima facie case.

[7] Certain minor points are raised by appellant in which we find no merit. Appellant complains that the trial court erred in giving an instruction to the effect that the jury could find in accordance with an inference which they might reasonably make from circumstantial evidence even though direct evidence to the contrary has been introduced by the defendant. It is not the rule that a jury must accept as true all direct evidence offered in opposition to an inference. If the direct evidence to the contrary is not clear, positive, uncontradicted, and is not free from doubt, the jury is entitled to reject it. The instruction is, therefore, not subject to criticism.

[8] The appellant also complains of the misconduct of the attorney for the respondent in asking Mr. Gilroy, circulation manager of the Chronicle, if the company did not require O'Brien to carry insurance on his car. The question of whether the witness should answer the question was argued without the presence of the jury, the objection thereto was sustained, and the question was not answered by the witness. It is to be noted that the question was directed only to the ascertainment of whether insurance was carried by O'Brien, against whom the action had been dismissed, and not whether insurance was carried by the Chronicle Publishing Company. The asking of such question, relative to the insurance carried by a third party, was not such prejudicial error as to warrant a reversal of the judgment.

[9] We find no error in the fact that the attorney for the respondent examined witnesses for appellant as to their diligence in ascertaining the whereabouts of O'Brien. Since essentially only O'Brien knew precisely what he was doing at the time and place of the accident, his testimony was, of course, extremely vital. While there was no legal duty on either party to produce O'Brien, in view of the provisions of subdivision 6 of section 2061 of the Code of Civil Procedure that "evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict", we think it was relevant and material for respondent to inquire whether it was within the power of the appellant to procure the presence of O'Brien at the trial. This was a legitimate field of inquiry.

The judgment is affirmed.

We concur: CARTER, J.; SHENK, J.; GIBSON, J.; EDMONDS, J.

39 Cal.App.2d 431

THREE G DISTILLERY CORPORATION v. JOHNSON, State Treasurer, et al.

Civ. 6381.

District Court of Appeal, Third District, California.

June 10, 1940.

1. Intoxicating liquors 🔑96

A liquor wholesaler which delivered to retailer liquor for purpose of making sale believing that liquor was fit for beverage use could not recover from state amount of revenue stamps affixed before discovering that liquor was not fit for beverage purposes on ground that transaction could not be deemed to be a "sale", since fact that transaction was an illegal sale would not exempt seller from compliance with statute. St.1935, p. 1139, § 32.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

2. Taxation 🔑543(6)

The performance of all other conditions precedent to maintenance of action such as protest and proper demand for return of the tax before suit is brought if they are required by statute must be alleged.

3. Intoxicating liquors 🔑96

In action by liquor wholesaler to recover from state amount of revenue stamps affixed to packages of liquor which had been sold to retailer who returned liquor to wholesaler because it was not fit for beverage use, complaint which showed on its face that claim was based on unlawful transaction consisting of sale of liquor not properly prepared for beverage purpose, and which did not allege that taxes were paid under protest, was demurrable. St.1935, p. 1139, § 32.

4. Intoxicating liquors 🔑6

The Legislature had right to regulate liquor business and to impose conditions and regulations as it might deem proper, such business being a privilege and not a right, and license to carry on such activity being but a permit to do that which otherwise would be unlawful. St.1935, p. 1123.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Three G Distillery Corporation against Charles G. Johnson, as State Treasurer of the state of California, and others to obtain a refund of the value of stamps affixed to liquor packages, wherein defendants filed a demurrer. From a judgment for plaintiff, defendants appeal.

Reversed.

Earl Warren, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for appellants.

Martin Gang, of Los Angeles, for respondent.

PER CURIAM.

The complaint in this action alleged that plaintiff as a licensee under the Alcoholic Beverage Control Act (Stat.1935, p. 1123) sent to a retailer a quantity of distilled spirits for the purpose of making a sale, and at the time believed that such distilled spirits were fit for beverage use, but that in fact such distilled spirits were improperly prepared and were returned to plaintiff for correction of the defect in preparation. It also appeared that plaintiff had, as required by the provisions of the act, sent to the retailer the required number and amount of stamps to be applied to the packages of distilled spirits contained in the particular shipment. As soon as the retailer found this particular liquor was not fit for beverage purposes, he returned the lot to the wholesaler, respondent herein, but prior to such discovery the stamps had been affixed to the several packages. The wholesaler received the return shipment and removed the stamps, and made demand upon the board for a refund of the value of the stamps so affixed, which was refused.

To the complaint a general demurrer was interposed, and after argument, was overruled, and defendants given time to answer. This they refused to do, relying upon the asserted failure of the complaint to state a cause of action. The default of the defendants was then entered, and from the judgment entered thereon this appeal is taken.

Section 32 of the act is the section providing for the recovery of excise taxes illegally collected. This section requires that to recover any excise tax it must have been paid under protest, and only those grounds of illegality specified in the protest may be considered by the court. It is the failure to positively allege that the taxes were paid under protest that appellants claim render the complaint fatally defective.

[1] Respondent contends that this excise tax is imposed only upon distilled spirits

actually sold, but that in as much as these spirits were not properly prepared to be sold, plaintiff had no right or license to sell the same, and therefore this transaction could not be deemed to be a sale.

With this contention of plaintiff we cannot agree. Under the facts as alleged very obviously a sale was made. It may have been an illegal sale, but that would not exempt the seller from compliance with the statute. McKesson & Robbins, Inc. v. Collins, 18 Cal.App.2d 648, 64 P.2d 469. The fact that the liquor stamps were sent by the seller to be affixed, indicates its idea of the transaction. Section 32 of the act is the only section providing for the recovery of excise taxes illegally collected. It is also the only section authorizing the judgment given here by the trial court, that is, the crediting of a licensee's tax liability to the extent of the amount determined to have been illegally collected.

[2] The rule as stated in 61 Corpus Juris, page 1004, is universally accepted: "The performance of all other conditions precedent to the maintenance of the action, such as protest, and a proper demand for the return of the tax before suit is brought, if they are required by the statute, must be alleged."

[3] To the same effect is the rule in 21 California Jurisprudence 60, that "in pleading a right derived from a statute or statutory privilege one must allege the facts which the statute requires as to the foundation of his right * * *," and so here, where the complaint failed to allege that the payment of the tax was under protest, the complaint was fatally defective and the demurrer should have been sustained.

[4] True, as respondent states, no opportunity was given to file a protest, but in Sandelin v. Collins, 1 Cal.2d 147, 33 P.2d 1009, 1011, 93 A.L.R. 956, it was held that the legislature had the right to regulate the liquor business and to "impose such conditions and regulations as it might deem proper", that business being a privilege and not a right, and a license to carry on such activity is but a permit to do that which otherwise would be unlawful. State Board of Equalization v. Superior Court, 5 Cal. App.2d 374, 42 P.2d 1076.

Respondent cites us to the federal practice as evidenced in United States v. American Tobacco Co., 166 U.S. 468, 469, 17 S. Ct. 619, 41 L.Ed. 1081, but that is governed by federal statute specifically providing for the return and redemption of revenue stamps that have been spoiled or which have through mistake, been improperly used. The Alcoholic Beverage Control Act contained no such provisions at the time here involved, but in 1937, section 33d was added which seems to make provision for such contingencies. St.1937, p. 2154. Such an amendment would, under the general rule of statutory construction, seem to indicate an intention to change the meaning of the act rather than to interpret it. Young v. Three For One Oil Royalties, 1 Cal.2d 639, 36 P.2d 1065.

Since the complaint shows on its face that the claim for relief is based on an unlawful transaction, namely the sale of distilled spirits not properly prepared for beverage purposes, and the complaint not alleging that the taxes were paid under protest, the judgment must be reversed. It is so ordered.

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39 Cal.App.2d 435

SHARP et al. v. BIG JIM MINES et al.

Civ. 6378.

District Court of Appeal, Third District, California.

June 10, 1940.

1. Corporations ⇨665(3)

The levying of an assessment on stock of foreign corporation is strictly an "internal affair" of the corporation which will not generally be interfered with or controlled.

See Words and Phrases, Permanent Edition, for all other definitions of "Internal Affair".

2. Corporations ⇨665(3)

Generally, local courts will not interfere with or control internal affairs of a foreign corporation.

3. Corporations ⇨665(3)

A local court will interfere with and control internal affairs of foreign corporation when the court acquires complete jurisdiction over the corporation, and the court is able not only to hear and determine the cause but to enforce its decree in such a manner as to do complete justice to the parties.

4. Corporations ⚷665(3)

Where a corporation is nonresident only in that it is the creation of another state, and its officers, agents, books, place of business, business, and all its property are within the jurisdiction of the court, the court will not deny relief in an action against the corporation on the ground that internal affairs of corporation will thereby be affected.

5. Mines and minerals ⚷108

Where principal place of business of foreign mining corporation was in California where all books and records of the corporation were kept and the corporate business was conducted, California court had jurisdiction to enjoin levy of assessment upon stock of the corporation on ground that assessment was void because of invalidity of meeting of stockholders at which corporate by-laws were purportedly amended so as to allow the levying of the assessment, even though the case involved an "internal affair" of corporation.

6. Judgment ⚷251(1)

Where corporate stockholders brought action to enjoin levy of assessment upon corporate stock and sole question presented by pleadings was validity of purported meeting of stockholders at which corporate by-laws were amended to allow levying of assessment, and corporate directors were instructed to levy the assessment, portion of judgment for stockholders which purported to enjoin levy of further assessments except upon performance of certain conditions, exceeded issues and was therefore "coram non judice" and void.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Non Judice".

7. Judgment ⚷251(1)

In action to enjoin levy of assessment on stock of foreign corporation which was interested in mining property, portion of judgment enjoining levy of assessment to work a certain mine and to pay a certain note was not void on ground that it involved issues not within the pleadings, where issues with reference to ownership of mine by corporation, and questions concerning whether note was a charge against the corporation were litigated.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by Omer L. Sharp and others against the Big Jim Mines and others to enjoin the levy of an assessment on corporate stock of the corporation. From an adverse judgment, defendants appeal.

Judgment modified and as modified, affirmed.

Emmett A. Tompkins, of Los Angeles, for appellants.

Laurence W. Beilenson, Paul E. Iverson, and Loeb, Walker & Loeb, all of Los Angeles, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to enjoin the levy of an assessment upon corporate stock of defendant corporation. The trial court found for plaintiffs upon all issues, and judgment was entered enjoining the levy of such assessment. Defendants' appeal is from the judgment, and is based upon the judgment roll alone.

The findings disclose that plaintiffs are all stockholders in defendant corporation. Defendant Black is president of said company, and defendant Oaks is its secretary. Defendants Oaks, Black and Gordon are directors. All of said defendants are residents of the state of California. Said corporation was organized under the laws of Arizona, to do business in California. Its principal place of business is Los Angeles, California, where all of its books and records are kept. For years last past all the business of said company has been conducted in California, where it is interested in two mining properties.

It is further found that a purported meeting of the stockholders of said company was held on September 16, 1936, at which they purported to amend article V of the by-laws to allow the levying of a sixth assessment, and instructed the directors of said corporation to levy an assessment of one-half cent per share on each share of stock outstanding; that plaintiffs received notice of said assessment of their shares of stock, in which it was stated that unless said assessment was paid before October 30, 1936, a penalty of one-half a cent a share would be imposed, and that unless said assessment was paid before November 30, 1936, their stock would be sold to satisfy said assessment; that at the time of said meeting there were 3,940,000 shares of said corporation issued and outstanding; that 1,139,996 shares were represented in person or by proxy, or 28.8 per cent of the total outstanding and issued capital stock; that on the date of said meeting, 877,627 shares of said stock were illegally issued and outstanding, and held by some seventeen stockholders whose names are set forth. Of the latter amount defendant Keating owned 538,185 shares; that the by-laws of said corporation provide that a majority of the outstanding and issued stock is necessary for a quorum at any stockholders' meeting; that there was no quorum of stockholders at said meeting, and any action taken thereat was void and of no effect; that the said 877,627 shares are illegal, for the reason that no permission to issue the same was ever procured from the Arizona corporation commissioner, and that of said illegal shares 793,127 were represented at said meeting, and that a vote to levy such purported assessment would not have carried without the vote of said illegal shares.

The judgment enjoins defendants from collecting said assessment and selling any stock for failure to pay the same; it also enjoins defendants from levying any *further assessment* on the stock of said corporation until, (A) A full financial statement is sent to the stockholders; (B) A report of a mining engineer, appointed by plaintiffs, is sent to the stockholders; (C) All stock illegally issued is canceled; said stock being specified with the names of some eighteen stockholders and number of shares held by each, only one of them being joined in this action; (D) The defendant files a copy of its articles of incorporation with the secretary of state of the state of California; (E) Article V, section 9 of the by-laws is amended. The judgment further restrains the corporation from levying a further assessment for the development of Calaska mine, or for the purpose of paying the Security-First National Bank anything on account of a promissory note executed by defendant Keating.

The chief contention made by appellants is that the court had no power or jurisdiction to entertain the action or render the judgment. They rely upon the general rule as expressed in 17 Fletcher's Cyclopaedia of Corporations, section 8425: "Otherwise stated, it is the rule that the courts of one State will not exercise the power of deciding controversies relating merely to the internal management of the affairs of a Corporation organized under the laws of another State, or of determining rights dependent upon such management, but will leave questions relating to the management of the internal affairs of a foreign Corporation to be settled by the tribunals of the State which created the Corporation."

As supporting this rule, and indicating the views of California courts they cite the case of Southern Sierras P. Co. v. Railroad Commission, 205 Cal. 479–483, 271 P. 747, 748, where reference is made to the management of the internal affairs of a foreign corporation in the following language: "Such matters must be settled by the courts of the state creating the corporation. This rule rests upon a broader and deeper foundation than the mere want of jurisdiction in the ordinary sense of that word. It involves the extent of the authority of the state over foreign corporations. Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N.W. 324, 50 Am.St. Rep. 407."

[1] It must be conceded that the levying of an assessment is strictly and inherently an internal affair of the corporation. (17 Fletcher's Cyc. of Corp., sec 8437.)

[2, 3] Conceding the general rule to be as stated above, respondents contend that the facts of this case bring it within an exception to such rule which is stated in Thompson on Corporations (3d Ed., vol. 8, p. 963): "The general rule that local courts will not interfere or control the management or the internal affairs of a corporation, is not without exception. But courts will interfere and control the management and internal affairs of a foreign corporation when it acquires jurisdiction over a foreign corporation, where such jurisdiction is complete and the court is able not only to hear and determine, but to enforce its decree in such a manner as to do complete justice to the parties. Thus, to this particular point the Louisiana court said that, 'the courts of a state will not ordinarily entertain suits involving the exercise of visitorial power over foreign corporations, nor will they, ordinarily, undertake to regulate the internal management of such corporations, but this rule is subject to the same exceptions as the necessity upon which it is founded, and where in a particular case, a court acquired

complete jurisdiction, and is able not only to hear and determine, but to enforce the determination in such a manner as to do complete justice, the jurisdiction will be exercised, although the result may be the regulation of the internal affairs of a foreign corporation'." State ex rel. Watkins v. North American Land & Timber Co., 106 La. 621, 31 So. 172, 87 Am.St.Rep. 309.

This exception is also noted in Fletcher's Cyclopaedia of Corporations, volume 17, section 8427: "However, the courts generally recognize that controversies may involve some consideration of, or interference with, the internal affairs or management of a foreign corporation without calling for an exercise of visitorial powers over the corporation, and the present tendencies of the courts seems to be towards a greater readiness to recognize exceptions to the general rule of noninterference, especially where the corporation is foreign in a technical sense only. As said in a recent case [Scholl v. Allen, 237 Ky. 716, 36 S.W.2d 353] 'the vague principle that courts will not interfere with the internal affairs of a corporation whose foreignness is at best a metaphysical concept must fall before the practical necessities of the modern business world'. In such cases the courts are inclined, in considering the questions of public policy and expediency to determine whether or not jurisdiction should be exercised, to look to the real, practical status of the corporation rather than its technical or mere nominal foreignness. Convenience, expediency and justice are to be determined, in part at least, by the location of the books, records, assets and the principal offices of the corporation, the place of residence of the directors and officers, and the place where its business is transacted. Inexpediency, on the other hand, may be based upon comity, legal restrictions, lack of equity on the part of the complainant or lack of power in the court to render or enforce an equitable decree for want of jurisdiction of property or parties, and unless some such basis is apparent, the court should not decline to exercise jurisdiction which it admittedly has."

In 12 Ruling Case Law, page 33, section 22, the qualification of the general rule is thus expressed: "Irrespective of the question as to the proper test to be applied in determining what are the internal affairs of a corporation, the view has been expressed by some courts that in the case of corporations which are nonresident only in that they were created in another state—the officers, agents, stockholders, business, and property all being within the jurisdiction of the court—they will not deny relief in a proper case on the ground that the 'internal affairs' of the corporation will be affected."

This exception is recognized in the case of Wait v. Kern River Mining, etc., Co., 157 Cal. 16, 106 P. 98, 100. There, the corporation was organized in the state of Arizona, but all of its property was situate, and all of its business was carried on in California, and it had its office in the city of Los Angeles. We quote from the opinion: "Defendant corporation was, as we have seen, organized under the laws of Arizona. But for all practical purposes, according to the record, it is a California corporation. Its contemplated business was all to be transacted in this state, all of its property is here, and it does business nowhere else. As was said by Judge Lurton of another corporation in Young v. South Tredeger Co., 85 Tenn. 189, 2 S.W. 202, 4 Am.St.Rep. 752, 'its whole tangible and ponderable substance is in this state.' It is a foreign corporation only in the sense that it is created in another state, and continues to enjoy corporate life by permission of that state. In every other sense, it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. Under such circumstances its residence in Arizona, or anywhere else outside of California, is the merest fiction. As to such a corporation, so organized and situated in regard to all its business and property, we can see no good reason why, as was said in the case last cited, 'the fiction as to the situs of the corporation entity ought not to yield in the interest of justice to the actual facts,' to an extent sufficient to warrant the holding that the corporation is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the situs of its stock'."

[4] In Stabler v. El Dora Oil Co., 27 Cal.App. 516, 150 P. 643, mandate was invoked for the purpose of compelling the board of directors of defendant corporation to call a meeting of its board of directors. The corporation contended that the courts of California had no right or power to interfere with its internal affairs, since it was incorporated under the laws of Arizona. The court pointed out that all the business of the corporation was transacted

in California; all its property was situated there; all the directors resided in this state, and their meeting was held there. The decision quotes the same language from the Wait case which appears above herein, and holds that the California court had the right and power to proceed, since with all the parties before it, complete jurisdiction was acquired. We therefore believe that it may safely be said that when a corporation is non-resident only in that it is the creation of another state—its officers, agents, books, place of business, business, and all its property being within the jurisdiction of the court—policy and expediency do not require the court to deny relief in a proper case on the ground that the internal affairs of the corporation will be affected.

The authorities relied upon by appellants, with one exception, involve facts which indicate an inability or want of power in the courts to enforce or effectuate their orders or decrees. In other words, the record fails to show complete jurisdiction which requires that the officers, board of directors, and the records of the corporation be present within the state whose courts have proceeded to adjudicate the questions presented. The only case which appears to make no exception whatever to the general rule is that of Thompson v. Southern Connellsville Coke Co., 269 Pa. 500, 112 A. 533. There, apparently, the state courts exercise no jurisdiction whatever in respect to *any* action involving the internal affairs of a foreign corporation. We regard the holding as opposed to the weight of authority, both in our own and other states.

[5] The demurrer to the complaint was properly overruled, for the reasons given above. The complaint does not show lack of jurisdiction.

It is contended by appellants that the portion of the judgment granting an injunction against the levying of future assessments, except upon certain conditions, was in excess of the jurisdiction of the court, and void, as it involved issues not within the pleadings. Baar v. Smith, 201 Cal. 87, 255 P. 827. We are in accord with that view. The allegations of the complaint are directed to the invalidity of the stockholders' meeting of September 16, 1936, when it is alleged the stock of plaintiffs was assessed. The prayer of the complaint reads as follows: "Wherefore, plaintiffs pray that defendants and all of them be enjoined from levying *said assessment,* imposing said penalty, making sale of said shares or any of them, or taking any step or steps in connection therewith; that such injunction issue (a) for all purposes, (b) pending the completion of an audit and investigation of the affairs of the corporation, and until a reasonable time thereafter, (c) until it be determined what shares of the corporation are legally issued; for a temporary injunction and temporary restraining order to the same effects pendente lite; for costs of suit, and for general relief." (Italics ours.)

[6] We find nothing in the pleadings which would justify the court in enjoining defendant corporation from holding, levying, and collecting any *further* assessments.

It is true that the court *finds* that 877,627 shares of stock were illegally issued, but the fact that such stock is outstanding cannot be made the basis of an injunction against the levy of any further assessments by the *corporation,* under the pleadings before us. The *stockholders* might be enjoined from voting such stock if they were before the court. Only one stockholder, A. G. Keating, who owned 583,185 shares, was made a party to the action, and he was not enjoined from the performance of any act arising from his ownership. The injunction is directed solely against *corporate* acts. The sole question presented by the pleadings here was the validity of the meeting of September 16, 1936. The court found that such meeting was not legal, and properly enjoined any further proceedings in connection with the purported levy of the assessment. That portion of the judgment which enjoined the levy of any further assessments, except upon the performance of certain conditions, exceeded the issues, and was therefore coram non judice and void. It will be noted that the conditions in the judgment mentioned above are not attached to the injunction relative to the stockholders' meeting in question, but to the injunction against *any* future levy. As the injunction against any future levies must fall, the conditions fall with it.

[7] The same contention is made by appellants in respect to the injunction against the levy of an assessment to work the Calaska mine, and to pay a promissory note executed by defendant Keating. We find that the issues with reference to the ownership of the mine by defendant corporation, and the question as to whether or not the note was a charge against the corporation, were presented and litigated. The findings were that the corporation had no title to

the mine, and that the corporation received no consideration for the note executed by defendant Keating while he was its general manager. The contention is without merit.

The judgment is modified to read as follows: "That the defendants Big Jim Mines, Inc., A. G. Keating, W. B. Oaks, C. S. Black, and F. V. Gordon (O. K. L. P. G.), and each of them, are hereby enjoined from collecting the assessment on the stock of the Big Jim Mines, Inc., noticed to be due and payable on or before October 30, 1936, and are hereby enjoined from levying or collecting any penalty for failure to pay the same, and are hereby enjoined from selling any stock at public auction for failure to pay said assessment. That the defendants, and each of them, are hereby enjoined from levying any assessment upon the stock of said Big Jim Mines, Inc., for the purpose of developing the Oak Mesa Mine property, also known as Calaska Mine, and are hereby enjoined from levying any assessment on the stock of said Big Jim Mines, Inc., for the purpose of paying the Security-First National Bank of Los Angeles anything on account of the promissory note executed by A. G. Keating."

As so modified, the judgment is affirmed.

Appellants will recover their costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

F. W. WOOLWORTH CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 11436.

District Court of Appeal, First District, Division 2, California.

June 10, 1940.

Hearing Granted Aug. 8, 1940.

1. Workmen's compensation 🔑1558

In determining whether store stock clerk was entitled to workmen's compensation for injuries in falling from window during an alleged mental lapse, in absence of medical testimony there is no causal connection between symptoms of exhaustion and want of fresh air on one hand, and affliction of a mental lapse on the other.

2. Workmen's compensation 🔑1939

In reviewing workmen's compensation award, the appellate court must assume that facts testified to by injured employee were true.

3. Workmen's compensation 🔑1358

The fact that store stock clerk was injured in falling from window did not, standing alone, establish his right to workmen's compensation.

4. Workmen's compensation 🔑1558

Evidence that store stock clerk after leaving basement felt "foggy", that he then went in elevator to fifth floor, opened elevator doors, entered hallway, turned away from his place of work and 25 or 30 feet to the left opened window, placed his pliers and pencil on the sill, and fell into light well, did not show a "faint" or a "fainting", which is a temporary suspension of consciousness due to a cerebral anemia, as regards clerk's right to workmen's compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Faint" and "Fainting".

5. Workmen's compensation 🔑628, 631, 656

Under compensation act an employee has right to seek fresh air, but he may not do unreasonable acts and claim that they arise out of the employment, and he may not create a new and added peril to which he by his own conduct has needlessly exposed himself.

6. Evidence 🔑54

An inference cannot be predicated on an inference.

7. Workmen's compensation 🔑631

If store stock clerk, after raising window sash for fresh air, sat on window ledge, swooned, and fell out of window, he was not entitled to workmen's compensation, since he could not take such a position and thus increase risk of the employer.

8. Workmen's compensation 🔑656

Where store stock clerk, who was on his way to fifth floor to return panels to storerooms, felt "foggy" on leaving basement and on reaching fifth floor opened elevator doors and turned left 25 or 30 feet, which was away from place where storerooms were located, and opened a window and placed his pliers and a pencil on the sill and fell out into a light well, injury was not one "arising out of employment" so as to entitle clerk to workmen's compensation.

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* Subsequent opinion 111 P.2d 313.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment".

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Proceeding under the Workmen's Compensation Act by Alva Sivley, employee, opposed by the F. W. Woolworth Company, employer, and the Travelers Insurance Company, insurance carrier. To review an award in favor of the employee by the Industrial Accident Commission of the State of California, the employer and insurance carrier petition for a writ of review.

Award annulled.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten, Atty., Industrial Accident Commission, and Dan Murphy, Jr., Asst. Atty., both of San Francisco, for respondent.

STURTEVANT, Justice.

While employed by F. W. Woolworth Company as a stock clerk in one of the stores of the employer, Alva Sivley suffered an accident. He applied to the Industrial Accident Commission to fix the amount of his compensation. The commission made an award in his favor against the Travelers Insurance Company, the insurance carrier of the employer. The latter applied for a rehearing. That application was denied and the insurance carrier has applied to this court for a writ of review.

That Alva Sivley was employed by the F. W. Woolworth Company and that he suffered an accident while so employed are admitted facts. However, it is earnestly contended that the evidence does not support the finding that the accident "arose out of" said employment. The determination of that claim involves a consideration of the following facts:

The F. W. Woolworth Company maintains a store facing Post street and extending to the rear abutting on Maiden lane. The building is five stories or more in height. It is known as the Rosenthal building. Adjacent to that building is one occupied by the Liebes Company. Between the two buildings is a light well or court. The Woolworth Company used the basement and main floor of the Rosenthal building for sales rooms. On the third floor it uses some of the space as a storeroom. On the fifth floor it uses two rooms for storage. Those two rooms are numbered 514 and 515. They are located in the southeast corner of the building. A small hall leads from west to east to serve both rooms. At the extreme western end of that hall is the freight elevator. As one steps out of the freight elevator another hall extends to the left, that is to the north. Down that hall twenty-five or thirty feet distant there is a row of four windows facing the above-mentioned light well. The windows are two feet seven inches from the floor and the window ledge is eighteen inches wide. The windows are large and the glass is set in metal casing. From the window sill the space is unbroken on the outside down to the bottom of the windows in the second story. It is the custom of the management that when the store is closed in the evening the outside doors and windows are all closed.

The applicant is a young man about twenty-seven years of age. He is about five feet seven inches tall and slender in build. For about three years he had been employed by the F. W. Woolworth Company. His work had been principally in duties performed in the storeroom on the third floor. On November 21, as the day drew to a close, he inquired if there was to be any night work and if so he wanted the employment. His request was granted. After his ordinary day's work was done he went to the lunch room, had an evening meal, and returned to do the work that was on hand. That work consisted of going to the storeroom on the fifth floor, collecting certain display panels and taking them to the main floor and basement floor for the purpose of making a display of holiday goods. The panels were made of cardboard and were light. In a short time other employees arrived and all engaged in putting the panels in place. To do that work required the use of a ladder and making certain wire connections. By ten o'clock in the evening the necessary panels had been put in place and there were some extras that were not needed and which were to be returned to the fifth floor. Sivley commenced to take them back. He put several in the freight elevator and took them to the fifth floor. While there he heard a buzz that indicated he was needed below. He set the panels off on the floor in the corridor on the fifth floor and then took the elevator below. On arriving at the bottom he found that one of the employees wanted Sivley to let him out. After doing so, Sivley locked the door, returned to the elevator, and started to return to the fifth floor. In doing his work it was his habit to carry a lead pencil behind his ear. While engaged in placing the panels he used a pair of pliers which he carried in his pocket. He testified:

"I started up and found it was getting stuffy in there. I needed air, and evidently I walked down the hall and opened a window for air, and when I did why that is the last I remember, and I came to down there in the light well.

"Q. And then when do you remember it getting stuffy, that it was getting stuffy and that you needed air? A. When I started up in the elevator.

"Q. When you started up in the elevator? A. Yes, from the basement. Just after that, oh, everything was hazy, I don't know.

"Q. Everything is hazy since then? A. Yes.

"Q. And the next thing you know is when you were picked up, is that right? A. No, I came to down in the light well and I was hollering for help. * * *

"Q. Then the last thing you recall is when you started up in the elevator? A. Started up, yes. I don't know how far I got when I got this feeling at all.

"Q. Then you don't want us to understand you remember you went over and opened this window, that you started to the window even. A. No because I don't know a thing about it. I don't want you to understand I even think I know because I don't know a thing about it. * * * A. It (the light well) goes off from the left from the elevator.

"Q. And it isn't in the direction that you would have gone if you had been going to the rear where the stock was put? A. No sir.

"Q. Down the other way? A. Down the other way, yes sir.

"Q. And as far as anything connected with taking care of these articles that you brought up from the basement there wouldn't be any need of your going down this other hallway, was there? A. Why No."

The foregoing testimony was repeated but substantially to the same effect.

Approximately thirty minutes after Sivley let his fellow employee out of the door a tenant of the Liebes building heard Sivley calling for help. Others rushed to his assistance. He was found at the bottom of the light well level with, and just outside of, the windows on the second floor.

He was at once removed to a hospital and on examination it was found he had suffered numerous injuries—broken bones—six in right foot, one in left, three in pelvic region; left elbow dislocated and many bruises and scratches. One of the doctors who examined him expressed the opinion that in falling he fell feet first. Almost immediately after the accident an examination was made on the fifth floor and it was found the first window to the left of the elevator was open. The pliers above mentioned were lying on the window sill and Sivley's pencil rested in between the handles of the pliers.

As to the ventilation of the premises it should be noted that the room on the main floor is sixty feet by one hundred feet and the ceiling is twenty-five feet high. The other rooms on other floors have a ceiling about fifteen feet high. The testimony showed that when the elevator was operated there was an unusually heavy draft. While performing their work during that evening some of the employees took off their coats but none complained of heat or suffocation. The report of the weather bureau showed the temperature for San Francisco as being from fifty-four to fifty-six degrees Fahrenheit between six o'clock and midnight. There was no testimony that any artificial heat was applied to the building during those hours. Rooms 514 and 515 where the panels were to be stored were well ventilated by two open windows on Maiden lane and through the transom, the glass in which was broken. The transom is about thirty-eight by twenty-three inches.

Ordinarily the applicant worked from about 7:30 in the morning until about five in the evening. Sometimes he worked overtime. As shown by the time cards he had not worked overtime at all during the previous week. On Saturday he was released at noon until Monday morning. He worked until about half past ten on

Monday night and the accident occurred at about half past ten on Tuesday night.

[1] While the claimant testified that in the elevator he became "foggy", he did not testify that at any time he fainted. His contention was in effect that he suffered a mental lapse. There was not a particle of evidence, medical or otherwise, showing the nature of the mental lapse or the cause thereof. In particular there was no evidence that the work he was performing did, or could, cause a mental lapse. In the absence of medical testimony there is no causal connection between the symptoms of exhaustion and want of fresh air, on the one hand, and the affliction of a mental lapse, on the other. Veloz v. Fidelity-Union Casualty Co., Tex.Civ.App., 8 S.W.2d 205, 206, and 73 A.L.R. 528 and cases there cited.

[2, 3] The claimant testified that after the mental lapse commenced he remembered nothing until he called for help. Assuming, as we must, such facts are true, the claimant is not helped. If he was unable to testify to facts establishing the several elements of his cause of action, he should have produced the testimony of others. The fact he was injured did not, standing alone, establish a case in his behalf. As stated in Mello v. Industrial Acc. Comm., 84 Cal.App. 233, at page 236, 258 P. 104, at page 105, "The burden was upon the petitioners 'to show that the injury arose out of as well as in the course of the employment; and there is no presumption * * * that because an injury occurs in the course of the employment it arises out of or because of that employment.' G. L. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 593, 200 P. 17, 19." Moreover, as already shown, from the instant the claimant left the door of the elevator and turned to his left instead of going straight ahead to rooms 514 and 515, he stepped aside from his employment and was not acting within his employment. The nexus was broken. He has not in any manner excused or explained his act. If he was in truth and in fact seeking fresh air the record shows his line of work would take him directly to fresh air in rooms 514 and 515, the place where the panels were to be stored and which was distant from the elevator door about the same distance as the window out of which he subsequently fell.

[4] In the briefs a fainting is spoken of. The claimant did not testify that he fainted and there was no evidence of a "fainting". That ailment is defined in Dorland's American Illustrated Medical Dictionary as "* * * a temporary suspension of consciousness due to a cerebral anemia". But the claimant does not say that at any time before he struck the bottom of the light well he was unconscious. The uncontradicted evidence is that while in the elevator, just after leaving the basement, he felt "foggy". The evidence shows he then went to the fifth floor, opened the elevator doors, entered the hallway, turned away from his place of work, passed twenty-five or thirty feet to the left, opened the window, placed his pliers and pencil on the sill, and fell into the light well. Such facts do not, within any proper meaning of the words, show "a faint" or "a fainting".

[5] In support of the award the respondents quote testimony to the effect that Sivley was exhausted from long hours of work; that when the elevator left the basement he felt "foggy and that he needed air"; and that his subsequent acts were done to administer to those complaints. That an employee has a right to seek fresh air is settled law. Honnold on Workmen's Compensation, vol. 1, p. 381. But in that connection the law is also well settled that an employee may not do unreasonable acts and claim they arise out of the employment and he may not create a new and added peril to which he by his own conduct has needlessly exposed himself. (71 Cal. Jur., 657.) "The accident must be one resulting from a risk reasonably incident to the employment." Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 685, 158 P. 212, 213, L.R.A.1916F, 1164. In Monahan v. Hoage, 67 App.D.C. 174, 90 F.2d 419, 421, the rule is clearly stated. In that case the United States Court of Appeals for the District of Columbia applied said rule in a case, the facts of which were closely parallel to the facts in the present case.

[6, 7] Finally it is argued that as Sivley became "foggy" it will be inferred he needed fresh air; that it will then be inferred he went to the window for the purpose of getting fresh air; and then it will be inferred he fell out of the window. To that argument there are two

answers. One is that an inference cannot be predicated on an inference. The other answer is that a man five feet seven inches tall, standing by it, cannot fall out of a window which is two feet seven inches from the floor and which has a window ledge eighteen inches wide. The center of gravity of his body will be well within the building and not without it. Moreover, if Sivley fell out of the window he would have gone down head first and not feet first. If, after he raised the window sash, he sat on the window ledge, swooned, and fell out of the window, his claim is not better. He was not entitled to take such a position and thus increase the risk of the employer. Monahan v. Hoage, 67 App.D.C. 174, 90 F.2d 419, 420.

[8] The record contains no evidence supporting the finding contained in the award that Sivley suffered injuries "arising out of" his said employment.

The award is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

In re ANDREWS' GUARDIANSHIP.
ANDREWS v. ANDREWS et al. *

No. 12603—S.

District Court of Appeal, Second District, Division 1, California.

June 11, 1940.

Hearing Granted Aug. 9, 1940.

1. Insane persons 🔑27

Reviewing court was without jurisdiction to consider merits of an appeal, from an order appointing a guardian for an incompetent, which was not taken within the time prescribed by law, and appeal would be dismissed. Probate Code, § 1233; Code Civ.Proc. § 939.

2. Insane persons 🔑8

The superior court acquired jurisdiction of a proceeding to appoint a guardian for an alleged incompetent when petition for the appointment was filed and service of notice, required by the statute, made upon alleged incompetent, and that alleged incompetent was not present at the hearing, or that determination of the issue presented at the hearing was erroneous, does not show a lack of jurisdiction. Probate Code, § 1461.

3. Insane persons 🔑27

No prejudice resulted to an alleged incompetent, as result of a physician's affidavit taken over telephone, stating that, in opinion of affiant, alleged incompetent was unable to attend a hearing, on a petition to secure the appointment of a guardian for her, where service of notice of hearing was properly made upon alleged incompetent and at a hearing, on motion to vacate guardianship order, physician confirmed statements made by him in his affidavit.

4. Insane persons 🔑13

An attorney for person filing petition for the appointment of a guardian for an alleged incompetent, not being a party to the action, was competent to serve the citation on alleged incompetent. Code Civ.Proc. § 410.

5. Insane persons 🔑25

The alleged power of the superior court to set aside an order, appointing a guardian, from which no appeal has been taken, and which for all purposes was final, could be exercised only when, in the discretion of the superior court, the ends of justice would be thereby served.

6. Judgment 🔑336, 386(1)

The granting of an application to set aside a judgment which is not void on its face must depend on the facts and circumstances of each particular case except that the application must be made within the time limited by statute. Code Civ.Proc. § 473.

7. Insane persons 🔑25

The superior court did not abuse its discretion in refusing to set aside original order appointing a guardian for an alleged incompetent from which no appeal had been taken, where alleged incompetent acquiesced in the order for four months and permitted guardian to administer her estate.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, and V. N. Thompson, Judges.

Proceeding in the matter of the guardianship of the estate of Juliette B. Andrews, on the petition of John F. Andrews, and opposed by Juliette B. Andrews. From two orders adjudging Juliette B. Andrews, incompetent, and appointing the First National Trust & Savings Bank of San Diego as guardian of her estate and denying Juliette B. Andrews' petition to vacate previously entered order appointing a guardian, she appeals.

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* Subsequent opinion 110 P.2d 399.

Appeal from order appointing a guardian dismissed. Order denying petition to vacate previous order affirmed.

Hugh B. Rotchford and Hubert Starr, both of Los Angeles, for appellant.

Wright, Monroe, Harden & Thomas, of San Diego, for respondent First Nat. Trust & Savings Bank of San Diego.

WHITE, Justice.

This is an appeal from two orders of the superior court of San Diego county, the first of which was made on April 22, 1938, adjudging the appellant incompetent and appointing respondent bank as guardian of her estate, while the last-named order was one made April 13, 1939, denying appellant's petition to vacate the previously entered order appointing a guardian for her estate.

The pertinent facts are that on or about April 7, 1938, proceedings were had upon a complaint which sought commitment of appellant to a state institution as an alcoholic. After a hearing at the psychopathic ward on April 14, she was sent home and the hearing continued one year, a psychopathic parole officer being designated "to look after her to some extent". Mrs. Andrews was represented at this hearing by attorney Keith Ferguson. Two days thereafter, on April 16, Mr. Ferguson filed on behalf of John B. Andrews, husband of appellant, a petition alleging that the latter was incompetent and praying for the appointment of a guardian of her estate. A citation was issued, and in the afternoon of that day Mr. Ferguson personally served the same upon Mrs. Andrews. Mr. Ferguson told Mrs. Andrews at that time that if her physician believed that the state of her health was such that she should not appear they could substitute the affidavit of her physician to that effect, and that it seemed to him a proper case for the affidavit to be used. Mrs. Andrews asked if she should contact her doctor, but Mr. Ferguson said he knew her physician, Dr. Diefenbach, and would speak to him; that he presumed he would be willing to make such an affidavit. On April 22, the day set for the hearing, Mr. Ferguson prepared an affidavit and sent it to Dr. Diefenbach, who signed it after a telephone conversation with Mr. Ferguson. It was then returned to the office of Mr. Ferguson, who affixed his signature and notarial seal thereto and presented it at the hearing. The affidavit contained the statement "that Juliette B. Andrews * * * is under his" (affiant's) "professional care; that she is confined to her home in the personal charge of nurses at all times; that in the opinion of affiant, she is not able to attend a court hearing on Friday, April 22, 1938, by reason of her physical condition". The doctor testified at the hearing on the petition to vacate the order appointing the guardian that he had last seen Mrs. Andrews on March 15, but that his affidavit was based on "knowing the patient since 1936; seeing her through several illnesses; letters which I had from Doctor Kerr of the University of California * * * and also a neurologist whom I don't recall"; also reports from Dr. Yuskis as to her alcoholism and inability to eat; and extreme nervousness and inability to sleep at night. The doctor further testified:

"I knew she was up around the house, at least this is my report of the nurse. I knew she had been out for rides. I urged that. I knew she was * * * very nervous and very restless * * *

"Q. You have not given us the ultimate conclusion that you reached as to whether she was in condition to be produced in court or not? A. Physically she could have been taken to court. * * *

"Q. What did you apprehend, as a professional man, would probably happen? * * * A. An extreme nervous tension, one of these cataleptic or epileptic seizures, whichever they were, and strain on a woman who had gone through considerable, with a serious illness shortly in the background. * * * I thought she should not be produced.

"Q. Why not? A. On the ground just stated, and from the fact that this was presumably settled and it was agreeable to her to go through with this procedure."

On cross-examination he testified: "Q. * * * You were under the impression, at least under the belief at the time you made this affidavit, that Mrs. Andrews had consented to the appointment of a guardian of her property, and that this proceeding was agreeable to her? A. That is what I was told and believed."

The doctor further testified that he never saw Mr. Ferguson in person; that he thought the incompetency hearing was merely "a formal routine matter".

In its decision the trial court found that Mrs. Andrews was well able to attend the guardianship hearing, had she so desired.

It is stated in respondent's brief and not denied, that since the adverse ruling upon her application to revoke the order appointing the guardian, appellant on her own petition has been restored to competency.

[1] The appeal from the order appointing the guardian must be dismissed, for the reason that the same was not taken within the time prescribed by law. Probate Code, § 1233; Code Civ.Proc., § 939. This court is therefore without jurisdiction to consider the appeal on the merits. Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am.St.Rep. 68; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459.

[2] Appellant's claim that the order denying her petition to set aside the decree appointing the guardian must be reversed because the court was without jurisdiction, cannot be upheld. It is true, as urged by appellant, that section 1461 of the Probate Code provides that the alleged incompetent "must be produced at the hearing", but that such attendance may be excused upon the filing of an affidavit by a physician that by reason of physical disability such person is unable to attend. However, it is not the presence of the alleged incompetent at the hearing that confers jurisdiction. That is acquired when the alleged incompetent has legal notice of the proceedings. Even though the determination of the issue presented at the hearing as to her competency was erroneous, that does not show a lack of jurisdiction. Due and legal service upon the alleged incompetent of the notice in conformity with the provisions of section 1461 of the Probate Code in the instant case is unquestionably established. When, therefore, appellant's husband filed the petition and service of the notice required by the statute was made upon appellant, the court acquired jurisdiction. In re Pozzo's Guardianship, 104 Cal.App. 11, 285 P. 330; Halett v. Patrick, 49 Cal. 590; Snyder v. Superior Court, 206 Cal. 346, 274 P. 337.

[3] It becomes unnecessary to pass upon the legality of the physician's affidavit taken through the telephone, for it is evident no prejudice resulted to appellant therefrom. Indeed, at the hearing upon the motion to vacate the guardianship order the doctor confirmed the statements made by him in his affidavit and gave his reasons for believing that the alleged incompetent should not have attended the hearing, testifying as to the consequences which in his opinion might ensue to her physical and mental well-being were she to attend. Banning v. Banning, 80 Cal. 271, 22 P. 210, 13 Am.St.Rep. 156; Fairbanks, Morse & Co. v. Getchell, 13 Cal.App. 458, 110 P. 331.

[4] We find no merit in appellant's contention that due and legal service of the citation was not made upon her for the reason that under the old common-law rule, undisturbed by statute, an attorney may not serve a process the issuance of which was procured by him. Upon conflicting but substantial evidence, the court found that in the guardianship proceeding attorney Ferguson was acting as counsel for appellant's husband. Not being a party to the action, the attorney was competent to serve the citation. Code Civ.Proc., sec. 410; Anderson v. Goff, 72 Cal. 65, 66, 13 P. 73, 1 Am.St.Rep. 34; Sheehan v. All Persons, 80 Cal.App. 393, 252 P. 337.

[5-7] Lastly, appellant urges that the order refusing to set aside the original order appointing a guardian should be reversed because the petition for such relief was timely and merited for appellant an opportunity to have a hearing upon the merits and in her presence. Conceding, but not deciding, that the court had a right in the second proceeding to set aside an order from which no appeal was taken and which for all purposes was final, such power nevertheless could be exercised only when, in the discretion of the court, the ends of justice would be thereby served. In the instant case the court resolved its discretion against appellant, and we cannot say that the court's action amounted to an abuse of discretion. The granting of such relief as to a judgment or order not void upon its face must depend somewhat upon the circumstances of each particular case, except, of course, that application for relief must be made within the time limited by section 473 of the Code of Civil Procedure. Where, as in the case before us, the applicant for relief acquiesced in the original order of guardianship for four months and permitted respondent bank as guardian to administer her estate, we would not be

justified in concluding that the trial court's decision was not a fair and just exercise of its discretion.

For the reasons herein stated, the appeal from the order of April 22, 1938, appointing respondent bank as guardian is dismissed, and the order of April 13, 1939, denying the petition to vacate the aforesaid order of April 22, 1938, is affirmed.

We concur: YORK, P. J.; DORAN, J.

WEBSTER v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.*

Civ. 2364.

District Court of Appeal, Fourth District, California.

June 4, 1940.

Rehearing Denied July 1, 1940.

Hearing Granted Aug. 1, 1940.

1. Physicians and surgeons 🔑11(3)

A proceeding against dentist for unprofessional conduct is in nature of a "criminal trial" in which all intendments are in favor of accused and evidence is to be construed with a degree of strictness commensurate with severity of penalty imposed. St.1937, p. 1247, §§ 1670–1680.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Trial".

2. Physicians and surgeons 🔑6(2)

A dentist cannot be held to have violated the provisions of the Dental Practice Act unless his acts come within both the letter and the spirit of the law. St.1937, p. 1247, §§ 1670–1680.

3. Evidence 🔑60

In the absence of evidence that there has been a violation of statute regulating dentists, presumption is that the law has been obeyed. St.1937, p. 1247, §§ 1670–1680.

4. Physicians and surgeons 🔑11(1)

A license to practice dentistry is "property right" of which the holder cannot be arbitrarily deprived.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

5. Physicians and surgeons 🔑11(2)

Where advertising published by dentist was not shown to have been of a character tending to deceive or mislead the public, or that it advertised a professional superiority or the performance of professional services in a superior manner, or that advertisement was to guarantee any dental service, order suspending dentist's license for publication of such advertising was not justified. St. 1937, p. 1248, § 1680, subds. 11, 12, 17.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Proceeding for a writ of mandate by William L. Webster against the Board of Dental Examiners of California. From a judgment for the defendant, the plaintiff appeals.

Reversed, with directions.

Charles E. Burch, Jr., and Irwin R. Hazen, both of San Diego, for appellant.

H. E. Lindersmith, of Los Angeles, for respondent.

GRIFFIN, Justice.

This is an appeal from a judgment of the superior court of San Diego county denying appellant's petition for a writ of mandate directed to the respondent Board of Dental Examiners of California. The accusation concerns a newspaper advertisement published by the appellant in the San Diego Progressive Journal on June 10, 1938. It contained some of the following expressions:

"Dr. Webster offers his finest dental plates. Natural expression. The newest plate material in dentistry. This new material, although having the most delicately shaded natural gum color, will absolutely not change in color. Does not stain from smoking, alcohol or alkaloids, will not shrink or warp. Be sure your new dentures are made of this wonderful new material. Seeing Is Believing. Dr. Webster invites you to See and Talk to former patients who will be in his office all of this week to show you These Beautiful Plates. Only by Seeing them can you actually Appreciate their Natural Beauty. Note how they Mold the Features back to that Youthful appearance by adding charm and Beauty to the Profile. Talk to these patients and let them tell you they Eat Corn Off The Cob, Eat Steaks and Taste their foods as well as they ever did. A Natural Expression. These new dental plates are so ably designed that Dr. Webster challenges you to detect any false appearance in either the beautifully shaded porcelain teeth or artistically blended natural looking pink gums. Each tooth is set so that it appears to be growing there, yet these beautiful plates cost you very little money. * * *

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* Subsequent opinion 110 P.2d 992.

"Dr. Webster's Immediate Restoration Plate Material Weighs Less Than 1 Oz.

"This beautiful plate material which forms the gums and the main body of Dr. Webster's Natural Appearing Dental Plates has a new natural Gum-Pink color which looks just like real healthy gums. Made from a secret formula, is a development of dental science which many plate wearers have been thankful for. Is particularly adaptable to difficult cases, since it weighs Less Than One Ounce, enabling Dr. Webster to fashion a plate which will fill out the cheeks, and fit properly without being heavy or bulky.

"Have your dental plates made 'The Webster Way' of immediate restoration. You need not be without your teeth for even one hour, or lose a single day's employment. Dr. Webster's immediate restoration dentures or plates are faithful reproductions of your own natural gums and teeth, in their true color, size and form. These plates are made to defy detection—so much so that members of your immediate family or most intimate friends need not know that you are wearing artificial teeth. Why suffer the embarrassment of being without your teeth even one hour.

"Is your mouth difficult to fit? No matter how little you pay for your dental plates at Dr. Webster's, an individual study of your case is always made. There is no limit to the care used in fitting difficult cases. Great care is taken not to cause wrinkles, drooping mouth, unnecessary lines, unnatural expression, etc., when making these new beautiful plates * * * 'See Dr. Webster today' and have your dental needs cared for the 'Webster Way'."

The charging part of count one of the accusation reads in part as follows: "That William L. Webster has been guilty of unprofessional conduct as the same is defined in the aforesaid Dental Practice Act of the State of California, in that * * *" he "* * * knowingly and intentionally caused to be published * * * in * * * a newspaper * * * an advertisement wherein * * *" he "* * * did advertise as a dentist, professional superiority or the performance of professional services in a superior manner * * *."

Count two charges: "That William L. Webster * * * did advertise as a dentist and did make use of advertising statements of a character tending to deceive or mislead the public * * *".

Count number three charges that he "did advertise to guarantee dental service or services performed or offered to be performed by him * * *."

The accusation was presented to the Board of Dental Examiners pursuant to the provisions of the Dental Practice Act. Business and Professions Code, §§ 1670–1680, St.1937, p. 1247, Deering's General Laws, Act 2048, § 13, 14. Appellant filed a written answer by which he admitted that he caused the advertisement to be published at the time and place designated in the accusation. Testimony both oral and documentary was taken and the matter submitted to the Board of Dental Examiners for decision. The board, after considering the testimony, found the accused guilty on each of the three counts alleged and suspended the license of accused to practice dentistry in California for a period of six months on each count, the periods of suspension to run concurrently. The order provided that in case the accused should institute judicial proceedings the execution should be stayed pending final judicial judgment. Thereafter the accused sought a review of the order of said board by the superior court of San Diego county by way of petition for writ of mandate. The board filed an answer and return to the petition.

At the hearing before the superior court, the reporter's transcript of testimony taken before the board, together with the minutes of the board of all the proceedings had before that board were placed in evidence. The superior court decreed that the alternative writ of mandate should be discharged and that the peremptory writ of mandate should be denied. Findings of fact were expressly waived in open court by the parties. This appeal is taken by the petitioner from the judgment of the superior court.

The engrossed bill of exceptions sets forth the evidence considered by the board and the trial court, and includes the advertisement above set forth and extracts from the testimony of William L. Webster. He testified that by the use of the term "natural expression" he meant "the correct setting of the teeth according to the mold of the patient's face, the mold of your teeth, and the color, and the setting of the teeth to make it as natural appearing as possible", i. e., "they are made so naturally that one gets a natural mechanical efficiency out of them * * * when eating"; that in using the words "the newest plate material in dentistry", he meant acrylic resin, one of the newest materials; that he gained that information from the manufacturers; that "Dr. Webster's immediate restoration plate material" is not some special material which he had but material in general use by the dental profession in San Diego; that the "Webster way of immediate restoration" is his method of operating his business, a slogan which is not copyrighted; that he had no special way of immediate restoration but the technique used by the whole profession; that it consisted of taking "the impression before the teeth are all taken out, and the plate inserted immediately after the teeth are extracted"; that the secret "formula" referred to was not a secret formula of his own but of the manufacturer. Referring to the words "newest plate material in dentistry" and that it will not change in color, nor will it stain from smoke, alcohol or alkaloids, nor will it shrink or warp, he testified that the contents of the ad were based upon his experience and testing of the materials in his own laboratory by the manufacturers and that he did not intend to convey the impression that he was the only dentist using the new material.

The only contention presented is that there was not sufficient evidence before the respondent board or the superior court upon which petitioner could be legally found guilty of unprofessional conduct as defined in subdivisions 11, 12, and 17, section 1680, Dental Practice Act of California, St.1937, p. 1248. These subdivisions provide in general:

11. "The making use of any advertising statements of a character tending to deceive or mislead the public."

12. "The advertising of professional superiority or the performance of professional services in a superior manner."

17. "The advertising to guarantee any dental service * * *."

The respondent board is an administrative or regulatory board created under and by virtue of the Dental Practice Act of California, as incorporated in the Business and Professions Code of this state. Under this act, the respondent board is empowered to issue licenses to dentists privileging them to practice dentistry in California and, after notice upon hearing determining a dentist to be guilty of certain enumerated acts or omissions, to suspend or revoke his license. The question therefore presented is the application of the statute to the evidence herein presented.

Appellant argues that the proceedings are "quasi criminal" in nature and impose a strict construction of the law and evidence herein involved in favor of petitioner, citing Cavassa v. Off, 206 Cal. 307, 314, 274 P. 523; Bley v. Board of Dental Examiners, 120 Cal.App. 426, 431, 7 P.2d 1053; Randall v. Board of Medical Examiners, 110 Cal.App. 61, 64, 293 P. 790; and Messner v. Board of Dental Examiners, 87 Cal.App. 199, 205, 262 P. 58.

[1, 2] From the above-cited cases it appears that such proceedings have been held to be in the nature of a criminal trial, in which all intendments are in favor of the accused and the evidence is to be construed with a degree of strictness commensurate with the severity of the penalty imposed. No one can be held to have violated the provisions of the Dental Practice Act unless his acts come within both the letter and the spirit of the law.

[3] We are not unmindful of the fact that the question involved is one of ethics, upon which professional men naturally have honest differences of opinion. It is not for us to determine the ethical question. It is solely for us to determine whether there has been a violation of the law. In 1935 the California legislature joined other states in a movement toward a transition in the field of dentistry to a more dignified and ethical profession, and accordingly passed legislation on the subject relating to dental advertisements. The law, however, does not prohibit advertising entirely, as is the case in some states, but endeavors to set up some standard to regulate a limited form of advertising. The constitutionality of this form of legislation has been upheld in Semler v. Oregon

State Board of Dental Examiners, 294 U. S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. See, also, Semler v. Oregon State Board of Dental Examiners, 148 Or. 50, 34 P.2d 311. It appears from the history of the legislation in the various states regulating the conduct of practitioners in the learned professions of law, medicine and dentistry, that there is a marked tendency in recent years to enact more stringent regulations so that the ignorant, gullible members of the public be protected from quacks and charlatans, who spurn the ethics of their profession and thrive on ornate methods of advertising. However, it has been firmly established that a statutory proceeding for the revocation of a license is in the nature of a criminal trial in which all intendments are in favor of the accused. In the absence of evidence that there has been any violation of the law, the presumption is that the law has been obeyed. Messner v. Board of Dental Examiners, supra.

[4, 5] We will not endeavor to set forth and analyze each statement in the advertisement above mentioned separately. Some of the statements, when separately stated and technically construed, together with the inferences that may be drawn therefrom, may border on a violation of the act. It must be remembered that the truth of the statements set forth in the advertisement are not challenged. Therefore, it cannot be rightfully maintained (1) that they were of a character tending to deceive or mislead the public, or (2) that they advertised a professional superiority or the performance of professional services in a superior manner, or (3) that the advertisement was to guarantee any dental service. We do not wish to condone or approve any endeavor to circumvent the spirit and intent of the law and open the field to quacks and charlatans who spurn the ethics of their profession and thrive on ornate methods of advertising. However, in view of the fact that the proceedings are of a criminal nature, and that a license to practice dentistry is a property right of which the holder cannot be arbitrarily deprived, we feel impelled to hold that the respondent has not met the burden imposed upon it to establish by clear and convincing evidence appellant's guilt, and before his license to practice dentistry can be revoked or suspended it is essentially necessary so to do. We are unprepared to approve and sustain an order suspending a license for the publication of the article mentioned. Although our attention has not been called to any case where the facts are synonymous to the facts in the instant action, the publication and the reasoning expressed in Barron v. Board of Dental Examiners, 109 Cal.App. 382, 293 P. 144, are pertinent.

The judgment of the trial court is reversed, with directions to enter an order that respondent reinstate appellant's license as prayed for in his petition.

We concur: BARNARD, P. J.; MARKS, J.

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39 Cal.App.2d 477

PEOPLE v. BONNER.

Cr. 399.

District Court of Appeal, Fourth District, California.

June 13, 1940.

Criminal law ⚷1182

Where clerk's transcript was filed in the District Court of Appeal on March 22, 1940, and the reporter's transcript on April 9, 1940, and cause was regularly calendared for June 11, 1940, but no one appeared for appellant and no briefs were filed on his behalf, motion by attorney general for affirmance of conviction would be granted. Pen.Code, § 1253.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Thomas J. Bonner was convicted of burglary and he appeals.

Affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant was charged with the crime of burglary and with a prior conviction of felony. He admitted the prior conviction and was found guilty of burglary.

The clerk's transcript was filed in this court on March 22, 1940, and the reporter's transcript on April 9, 1940. The cause was regularly calendared for June 11, 1940, and no one appeared for the appellant and no briefs have been filed on his behalf. When the cause was called the attorney general moved for an affirmance under section 1253 of the Penal Code.

The motion is granted and the judgment is affirmed.

I concur: MARKS, J.

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39 Cal.App.2d 458

VAN ANTWERP v. SMITH.

Civ. 11061.

District Court of Appeal, First District, Division 1, California.

June 11, 1940.

1. New trial 🔑70

In passing upon propriety of order granting new trial, the only test is whether there is any evidence that would legally substantiate and uphold a verdict for the moving party if the jury had decided for him.

2. New trial 🔑71

In pedestrian's action for injuries suffered when struck while crossing street, by automobile making left turn, conflicting evidence on whether automobile was on wrong side of street *held* to authorize either verdict for plaintiff or verdict for defendant, under which circumstances grant of new trial after verdict for defendant was not an abuse of discretion. Vehicle Code, § 560, St.1935, p. 188.

3. Automobiles 🔑206

The rule requiring constant vigilance by pedestrians to protect their own safety must be relaxed if there is evidence to show that automobile was at least partially on wrong side of street.

4. Automobiles 🔑160(4)

Generally, dependent upon the facts of the case, driver of automobile should yield the right of way to a pedestrian crossing road within a pedestrian lane. Vehicle Code, § 560, St.1935, p. 188.

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by Anna Van Antwerp against F. E. Smith, also known as F. E. Schmidt, for injuries suffered when struck by automobile. From an order granting plaintiff's motion for new trial, defendant appeals.

Affirmed.

Murphy & Hall, of Santa Cruz, for appellant.

Stanford G. Smith, of Santa Cruz, and Anthony J. Franich, of Watsonville, for respondent.

WARD, Justice.

An appeal by defendant in a personal injury action from an order granting plaintiff's motion for a new trial. The order was granted upon the grounds of the insufficiency of the evidence to justify the verdict, and that the verdict is against the law. Appellant contends that the evidence as a matter of law establishes his freedom from negligence, and that contributory negligence of plaintiff was conclusively shown.

[1] Appellant attacks certain instructions given the jury on the court's own motion. It is admitted, however, that no prejudice resulted to his cause as a result thereof as the jury returned a verdict in his favor. He contends that the instructions, nevertheless, indicate the attitude of the trial judge in ruling upon the motion for a new trial. In passing upon the propriety of an order granting a new trial, the only test is whether or not there is any evidence that would legally substantiate and uphold a verdict for the moving party had the jury decided for him. Measured by this test, the only question to be decided in the instant case is, has the trial court abused its discretionary powers.

The accident occurred at Soquel and Pacific avenues in the city of Santa Cruz. Soquel avenue, running approximately easterly and westerly, intersects and terminates at Pacific avenue, which runs generally in a northerly and southerly direction. Traffic signals are operated at the intersection. Defendant, accompanied by his wife, was driving his automobile in a westerly direction on Soquel avenue, approaching its intersection with Pacific avenue. He testified that he stopped his car at the intersection to await the "Go" signal, whereupon he made a left hand turn. At that time pedestrians were crossing from the west to the east side of Pacific avenue in the southerly pedestrian lane, plaintiff being approximately five feet behind the other crossing pedestrians. When near the center of Pacific avenue plaintiff was struck by the front right bumper of defendant's car, knocked down and suffered certain injuries, the basis for the claim for damages.

[2] Defendant claims that immediately before the impact plaintiff gave him a signal to proceed. According to plaintiff's testimony, she did not observe the car and did not give such signal. She also contends that the defendant "cut" into the intersection. To substantiate this claim, the position of her body after the impact, and the location of the car, are called to our attention. With considerable force, defendant quotes testimony to disprove this contention. The jury could reasonably have adopted either theory.

[3, 4] Defendant urges that plaintiff was guilty of contributory negligence, but on this point the evidence seems to be conflicting. Defendant places plaintiff outside of the pedestrian lane. Plaintiff's testimony contradicts this statement, and the evidence of the impact, the location of the car, and the position of plaintiff's body within the pedestrian lane near the center thereof, tend to uphold her contention. If plaintiff's contention that defendant was on, or at least partially on, the wrong side of the street, is correct, and there is some evidence to uphold it, then the rule requiring constant vigilance on the part of pedestrians to protect their own safety, as in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, 515, "to look is to see", must be relaxed and made applicable to the facts of this case. Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 93 P.2d 135; Wright v. Foreman, 86 Cal.App. 595, 261 P. 481; Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518; Gibb v. Cleave, 12 Cal. App.2d 468, 55 P.2d 938; Sinclair v. Harp, 18 Cal.App.2d 167, 63 P.2d 876. It should be noted that generally, dependent however upon the facts of a case, the driver of an automobile should yield the right of way to a pedestrian crossing a road within a pedestrian lane. Vehicle Code, § 560, St. 1935, p. 188.

In Gallardo v. Luke, 33 Cal.App.2d 230, 233, 91 P.2d 211, 213, the court said: "In the instant case a scrutiny of the evidence shows that the experienced mind of the judge could reach a different though rational conclusion than the possibly equally reasonable one drawn by the jury. Upon the question of whether or not decedent misjudged his ability to avoid the impact with the truck, and whether he exercised due care and prudence under the particular circumstances presented in this case are debatable questions. Even if this court reached a conclusion in conformity with the views of the jury, it could not impose and substitute its views upon this controvertible issue unless the trial court abused its discretion."

No abuse of discretion on the part of the trial judge has been demonstrated. The order granting a new trial is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

39 Cal.App.2d 461

DE LA FALAISE v. GAUMONT-BRITISH PICTURE CORPORATION, Limited, et al.

Civ. 11897.

District Court of Appeal, Second District, Division 1, California.

June 11, 1940.

Hearing Denied Aug. 8, 1940.

1. New trial 🔑6

The matter of granting or refusing to grant a motion for new trial is largely within trial court's discretion.

2. New trial 🔑72

The trial court, on motion for new trial, must weigh and consider evidence of both parties and determine just conclusions to be drawn therefrom.

3. New trial 🔑72

The trial court, if satisfied that findings of jury are contrary to weight of evidence, may grant new trial.

4. Appeal and error 🔑1015(3)

The probative force or evidentiary value of testimony is within determination of trial court in proceeding on motion for a new trial.

5. New trial 🔑68

An order granting a new trial cannot be sustained where there is no substantial conflict in testimony and evidence will be insufficient as matter of law to support verdict in favor of moving party.

6. Master and servant 🔑29

Where contract employing actress provided that starting date for making photoplay should be not later than November 14, and not earlier than September 1, and that actress would be given notice of starting date not later than August 1, film company could not excuse its failure to give the notice as specified, which constituted a "condition precedent", by asserting that because actress was engaged in making a photoplay for another corporation from July 13 to August 22, she thereby put it out of her power to perform, where she alleged that she was at all times ready, able and willing to perform, record disclosed nothing to contrary, and evidence negatived intent to abandon contract. Civ.Code, §§ 1436, 1439.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

7. Master and servant 🔑59

Where the giving of notice by film company to actress as to starting date of making motion picture was "condition precedent" to her duty to perform, or offer to perform, services, film company could not place her in default without first giving her the notice required by contract. Civ.Code, §§ 1436, 1439.

8. Contracts 🔑278(1), 312(1)

The failure to comply with a "condition precedent" not only prevents an action by defaulting party to enforce contract, but also will sustain an action by the other party for breach thereof. Civ.Code, §§ 1436, 1439.

9. New trial 🔑68

Where there was no conflict in testimony on material issues, and evidence, as a whole, was insufficient, as matter of law, to support judgment for defendant, it was error amounting to abuse of discretion to grant defendant's motion for a new trial.

10. Master and servant 🔑41(1, 6)

The measure of recovery by wrongfully discharged employee is generally and primarily the agreed wage for unexpired part of term, and burden is on employer to rebut this presumption by proof that damages sustained were actually less.

11. Master and servant 🔑42(1)

The measure of damages of wrongfully discharged employee is amount of salary agreed on for entire period of service, less amount which servant has earned or, with reasonable effort, might have earned from other employment.

12. Master and servant 🔑42(2)

The "other employment" which wrongfully discharged employee must seek to mitigate damages, is employment of a character substantially similar to that of which he has been deprived, and he need not enter on service of a different or inferior kind.

See Words and Phrases, Permanent Edition, for all other definitions of "Other Employment".

13. Master and servant 🔑42(2)

Where contract engaging actress to perform services in production of photoplay provided for certain guaranteed payments to her, it was proper, in an action by actress against film company for breach of contract to offset against the amount guaranteed the amount received by her in radio engagements during period covered by contract, because, though such work might be different in character from that required of a moving picture actress, it was not inferior thereto. Civ. Code, §§ 1436, 1439.

14. Master and servant 🔑36, 39(1)

Where contract employing actress in production of photoplay required film company as "condition precedent", to give her notice as to starting date, and actress was never in default, she was not required to tender performance before suing for breach of contract, it being sufficient to allege in complaint that she was ready, able and willing to perform contract, but that film company failed to fix time and place for performance. Civ.Code, §§ 1436, 1439.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Constance Bennett de la Falaise against Gaumont-British Picture Corporation, Limited, and another, for breach of contract under which plaintiff was to render services as a motion picture actress in certain photoplays. From a judgment limiting the amount of plaintiff's recovery to a specified sum, and from an order granting named defendant's motion for a new trial, plaintiff appeals.

Order granting motion for new trial reversed and original judgment affirmed.

Barry Brannen, of Los Angeles, for appellant.

Don Marlin, of Los Angeles, for respondent.

YORK, Presiding Justice.

The record herein reveals that appellant entered into a contract with respondent whereby she agreed to render services as a motion picture actress in the production by respondent of two photoplays entitled "Everything is Thunder" and "The Hawk", each picture to be produced in London, England, to be completed within a reasonable time following the starting date, and neither to require appellant's services for a period of more than eight weeks. For such services appellant was to receive from respondent "10% of the U. S. A. gross distribution receipts from the distribution of said two motion pictures * * * and as a guaranteed advance for each production on account of such percentage $30,000 in cash, * * * also * * * the additional sum of $5,000 on each picture * * * which sum, however, is not an advance and is not to be recouped * * * from the percentage due (appellant) from gross receipts of distribution." All such moneys due appellant to be paid to her in the United States through respondent's subsidiary company, Gaumont-British Picture Corporation of America.

The first picture "Everything is Thunder" was produced and completed, appellant receiving on account thereof the $30,000 guaranteed advance and the additional sum of $5,000 provided by said contract.

With respect to the second picture "The Hawk", said contract provided that the starting date for the same should be not later than November 14, 1936, not earlier than September 1, 1936, and in any event appellant was to receive notice of the precise starting date not later than August 1, 1936. This second picture was not made and appellant never received notice of the starting date thereof, nor was anything ever paid her on account of said production.

In March, 1937, appellant brought the instant action for breach of contract against respondent, the complaint alleging that said breach consisted in the failure of respondent to advise appellant of a starting date for said production, the refusal of said company to produce the second picture, and to pay the compensation provided for appellant's services therein, notwithstanding she was ready, able and willing to perform her part of the said contract. In a second cause of action against respondent and its American subsidiary, appellant sought an accounting of the gross proceeds resulting from the distribution of the first photoplay in the United States. During the trial appellant dismissed her second cause of action without prejudice to both defendants, which eliminated the Gaumont-British Picture Corporation of America from the case, leaving Gaumont-British Picture Corporation, Ltd., the sole respondent herein. Appellant also waived her right to recover from respondent on her first cause of action more than $35,000, the minimum compensation guaranteed for her services in the second picture.

It was brought out at the trial, in addition to the facts hereinbefore narrated, that early in the summer of 1936 appellant made arrangements to make the fourth and last picture required under a contract dated June 30, 1933, between her and Twentieth Century-Fox Film Corporation. By this arrangement appellant agreed to commence this picture entitled "Ladies in Love" on July 13, 1936, and to continue her services with the aforementioned company until its completion, the estimated "shooting schedule" for the same being not more than six weeks. Appellant received compensation for such services from said July 13 to August 22, although, because she had been ill during the filming thereof, she gratuitously continued to render her services in connection with said picture for an additional period of thirteen days, or until September 4, 1936. It was further shown that appellant's agent made diligent attempts to secure employment for her as a motion picture actress but that appellant received no offers of employment and no compensation for her services in motion pictures between September 1, 1936, and January 1, 1937. However, she did receive the sum of $4,000 for two radio engagements on September 5 and 17, 1936, which took place in the evening at half past five and nine o'clock, respectively.

Respondent alleged in its answer that after the first picture was completed, the contract was mutually cancelled at a meeting between appellant's agent, William Hawks, and respondent's representative, Larry Darmour, which took place in May, 1936. However, the testimony of these two men established the fact that they failed to arrange for such cancellation. Furthermore, in a letter written on June 12, 1936, by appellant to Michael Balcon, a representative of respondent, which was introduced in evidence as plaintiff's exhibit 2, appellant expressed in strongest terms her desire and intention to render her services in the second picture.

No conflict appears to exist either in the factual situation or in the evidence adduced at the trial herein which was heard by the court sitting without a jury.

This appeal is prosecuted from that part of the judgment which limits the amount of appellant's recovery to $31,000 by deducting from the $35,000 guaranteed under the contract, the sum of $4,000 received by appellant for her services in radio broadcasts during the month of September, 1936. She also appeals from the order granting respondent's motion for a new trial.

In her appeal from the order granting the motion for a new trial, appellant contends that respondent's breach of contract is established by uncontradicted evidence, hence no issues of fact are involved and the questions on appeal relate wholly to the sufficiency of the evidence as a matter of law to support the judgment.

With respect to her appeal from the judgment, appellant urges that the measure of damages for breach of the contract is the sum of $35,000 and that the sum of $4,000 received by her in radio engagements was not earned during any period when respondent was entitled to her services and, therefore, cannot be offset in mitigation of damages.

While the minute order granting respondent's motion for a new trial specifies the grounds therefor as "insufficiency of the evidence to sustain the findings and judgment, and for error of law", respondent makes no attempt in its brief either to point out such error of law or to show in what particulars the evidence is insufficient. However, respondent urges that appellant's abandonment of the contract is established by her uncontradicted testimony to the effect that she began work in July, 1936, for Twentieth Century-Fox Film Corporation on the picture entitled "Ladies in Love", thereby relieving respondent from giving the notice of August 1, 1936, provided by the terms of the contract herein. Also, that appellant has failed to state a cause of action in her complaint because of her failure to allege that "she performed or that she tendered performance, or that defendant prevented performance or that performance was excused, of performing her obligations under the contract."

It therefore appears from the state of the record that it is incumbent upon this court to decide as a matter of law whether the evidence which is uncontradicted is sufficient to sustain the judgment in favor of appellant.

[1-5] Quoting from the opinion in the case of Moss v. Stubbs, 111 Cal.App. 359, at page 362, 295 P. 572, 573, 296 P. 86: "The well-settled rule is that the matter of granting or refusal to grant a motion for a new trial is largely within the discretion of the trial court (Work v. Whittington, 61 Cal.App. 302, 214 P. 474); that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (Huckaby v. Northam, 68 Cal.App. 83, 228 P. 717; Smith v. Royer, 181 Cal. 165, 183 P. 660); but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it (Green v. Soule, 145 Cal. 96, 78 P. 337; Rudin v. Luman, 53 Cal.App. 212, 199 P. 874); and, if it is satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial (Gordon v. Roberts, 162 Cal. 506, 123 P. 288). Even where the evidence is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial. Otten v.

Spreckels, 24 Cal.App. 251, 141 P. 224; Roberts v. Southern Pac. Co., 54 Cal.App. 315, 201 P. 958. But it is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained. Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951; Wendling Lbr. Co. v. Glenwood Lbr. Co., 153 Cal. 411, 95 P. 1029; Empire Inv. Co. v. Mort, 169 Cal. 732, 147 P. 960; Harvey v. Machtig, 73 Cal.App. 667, 239 P. 78, 82. As will hereinafter appear, there is no substantial conflict in the evidence as to any of the essential facts * * * and the determinative question presented with reference to the evidence is therefore whether as a whole it would be sufficient as a matter of law to support verdicts in favor of [the moving parties], in the event that such verdicts had been found." It was held in the cited case that the evidence was wholly insufficient as a matter of law to support verdicts in favor of the moving parties, and the order granting a new trial was reversed, the court commenting as follows, 111 Cal.App. at page 371, 295 P. at page 576: "As said by the court in Harvey v. Machtig, supra, in directing a reversal: 'We are not unmindful of the reluctance with which appellate courts reverse orders granting or refusing new trials, nor of the rule that a trial court in passing upon such a motion is not bound by the findings of the jury if there is sufficient evidence to sustain a contrary finding. Huckaby v. Northam, 68 Cal.App. 83, 228 P. 717. Where, as here, however, there is no evidence upon which a contrary finding could be founded, the order granting a new trial cannot be sustained upon appeal.'"

The rule enunciated in the case of Moss v. Stubbs, supra, was followed in Seth v. Lew Hing, 125 Cal.App. 729, 732, 14 P.2d 537, 15 P.2d 190, the court citing as additional authorities to the same effect: Hitchcock v. Rooney, 171 Cal. 285, 288, 152 P. 913; Estate of Baird, 198 Cal. 490, 507, 246 P. 324; Vertson v. City of Los Angeles, 116 Cal.App. 114, 2 P.2d 411. See, also, Henderson v. Braden, 35 Cal. App.2d 88, 91, 94 P.2d 625.

[6, 7] Stripped of all unnecessary detail, the cause of action herein is one for breach of contract on the part of respondent resulting from its failure to perform a condition precedent, i. e., the giving of notice to appellant on or before August 1, 1936, as to the starting date of the second picture. See sec. 1436, Civ. Code. Respondent cannot excuse its failure in this regard by asserting that because appellant was engaged in making a photoplay for Twentieth Century-Fox Film Corporation from July 13 to August 22, 1936, she thereby put it out of her power to perform her obligations under the contract. She alleges in her complaint that she was at all times, ready, able and willing to perform, and for all that appears in the record, had she received notice on August 1st that respondent expected her arrival in England on September 1st to start work on "The Hawk", she would have been present at the time and place fixed in said notice. The evidence negatives any idea of abandonment of the contract by appellant. Moreover, it should not be overlooked that respondent unsuccessfully sought from appellant a cancellation of the contract early in the spring of 1936, at which time it apparently considered the contract in full force and effect, therefore, before it could place appellant in default it was necessary for respondent to give notice as provided in said contract. See sec. 1439, Civ.Code.

[8] It is well recognized that a failure to comply with conditions precedent not only will prevent an action by the defaulting party to enforce the contract, but also will sustain an action by the other party for a breach thereof. 6 Cal. Jur. 400, and authorities there cited, including Rosenberg v. Geo. A. Moore & Co., 203 Cal. 211, 263 P. 806.

[9] A review of the entire record reveals that there is no conflict in the testimony on the material issues, and that the evidence as a whole would be insufficient as a matter of law to support a judgment in favor of respondent. Consequently, it was error amounting to an abuse of discretion to grant respondent's motion for a new trial.

[10, 11] Passing to the appeal from the judgment which limits the amount of appellant's recovery to $31,000 by deducting from the $35,000 guaranteed under the contract the sum of $4,000 received by appellant for her services in radio broadcasts during the month of September, 1936, it is well settled that "'The measure of recovery by a wrongfully discharged employee is generally and primarily * * * the agreed wage for the unexpired part of the term; and the burden is upon the employer to rebut this presumption by proof that the damages sustained were actually less.' Gregg v. McDonald, 73 Cal.App. 748, 757, 239 P. 373, 376. 'The measure of damages in such cases is the amount of the salary agreed upon for the entire period of service, less the amount which the servant has earned or with reasonable effort might have earned from other employment.' Boardman Co. v. Petch, 186 Cal. 476, 484, 199 P. 1047, 1051; Seymour v. Oelrichs, 156 Cal. 782, 801, 106 P. 88, 97, 134 Am.St.Rep. 154." Goudal v. C. B. DeMille Pictures Corp., 118 Cal.App. 407, 414, 5 P.2d 432, 435, 7 P.2d 174.

[12] The "other employment" which the discharged employee is bound to seek is employment of a character substantially similar to that of which he has been deprived; he need not enter upon service of a different or inferior kind, in order to mitigate the damages. 18 R.C.L. 529; 28 A.L.R. 737.

Appellant calls attention to the case of Payne v. Pathe Studios, Inc., 6 Cal. App.2d 136, 44 P.2d 598, which, instead of being an action for breach of contract, was based upon the failure of respondent to pay the minimum compensation specified in an agreement very similar to the one here involved. In the cited case it was held that there was no obligation to mitigate the damages sustained, the court stating, 6 Cal.App.2d at page 142, 44 P.2d at page 600: "Here again we must bear in mind that this is not an action for damages for breach of the contract of employment, but an action on the contract itself for the agreed compensation. The doctrine of mitigation of damages has no place in such an action."

[13] Therefore, we must hold that it was proper to offset against the amount guaranteed under the contract the $4,000 received by appellant in radio engagements, because while such work might be denominated different in character from that required of a moving picture actress, it cannot be said to be inferior thereto.

[14] With respect to respondent's point that appellant has failed to state a cause of action in her complaint because of failure to allege performance or a tender of performance, the trial court passed upon the sufficiency of the complaint at the time of the hearing on the demurrer interposed by the defendants herein. Moreover, appellant was never in default under the contract, and therefore was not required to tender performance before suing for breach thereof. It was enough for her to allege that she was ready, able and willing to perform her obligations under the contract, but that respondent had failed to fix the time and place for such performance.

The order granting respondent's motion for a new trial is reversed, and the original judgment herein is affirmed.

We concur: DORAN, J; WHITE, J.

ANDERSON v. ANDERSON et al.

Civ. 2318.

District Court of Appeal, Fourth District, California.

June 12, 1940.

Rehearing Granted, Appeal Dismissed by Stipulation of Parties,
June 28, 1940.

1. Quieting title 🔑**44(3)**

In action against divorced husband, father-in-law, and another to quiet title to certain property on which husband had executed a mortgage in favor of father and which later passed to father under foreclosure sale, wherein plaintiff sought relief on theory that she had acquired an interest therein as her separate property by investment of her separate funds, evidence indicating that money was loaned to husband, that property was described in complaint for divorce as community property, that mortgage was given for a valuable consideration and that transaction was free from fraud, sustained findings on which relief was denied. Civ. Code, § 172.

2. Appeal and error 🔑**909(5)**

Where it was found by trial court that assignment was made in the year 1937, but assignment in the record was dated January 4, 1936, the District Court of Appeal, in absence of evidence to the contrary, would presume that assignment was properly dated and that it was delivered on date it bore. Code Civ.Proc. § 1963, subd. 23; Civ.Code, §§ 1053, 1055.

3. Divorce ⚷276(1)

Where first order allowing divorced wife support and suit money was dated November 10, 1936, and further allowance was contained in interlocutory decree of divorce dated June 18, 1937, wife was not a creditor of husband on January 4, 1936, the date on which husband conveyed interest in property to father, so as to permit wife to attack the transfer for constructive fraud, and her right to do so was particularly doubtful where evidence showing that transfer rendered husband insolvent was of questionable sufficiency.

4. Fraudulent conveyances ⚷208

Husband could give his interest in his separate property away, in absence of actual fraud, and only his then existing creditors could attack the conveyance if it caused his insolvency.

5. Fraudulent conveyances ⚷69(1)

An intent to defraud a particular creditor may exist if there is actual fraud, but it does not exist as to a future creditor if there is no actual fraud but only constructive fraud inferred because transfer of property renders the transferor insolvent.

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by Josephine Anderson against Albert J. Anderson and others to quiet title, and to set aside two allegedly fraudulent conveyances. From a judgment subjecting the interest of one of the defendants in certain property to the lien of a judgment against the named defendant, but denying all other relief, the plaintiff appeals.

Affirmed in part and reversed in part.

Marie M. Herney and Albert F. Herney, both of San Diego, for appellant.

Fred O'Farrell and Wright, Monroe, Harden & Thomas, all of San Diego, for respondents.

MARKS, Justice.

This is an appeal by plaintiff from a judgment that subjected the ½ interest of Julius Anderson in the San Diego Steam Laundry to the lien of a judgment of $532.60 against Albert J. Anderson, such lien to be enforceable after the death of Julius Anderson. The judgment denied all other relief sought by plaintiff.

The complaint contains three causes of action. The first sought to quiet plaintiff's title to the Uptown Locker Club in the city of San Diego. The second sought to set aside an alleged fraudulent conveyance of the Uptown Locker Club from Albert J. Anderson to Julius Anderson. The third sought to set aside an alleged fraudulent conveyance of a ½ interest in the San Diego Steam Laundry from Albert J. Anderson to Julius Anderson.

Plaintiff and Albert J. Anderson are husband and wife. Julius Anderson is the father of Albert. The evidence pictures Julius as a patient, kind and generous father, and Albert as a wasteful and prodigal son. Besides providing him with a substantial monthly income, Julius became surety for Albert in considerable amounts. He paid many of his debts. By 1933 Albert's creditors foreclosed on his securities. After those securities were exhausted a balance of more than $8,000 remained which Julius had to pay.

Plaintiff and Albert J. Anderson were married in 1923. There are two children the issue of this marriage. Albert proved to be no better husband than he had been a son. Plaintiff instituted an action for divorce on October 16, 1936, on the grounds of habitual intemperance and cruelty. She secured an interlocutory decree of divorce on June 18, 1937. She was given custody of the two children, $125 per month for their and her support, and certain community property. Other community property was awarded to the parties as tenants in common. The decree also provided for attorney's fees and court costs. No final decree of divorce has been entered.

In 1932, Albert started the Uptown Locker Club. Plaintiff contributed $1,000 of her separate funds to the venture, and Albert a sum not exceeding $750, part of which was community property. The venture was a financial success and, ultimately, about $14,000 was invested in it with all but the original investment being provided out of its profits.

In 1933, plaintiff was openly discussing instituting an action for divorce against Albert. On September 28, 1933, Albert executed a chattel mortgage on the Uptown Locker Club to secure his note for $7,500, payable to his father. It is not questioned that Albert's indebtedness to his father at that time exceeded the amount of the note.

Although Albert's income was ample to permit him to do so, he made no effort to reduce his indebtedness to his father. Under date of April 27, 1934, Albert and Julius entered into a contract giving the latter control over the finances of the Uptown Locker Club. It recited that Albert was then indebted to Julius in an amount of between eight and nine thousand dollars. It provided that all receipts from the club, except a petty cash fund, should be deposited in a bank account in the name of Julius; that operating expenses and debts of the business be paid from this account; that the overplus be paid on the indebtedness Albert owed Julius. It was particularly provided that Albert "shall have no control over said receipts and disbursements until said indebtedness to said Julius Anderson and other creditors of said business have been fully paid". Plaintiff does not question the fact of this indebtedness nor its amount.

The bank account was opened in the name of Julius but he received nothing on the debt. Albert admitted taking between three hundred twenty-five and three hundred fifty dollars per month in cash from the business cash register. He charged his and his family's bills for living expenses to this business. Plaintiff also charged bills to the club, including clothes for herself and the children. After the repeal of prohibition, they charged liquor for their personal use to the club besides drawing upon its stock. They were improving some acreage near Alpine in San Diego county. The bills for these improvements were also charged to the club. Julius frequently protested these withdrawals from the funds of the business. There was nothing left for him to apply on the indebtedness owed to him by Albert. The Alpine property was awarded to plaintiff in the divorce action and is now her home.

In 1937 Julius foreclosed his chattel mortgage and bought in the club property for $5,000. He has since operated the club and claimed its ownership. The regularity of the foreclosure proceedings and the sale under it are not questioned except that plaintiff now maintains that she owned at least a ½ interest in the club as her separate property, which interest did not pass to Julius under the foreclosure sale.

[1] If the trial judge had accepted the testimony of plaintiff and Albert as true he might have found that she originally owned a 100/175 interest in the club as her separate property. However, this evidence was contradicted, and it was found that plaintiff never owned any interest in the club as her separate property. There is ample evidence to support these findings and they cannot be disturbed here. Out of the considerable evidence supporting these findings we need only to point to the following: On June 24, 1936, plaintiff wrote a letter in which the following appears: "The thousand dollars in question was loaned by me to Albert Anderson to start the Locker Club, and was used for that purpose." Plaintiff's verified complaint for divorce contained the following: "The said parties have accumulated certain community property, which is described as follows, to-wit: * * * the lease and all furnishings of that place of business known as Uptown Locker Club, * * *."

The trial court found there was no fraud in connection with the execution and foreclosure of the chattel mortgage on the Locker Club; that the mortgage was executed in good faith and for a valuable consideration and was foreclosed because of default in its terms and in the terms of the note it secured, and not in carrying out an intent to defraud plaintiff of any of her property, nor to deprive her or her children of the support and maintenance by Albert J. Anderson to which they were legally entitled. These findings find ample support in the evidence.

Section 172 of the Civil Code provides that a husband is vested with the management and control of community property over which he has "like absolute power of disposition, other than testamentary, as he has of his separate estate", with certain exceptions not important here. See vol. 3, 10 Year Supp.Cal.Jur. 620. It follows that as the chattel mortgage was given for a valuable consideration and as the transaction was free from fraud, its foreclosure vested title to the Locker Club in Julius Anderson, the purchaser at the foreclosure sale. Johnson v. National Surety Co., 118 Cal.App. 227, 5 P.2d 39. Therefore, the portion of the judgment affecting the Locker Club must be affirmed.

The situation concerning the interest, if any, of Albert J. Anderson in the San

Diego Steam Laundry requires separate consideration.

Prior to 1926 Julius Anderson and Elmer L. Aldrich, as copartners, owned and operated the San Diego Steam Laundry, each having a ½ interest in it. The partnership owned no real property.

Under date of July 12, 1926, Julius Anderson executed a purported "bill of sale" attempting to convey to Albert all his ½ interest in the property and assets of the San Diego Steam Laundry with a life estate reserved to Julius. The instrument recited that it was made "in consideration of love and affection and other valuable considerations", but as it is not claimed that Albert gave any consideration for it other than love and affection, the transaction was an attempted gift. The instrument contained the following provision: "It being the intention by this instrument that I (Julius) shall retain possession of my interest in said San Diego Steam Laundry until by death, at which time said party of the second part (Albert) is hereby authorized to immediately take possession of the same without further steps or proceedings or notice and without legal proceedings of any kind."

Albert had been a salaried employee of the laundry prior to July 12, 1926, and continued to serve in that capacity. He was never in actual possession of any part of the laundry. No dividends were paid Albert by the laundry although Julius gave him a portion of the dividends he received. The laundry continued to be operated by Julius Anderson and Aldrich as copartners. Under date of January 4, 1936, Albert, without consideration, reconveyed his interest in the laundry to his father. By that time the marital relations between plaintiff and Albert had become seriously strained. It is this reconveyance which is under attack in the third cause of action.

The brief of respondents argues the question of the interest in the laundry, if any, which the bill of sale of July 12, 1926, transferred from Julius to Albert. Because of the view we take of the case we do not deem it necessary to decide this question at this time. We will assume, without holding, that the bill of sale of July 12, 1926, conveyed to Albert, a ½ interest in the property and assets of the laundry, subject to a valid life estate in Julius, which life estate gave Julius possession of all those assets and the right to ½ the income from the laundry during the remainder of his life.

The judgment made the amount of Albert's delinquent payments then due plaintiff a lien on the ½ interest of Julius in the assets of the laundry, such lien to be enforced only after the death of Julius. It also decreed that Julius was the owner of a ½ interest in the laundry and that Albert had no interest in it. The judgment further decreed that plaintiff would not be entitled to any lien on the interest of Julius in the laundry for any amounts which might become due in the future.

Plaintiff maintains that the portion of the judgment suspending the enforcement of the lien during the lifetime of Julius is erroneous, and, further, that future instalments of the support money allowed her should have been made a lien on this interest, enforceable immediately upon any of those instalments becoming due and in default.

We gather from the findings that the theory on which the judgment is based is as follows: That the assignment of July 12, 1926, from Julius to Albert, of an interest in the laundry, was in effect a gift of future interest; that the reconveyance of this interest by Albert to Julius rendered Albert insolvent; that in making this reassignment there was no intent to defraud; that the assignment constituted a constructive fraud on Albert's creditors by reason of its leaving him insolvent; that plaintiff was then a creditor of Albert and because of such constructive fraud on her she could attack the transfer.

[2] This theory is based on a mistake of fact that is carried into the findings. It is there found that the assignment from Albert to Julius was "in the year 1937". The assignment in the record is dated January 4, 1936. In the absence of evidence to the contrary we must presume that the bill of sale was properly dated (sec. 1963, subd. 23, Code Civ.Proc.) and that it was delivered on the date it bears (Secs. 1053, 1055, Civ.Code). Therefore, we must conclude that this bill of sale was executed more than nine months before the divorce action was instituted. The first order allowing plaintiff support and suit money was dated November 10, 1936. A further allowance was contained in the interlocutory decree of divorce which was dated June 18, 1937.

[3] It is clear that plaintiff was not a creditor of Albert J. Anderson on January 4, 1936, the date of the conveyance of the interest in the laundry by Albert to Julius. The finding that the conveyance of an interest in the laundry by Albert to Julius was in 1937 is contrary to the evidence.

The finding that this transfer rendered Albert insolvent has questionable evidentiary support. In fact little attention seems to have been given to Albert's financial condition on or about January 4, 1936. At that time he had the Alpine property, with a claimed value of about $10,000, which was encumbranced in the sum of $3,700, beside other property.

Thus, one very important factor necessary to support the theory of the findings and judgment is lacking from the evidence—that plaintiff was a creditor of Albert at the time of the assignment. The evidence supporting a second important factor is of questionable sufficiency; that the assignment rendered Albert insolvent. These are important because the trial court found against actual fraud and based its judgment on the finding of constructive fraud founded on the purported insolvency of Albert caused by the conveyance of the interest in the laundry and on the mistaken assumption that plaintiff was Albert's creditor on January 4, 1936.

[4] Whatever interest Albert had in the laundry was his separate property. In the absence of actual fraud, he could give this interest away, and only his then existing creditors could attack the conveyance if it caused his insolvency. Haller v. Haller, 102 Cal.App. 370, 283 P. 94. As was said in McAlvay v. Consumers' Salt Co., 112 Cal. App. 383, 297 P. 135, 140:

"It is the general rule that the only creditors who can complain are those who were creditors at the time of the alleged fraudulent transfer, or those subsequent thereto who were intended to be defrauded; but to make a voluntary conveyance void as to subsequent creditors it must be made with the intent of fraudulently preventing them from enforcing their claims. Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 P. 967; Franck v. Moran, 36 Cal.App. 32, 171 P. 841. Otherwise subsequent creditors cannot complain. Kane v. Desmond, 63 Cal. 464; Scales v. Holje, 41 Cal.App. 733, 183 P. 308."

[5] An intent to defraud a particular creditor may exist where there is actual fraud. It does not exist as to a future creditor where there is no actual fraud but only constructive fraud inferred because a transfer of property renders the transferor insolvent. Because there was no finding of an intent to defraud plaintiff by the bill of sale of January 4, 1936, and because she was not then a creditor of Albert, she could not successfully attack the bill of sale. This lack of intent to defraud a future creditor distinguishes this case from such cases as Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97, and Adams v. Bell, 5 Cal.2d 697, 56 P.2d 208.

Findings necessary to support the judgment rendered under the third cause of action are contrary to the evidence. That portion of the judgment is not free from apparent inconsistencies. It follows that the portion of the judgment which affects the interests of Julius, Delia and Albert J. Anderson in the San Diego Steam Laundry must be reversed.

It is ordered:

(1) That the portion of the judgment under the first and second causes of action determining the interests of the parties in the Uptown Locker Club is affirmed.

(2) That portion of the judgment which is under the third cause of action determining the interests of the parties in the San Diego Steam Laundry, and giving plaintiff a lien on the interest of Julius Anderson therein, is reversed, and the cause is remanded for a new trial solely on the issues presented by the third cause of action in the complaint and the answer thereto. None of the parties will recover costs on appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.

39 Cal.App.2d 518

TAYLOR v. TAYLOR.

Civ. 2296.

District Court of Appeal, Fourth District.
California.

June 18, 1940.

1. **Landlord and tenant** 🔑200(2)
Where tenant tenders and landlord accepts, as full payment of the rent, a less monthly rental than that reserved in the lease, landlord cannot later recover unpaid balance of rent reserved.

2. **Husband and wife** 🔑279(1)
Where husband and wife, who were each in possession of property belonging to them as joint tenants, rendered written accounts to each other and divided the net income between them and did not object to such division of income or to such accounts, amounts received by wife were in full satisfaction of her claims on husband under property settlement agreement providing for payment of larger amounts to wife.

3. **Contracts** 🔑238(2)
A written contract can only be modified by a contract in writing or by an executed oral agreement. Civ.Code, § 1698.

4. **Contracts** 🔑238(2)
An agreement affecting an obligation coming due in the future ordinarily cannot be executed until such obligation becomes due. Civ.Code, § 1698.

5. **Husband and wife** 🔑279(2)
A wife's acceptance, without objection, of less amounts than were provided for in written property settlement agreement between husband and wife, did not modify agreement as to future payments thereunder, notwithstanding that such amounts were received in full satisfaction of payments theretofore due under contract. Civ. Code, § 1698.

6. **Appeal and error** 🔑179(1), 846(5)
On appeal from judgment in action on property settlement agreement, whether agreement was mutually rescinded or abandoned would not be considered by District Court of Appeal, where rescission or abandonment was neither pleaded nor found by the trial court.

7. **Husband and wife** 🔑279(1)
A provision in property settlement agreement that husband was to advance wife $100 per month was equivalent to husband's agreement to pay wife that sum, notwithstanding additional provision that such sum was to be repaid to husband out of income from jointly owned properties when income was sufficient to permit such to be done.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action on property settlement agreement by Mae Taylor against Arthur Taylor. From the judgment, the plaintiff appeals.

Reversed, with instructions.

Goudge, Robinson & Hughes, of Los Angeles, for appellant.

J. W. Heard, Jr., of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment denying plaintiff recovery of any part of $4,173.81, alleged to be due her under a property settlement agreement and decreeing that the contract had been modified by agreement of the parties.

Plaintiff and defendant were formerly husband and wife. Plaintiff secured an interlocutory decree of divorce on May 31, 1923, and a final decree on September 30, 1924.

Under date of February 9, 1922, the parties entered into the property settlement in question here. It provided that community real property, a ten-acre orange grove in Kern county and business and apartment house property on Thirty-first street in Los Angeles, should thereafter belong to the parties as joint tenants with the right of survivorship. It contained the following: "It is further understood and agreed between the parties that the party of the first part (Arthur Taylor) shall have the management of the said real property, and annually, or oftener if necessary, will make a full and complete statement to the party of the second part (Mae Taylor) of the income from said property, and divide the net proceeds from the income thereto, equally between the said party of the second part and the said party of the first part, and, pending such settlement, will advance to her monthly, the sum of one hundred dollars ($100), and at the time of accounting, pay over to said second party any overplus, after paying said one hundred dollars ($100) per month. And, should the said property in any year not produce sufficient income to make up the one hundred dollars ($100) per month advanced by the party of the first part to the party of the second part, the party of the first part shall have the right to reimburse himself out of the income of any year in which said property does net a sufficient sum so to do."

Under date of September 20, 1922, the parties entered into a second contract which is of interest only because of its bearing on their relations and their conduct under the first contract. It recites that they owned described property in Glendale as joint tenants with the right of survivorship; that it was desired that plaintiff have a home for herself and her son; that Arthur Taylor leases the property and the furniture in it to her for the rest of her life; that Mae Taylor shall pay all taxes and assessments on the property and interest on the mortgage on it; that she at her own cost shall renew the mortgage from time to time, when necessary. It is probable that the mortgage on this property was foreclosed in 1937.

Plaintiff sought recovery of $4,173.81 which she claimed was due and unpaid under the terms of the property settlement, which sum she alleged had accrued between May 8, 1934, and October 1, 1937. Defendant denied owing plaintiff anything and asserted that the property settlement between them had been "fully changed and modified, wherein and whereby said parties did agree amongst themselves that in consideration of defendant allowing plaintiff to manage said Los Angeles properties plaintiff did release defendant from any obligation to advance plaintiff any monthly sums provided and /or attempted to be provided in said agreement, and that said parties to said agreement, the parties hereto, have ever since acted and relied upon said modification".

The trial court found that the contract had been modified by mutual agreement of the parties and that defendant owed plaintiff nothing. The effect of the judgment is to terminate any right in the plaintiff to demand any future advancements from defendant and to limit her payments from him to one-half of the net income from the two properties. It is admitted that there is no written agreement modifying or changing the property settlement.

It is admitted that the parties did not conform to the exact terms of the property settlement except for a relatively short time, if at all. For several years the income from the properties was considerable and defendant paid plaintiff money at such times and in such amounts as she requested. By 1932 the financial conditions had changed and the income from the properties had been greatly reduced. The Thirty-first street property was vacant and plaintiff moved from her Glendale home into it. The Glendale property was rented and plaintiff succeeded in renting the portions of the Thirty-first street property she did not occupy. However, the rentals were not regular and were varied in amounts.

Plaintiff had the management of the Glendale and Thirty-first street properties, and defendant continued the management of the orange grove. No regular payments were made to plaintiff. She received the income from the Glendale and Thirty-first street properties and paid some of their taxes and upkeep, rendering annual statements to defendant. Defendant collected the income and paid the taxes and expenses of the orange grove and some of the expenses on the other properties. He rendered annual statements to plaintiff showing the total income, taxes and expenses of all of the properties. The statements were a combination of the accounts rendered to him and his own accounts kept in connection with the orange grove. Prior to and after 1932, defendant regularly rendered annual statements to plaintiff. Plaintiff received them and made no objection to any of them until a few months before this action was filed in February, 1938. For several years prior to that date plaintiff had received less than one hundred dollars per month, though she had more than one-half of the net income from the properties.

The arguments of plaintiff which we need to consider may be grouped under two headings: (1) That the evidence is insufficient to support the conclusions that there was any agreement to reduce the amounts of the advancements to which she was entitled under the contract, or that the income received by her was paid and accepted in full satisfaction of her claims on defendant. (2) That as there was no agreement in writing modifying the written contract under which she claims, there could be no modification of it as to future payments falling due under it.

The contentions of the parties are settled by the cases of Julian v. Gold, 214 Cal. 74, 3 P.2d 1009, and Sinnige v. Oswald, 170 Cal. 55, 148 P. 203. Both cases involved actions by landlords brought under the terms of written leases where the owners had accepted less rentals than the leases specified and later brought suits for the unpaid instalments.

[1,2] It is now settled by these cases that where the tenant tenders, and the landlord accepts, as full payment of the rent, a less monthly rental than that reserved in the lease, he cannot later recover the unpaid balance of the rent reserved. This rule should be applied here. For a number of years the parties divided the net income between them. Even though the division was not equal, they rendered written accounts, one to the other. During these years no objections were made to this division of the income and to the accounts rendered. Under these facts the trial court was justified in drawing the conclusion that the payments received by plaintiff were in full satisfaction of her claims on defendant for the payments specified in the contract. These facts bring the case within the rule announced in Julian v. Gold, supra, as follows [214 Cal. 74, 3 P.2d 1011]:

"We therefore conclude that, in so far as said lease contract has been fully executed, the plaintiffs have lost their right to recover the sums allowed as rebates on the several installments of rent. We reach this same conclusion upon a well-known rule of waiver set up by section 2076 of the Code of Civil Procedure, which reads as follows: 'The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.'

"Under this section, if the lessor was unwilling to accept the amount tendered as in full, he could have protested then, but his acceptance, as in full payment, of a lesser sum than that due, brings him within the rule of estoppel declared by the above section. Smiley v. Read, 163 Cal. 644, 647, 126 P. 486, 487."

[3-5] A different situation is presented as to the future payments that might accrue under the contract. It was not modified in writing. A written contract can only be modified by a contract in writing or by an executed oral agreement. Sec. 1698 Civil Code. An agreement affecting an obligation coming due in the future ordinarily cannot be executed until that obligation becomes due. Therefore, the facts before us are not sufficient to support the findings and judgment declaring a modification of the written contract as to future payments under it. Sinnige v. Oswald, supra; Estate of McDougald, 146 Cal. 196, 79 P. 875.

[6] Defendant tacitly admits the correctness of this conclusion by urging that the judgment can be affirmed on the ground that the evidence shows a mutual rescission or abandonment by the parties of the terms of the property settlement. This argument is sufficiently answered by observing that rescission or abandonment was neither pleaded nor found by the trial court. Under the evidence here such an issue should be settled in the trial court in an appropriate action and not on appeal in this case where it was not an issue.

[7] Finally, defendant argues that the judgment should be affirmed because the contract does not contain any promise on his part to pay plaintiff any monthly instalment but only to advance her one hundred dollars per month to be repaid to him out of the income from the properties when sufficient to permit this to be done. The provision that he advance one hundred dollars per month is equivalent to his agreement to pay her that sum. Because he may be able to repay himself these advancements out of future income does not change defendant's agreement to make the advancements.

The judgment is reversed with instructions to the trial court to strike from the findings of fact and conclusions of law all references to a modification of the contract of February 9, 1922, and to enter judgment for defendant that plaintiff take nothing by her suit. Plaintiff will recover her costs of appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.

RUST v. HILL et al. *

Civ. 11911.

District Court of Appeal, Second District, Division 1, California.

June 17, 1940.

Rehearing Denied July 12, 1940.

Hearing Granted Aug. 15, 1940.

Mortgages ⚿375

Where pursuant to power contained in trust deed securing note executed in January, 1931, trustee, on April 24, 1935, sold real property at public auction, action instituted on March 30, 1938, to recover unpaid balance was not barred by statute requiring action for deficiency to be brought within three months after foreclosure sale in view of mortgage moratorium acts extending time for bringing action to July 1, 1939. Code Civ.Proc. § 337, subd. 1; § 580a; St.1935, p. 1214, § 19, as amended by St.1937, p. 60, § 9; St.1937, p. 460.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action on note by Richmond A. Rust against Frank P. Hill and wife. From a judgment dismissing the complaint, plaintiff appeals.

Judgment reversed and cause remanded with instructions.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for appellant.

Marcus Muskat, of Los Angeles, for respondents.

YORK, Presiding Justice.

On January 1, 1931, respondents executed a promissory note for $7,600 payable three years after date, and coincidentally therewith they executed a deed of trust on real property given as security for the payment of said note. Pursuant to the express powers of sale contained in the deed of trust, the trustee named therein on April 24, 1935, sold at public auction for the sum of $1,000 the real property covered by said instrument. This amount was credited upon the obligation leaving an unpaid balance of $8,522.69. By the instant action instituted on March 30, 1938, it is sought to recover judgment for such unpaid balance, together with interest and costs of suit.

The court sustained respondents' demurrer which alleged a failure to state a cause of action for the reason that it appeared upon the face of the complaint that the cause of action therein pleaded was barred by the provisions of subdivision 1 of section 337, and of section 580a, Code of Civil Procedure, which require that any action to recover a balance due on an obligation for which a deed of trust or mortgage with power of sale has been given as security, following the exercise of the power of sale, "must be brought within three months of the time of sale under such deed of trust or mortgage."

This appeal is prosecuted from the judgment dismissing the complaint.

It is contended by appellant that the time specified by said sections of the Code of Civil Procedure, supra, has been extended to July 1, 1939, in so far as the action in the instant case is concerned, by the mortgage and trust deed moratorium statutes of 1935 and 1937. Section 19 of the Mortgage and Trust Deed Moratorium of 1935 reads as follows: "Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter I, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter VII, Statutes of 1935, or any other provision of law, during the period commencing with the effective date of this act and ending on February 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1937." (Stats.1935, p. 1214, effective June 21, 1935.)

By an amendment to said section 19 of the 1935 moratorium statute, the time within which such actions therein delineated might be commenced was extended to October 1, 1937 (Stats.1937, p. 60, § 9, effective Jan. 29, 1937); and by section 19 of the Mortgage and Trust Deed Moratorium of 1937, the time was further extended to July 1, 1939. (Stats.1937, p. 460, effective May 5, 1937.)

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* Subsequent opinion 110 P.2d 657.

In support of his contention, appellant cites the decision in the case of Bakersfield Home Building Company v. J. K. McAlpine Land & Development Company, 26 Cal. App.2d 444, at page 450, 79 P.2d 410, at page 413, in which it was stated: "There is nothing in the suggestion that the extension of time granted by the legislation under discussion [moratorium statutes] to creditors is inapplicable to actions brought to recover balances due after the sale of the land by which the obligation was originally secured, and the application upon the debt of the proceeds. The extension has to do, by the express language of each of the moratorium statutes involved, with actions 'founded upon a written instrument secured by mortgage, deed of trust or contract of purchase', etc. *An action to recover a deficiency judgment is manifestly 'founded' upon the instrument secured by the mortgage, deed of trust, contract of purchase or other contract whereby the security is given*, although the amount of the deficiency that the holder is entitled to recover may not be susceptible of ascertainment until the security has been exhausted; and therefore it is not competent until that time to bring an action to recover it. Since, however, such an action is on the instrument secured (though not on the instrument that affords the security) such action is definitely included among those to which the moratorium privilege is expressly extended. The circumstance that the statutory extension has no application to obligations originally unsecured is immaterial.

"It is our view, then, that the time for commencing the present action was, before it had expired, extended by the moratorium legislation above discussed, first to October 1, 1937, and then to July 1, 1939, and therefore that the action was brought in time." (Emphasis added.) To the same effect, see, also, Everts v. Newhouse, 28 Cal.App. 2d 407, 82 P.2d 703, decided by this court and in which a hearing was denied by the Supreme Court on November 14, 1938.

Respondents urge in their brief that they are "unable to agree with the decision arrived at in the case of Bakersfield Home Building Company v. J. K. McAlpine Land & Development Company, Ltd., supra" for the reason that the court in arriving at its decision did not take into consideration the rules of law established by the previous cases of Reynolds v. Jensen, 14 Cal.App.2d 558, 58 P.2d 687, and Palo Alto Mutual Building & Loan Ass'n v. Cook, 17 Cal. App.2d 193, 61 P.2d 499.

As a matter of fact the court in the Bakersfield case, supra, not only considered both of the cases referred to by respondents, but discussed them in the following language excerpted from the opinion therein (26 Cal.App.2d at page 451, 79 P.2d at page 414):

"According to its minutes, the trial court in sustaining the demurrer relied on Palo Alto Mut. B. & L. Ass'n v. Cook, 17 Cal. App.2d 193, 61 P.2d 499, in which the facts were similar to those in the instant case. Palo Alto Mut. B. & L. Ass'n v. Cook did not reach the Supreme Court. There the sale under the deed of trust occurred on September 4, 1934, and the action to recover the deficiency was commenced on April 8, 1936. No question respecting the effect of the 1934 moratorium statute (Statutes of Extra Session of the 50th Legislature c. 1, approved September 15, 1934, St. 1935, p. 1) or of any subsequent moratorium legislation appears to have been raised or discussed there. It is likewise true that no question of the applicability of any moratorium statute was discussed in Reynolds v. Jensen, supra. Manifestly, therefore, neither of these cases argues anything against the conclusions which we have reached. Alferitz v. Borgwardt, 126 Cal. 201, 202, 207, 58 P. 460. In this case it was holden that a decision failing to note the effect of a statute did not amount to a construction of such statute. See, also, Mersfelder v. Spring, 139 Cal. 593, 595, 73 P. 452."

In sustaining the demurrer in the instant case, the trial court apparently relied upon the cases of Reynolds v. Jensen and Palo Alto Mut. B. & L. Ass'n v. Cook, supra, which were cited in support thereof. In this connection, it should not be overlooked that the decision in the Bakersfield case upon which appellant relies was not rendered until after the trial court made its ruling sustaining the demurrer herein.

In the Bakersfield case the promissory note and deed of trust there involved were executed on October 28, 1930; notice of default was recorded on January 30, 1936, the sale of the real property under the provisions of the deed of trust took place on

February 9, 1937, and the action for deficiency was commenced on September 10, 1937.

For the reasons stated, the judgment appealed from is reversed and the cause remanded to the trial court with instructions to overrule the demurrer to the complaint and allow the respondents (defendants) proper time in which to answer.

We concur: DORAN, J.; WHITE, J.

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39 Cal.App.2d 306

SWARZWALD et al. v. COOLEY (UNION BANK & TRUST CO. OF LOS ANGELES, Intervener) et al.

COOLEY (UNION BANK & TRUST CO. OF LOS ANGELES, Intervener) v. SWARZWALD et al.

Civ. No. 12496.

District Court of Appeal, Second District, California.

May 28, 1940.

1. Evidence 🔑67(3)

Where there is no evidence tending to prove that there has been a change in location of line of mean high tide, it is presumed that no change has occurred within many years, and where surface of bed rock along coast is above line of mean high tide, such presumption becomes practically conclusive.

2. Navigable waters 🔑36(6)

In suit between owners of adjacent beach lots to establish length of their common lateral boundary, where there could have been no change in location of mean high tide line after date of survey preceding sale of lots by common grantor, evidence established plaintiffs' title to area between lateral boundaries of plaintiffs' lot and line of ordinary high tide.

3. Boundaries 🔑3(8)

In suit between owners of adjacent beach lots to establish length of their common lateral boundary, where lots had been conveyed to plaintiffs and to codefendant's predecessor under contracts using metes and bounds descriptions and referring to a survey map, defendants could not claim that, because of map, distances named in surveyor's field notes should govern instead of monuments in ascertaining intention of parties, and that, because of map reference, part of land conveyed to predecessor was taken from defendants by judgment for plaintiffs, where language used by common grantor to define common boundary showed that boundary, as described in plaintiffs' contract, was same line described in predecessor's contract, and Supreme Court, in an opinion, had declared that map was inaccurate as to location of mean high tide line.

4. Appeal and error 🔑1097(5)

Supreme Court's opinion on former appeal in suit to establish length of common lateral boundary between adjacent beach lots was the "law of the case" on appeal to District Court of Appeal after second trial, where points determined in former appeal were the points under consideration by District Court of Appeal, notwithstanding new and additional evidence was received upon second trial, especially where such evidence did not alter issues as originally presented but merely added to record evidence which was indicated by Supreme Court as necessary to proper decision of the case.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

5. Navigable waters 🔑36(6)

In determining length of common lateral boundary between adjacent beach lots, where description in contracts under which lots were conveyed to plaintiffs and to codefendant's predecessor referred to a point in the "line of ordinary high tide", quoted phrase was properly given its technical rather than its commonly accepted meaning, in view of Supreme Court's declaration, that the mean high tide line, as of date of contracts, was a natural monument. Civ.Code, §§ 1644, 1647.

See Words and Phrases, Permanent Edition, for all other definitions of "Line of Ordinary High Tide".

6. Evidence 🔑52, 363

In suit between owners of adjacent beach lots in Laguna Beach to establish length of their common lateral boundary, where description in contracts under which lots had been conveyed to plaintiffs and to codefendant's predecessor, by common grantor, referred to a point in the line of "ordinary high tide", the easy availability of data referred to in the "Tidal Bench Marks" along coast of Southern California rendered proof of meaning of quoted phrase in vicinity of Laguna Beach unnecessary.

7. Boundaries 🔑3(3)

Natural boundaries and monuments take precedence over courses and distances contained in a description.

8. Boundaries 🔑3(3)

Where contract under which a beach lot was conveyed to plaintiffs, in describing common boundary between such lot and adjacent lot previously conveyed by common grantor to codefendant's predecessor, included a call referring to a point in the line of ordinary high tide, and line of mean high tide, as of date of contract, was a natural monument fixing the southerly boundary of all lots, the call to line of ordinary high tide in plaintiffs' contract was not incidental or intermediate and, in determining length of common lateral boundary between plaintiffs' and codefendant's lots, reference to line of ordinary high tide was entitled to preference over distances named in calls of survey.

9. Boundaries 🔑10

Where maps, plats or field notes are referred to in a description of property, they are to be regarded as incorporated in the description and a part of it.

10. Boundaries 🔑3(8)

In case of conflict between calls of surveyor's field notes and calls of a survey, calls of field notes will prevail, especially where calls of field notes are for monuments and calls of survey are by course and distance.

11. Boundaries 🔑3(8)

In case of discrepancy between surveyor's field notes and a plat, the plat must give way to field notes, and a plat may be corrected so as to conform thereto, and, if corrected, such plat supersedes original.

12. Boundaries 🔑14

Where contract under which plaintiffs purchased a beach lot described the southeast lateral as 379 feet more or less to a point in the line of ordinary high tide to Pacific Ocean, thence northwesterly along line of ordinary high tide to a point located 376 feet south, 59 degrees, 21 minutes, 30 seconds west from the point of beginning, plaintiffs' southeasterly line extended to mean high tide and the westerly boundary of plaintiffs' lot extended along the line of ordinary high tide to its intersection with common boundary of plaintiffs' lot and an adjacent lot at end of promontory.

13. Easements 🔑36(3)

In suit between owners of adjacent beach lots to establish length of their common lateral boundary where common grantor had conveyed defendants' lot to codefendant's predecessor before conveying plaintiffs' lot to plaintiffs, evidence was insufficient to establish that original sale of defendant's lot carried with it an easement by implication of access to water across beach in front of plaintiffs' lot and that plaintiffs took subject to such easement. Civ.Code, § 1104.

14. Easements 🔑16

In order for an easement to arise by implication, it must be both apparent and continuous, or obvious and permanent, and to establish an "easement by implication," there must be something upon the servient estate which is either visible or in the nature of a permanent artificial structure. Civ.Code, § 1104.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement by Implication".

15. Easements 🔑16

An easement which is apparent and continuous will pass as appurtenant without use of word "appurtenances", in a conveyance, but if it is not apparent and continuous, it is not included in conveyance unless grantor uses language in deed sufficient to create an easement de novo.

16. Easements 🔑16

An "apparent or obvious easement" is one that is visible on the servient estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Apparent or Obvious Easement".

17. Easements 🔑17(1)

Where codefendant's predecessor bought a beach lot from common grantor before plaintiffs purchased adjacent lot, codefendant could not claim an "easement by implication" of access to water across beach in front of plaintiffs' lot by reason of a trail leading to beach where such trail was entirely on codefendant's lot. Civ.Code, § 1104.

18. Easements ⚷17(1)

Where codefendant's predecessor bought a beach lot from common grantor before plaintiffs purchased adjacent lot, codefendant could not claim an easement by implication to cross common boundary to reach beach on ground that map referred to in predecessor's contract of purchase and in subsequent deed from common grantor became part of deed and that map showed that common boundary ran "across the beach in the cove", since such fact would not have conveyed to codefendant a right to cross over into plaintiffs' lot. Civ.Code, §§ 830, 1104.

19. Appeal and error ⚷173(2)

Defendants' claim of an easement by implication across plaintiffs' adjacent beach lot could not prevail where such claim was raised for first time on appeal. Civ.Code, § 1104.

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Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Suit by Eugene Swarzwald and another against Hallam Cooley and the Union Bank & Trust Company of Los Angeles, intervener with Hallam Cooley as defendant, and others, to establish the length of the common lateral boundary of two adjacent beach lots, wherein Hallam Cooley and the Union Bank & Trust Company of Los Angeles as intervener with Hallam Cooley filed a cross-complaint against Eugene Swarzwald and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Loeb & Loeb, of Los Angeles (Milton H. Schwartz, Norman Newmark, and Keating Coffey, all of Los Angeles, of counsel), for appellant Union Bank & Trust Co. of Los Angeles.

Warren E. Libby, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This action involves two adjacent beach lots in Laguna Beach. The owners sued each other to establish the length of their common lateral boundary. This is the second appeal. At first trial, defendant Cooley had judgment on his cross-complaint, fixing the length of said common boundary at 376 feet. On appeal, the Supreme Court reversed the judgment, Swarzwald v. Cooley, 220 Cal. 438, 31 P. 2d 381. In its opinion, the Supreme Court thus defined the issues: The record shows an action by plaintiffs Swarzwald and a cross-action by defendant Cooley, both in form to quiet title and to locate the oceanward extremity of a common boundary line. The bank and the other defendants are only nominally interested in the result of this litigation, the former being the trustee and the latter beneficiaries under a real estate subdivision trust, of which the lands in question are a part.

"The controlling question is the true location of the common point in the line of ordinary high tide, or mean high tide, of the Pacific Ocean, which, in May and June, 1937, marked the southerly terminus of the northwest boundary line of lot 9 and the like terminus of the southeast boundary line of lot 8, both situate in a subdivision of Laguna Beach lands in Orange county, Cal., officially designated as Arch Palisades No. 2.

"Description of these lots originates in the southwest boundary line of the state coast highway. They are each 100 feet in width along this highway and the laterals are uniform lines parallel to each other and perpendicular to said highway line, terminating in said mean high tide line, or ordinary high tide line, of the ocean. After meeting said tide line, lot 8 extends in the shape of a tongue or promontory several hundred feet farther into deep water. The two lots are a part of some 17 lots in said subdivision, all of which originate at said highway line, have fairly uniform side lines, and in a similar manner meet said tide line as their southerly boundary. Lot 17 is similarly situated, with respect to the said promontory feature, to lot 8. Although a regular subdivision map of said tract was filed in the office of the county recorder of said Orange county on March 26, 1927, these lots were conveyed by a metes and bounds description on a survey presumably made about November 15, 1926.

"The contention of respondent Cooley (defendant and cross-complainant), who prevailed in the court below, is that the northwest boundary of lot 9 is a line exactly 376 feet long, extending from the point of beginning on a course south 59 degrees 21 minutes 30 seconds west from said point of beginning. The contention of appellants Swarzwald (plaintiffs and cross-defendants) is that said line terminates, not at 376 feet, but at 592 feet along the same course from the point of beginning, or at least that it is 80 feet longer than 376 feet, which would terminate it where the irregular shape of lot 8 juts athwart its course."

Both lots were purchased from a common grantor, to-wit: the Bank of Italy, which held the property in a subdivision trust. The plaintiffs purchased the north half of lot 9 on a contract May 9, 1927. A month later he acquired the south half. Lots 7 and 8 were first sold to one Raymond Griffith on May 2, 1927. Cooley acquired Griffith's title and after said reversal, the Union Bank and Trust Company took over certain interests from Cooley and was made a party defendant and cross-complainant.

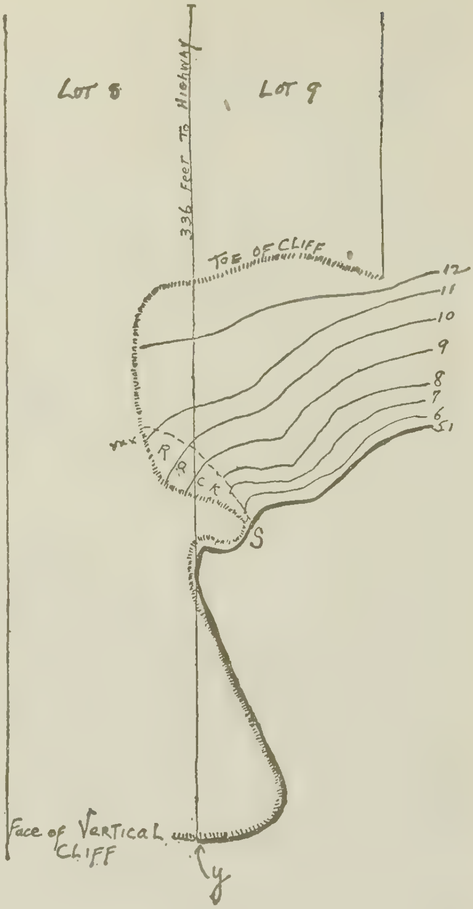
In the Griffith contract, the common boundary was described thus: "thence south 59 degrees, 21 minutes, 30 seconds west 376.00 feet more or less to a point in the line of ordinary high tide". In plaintiffs' contract, after describing its southeast lateral as "* * * 379 feet more or less to a point in the line of ordinary high tide to the Pacific Ocean; thence northwesterly along the line of ordinary high tide to a point located 376 feet south 59 degrees 21 minutes 30 seconds west from the point of beginning". Lot 9 in the main extends oceanward on a level with the coast highway till it breaks precipitately at a cliff about 336 feet from said highway. Between the toe of the cliff and the ocean is a beach or sandy area which is included within plaintiffs' lot 9 and extends into the "cove" on lot 8. The cliff continues across lot 9 in the same general northwesterly direction into lot 8 and, after making a large indentation or "cove" in the southerly side of lot 8, it continues its irregular line back across said common boundary, leaving a portion of said promontory and its abutting flat rock within lot 9. West of said "cove" said promontory continues to its end fairly on a level with the front portion of said lot 8.

On the second trial plaintiff had judgment. The court made a finding that the southeasterly boundary of lot 9 ran 385 feet from the highway to a point in the ordinary high tide; thence northwesterly along the line of ordinary high tide to the point of its intersection with said common boundary; that said point of intersection is 581.45 feet more or less, south 59 degrees, 21 minutes, 30 seconds west from the point of beginning in the highway and not 376 feet from the highway as the parties believed at the time of purchase. Said point of intersection is in the end of said rocky promontory about 265 feet south of the toe of the cliff. But the return of the line of said cliff after making said indentation into lot 9 cuts off access to the ocean across said sandy beach of lot 9. Because of the loss of said right of access to the ocean from the southerly side of lot 8, defendants prosecute this appeal.

The grounds upon which defendants seek a reversal of the judgment are as follows: (1) that the judgment is not supported either by a finding or by evidence upon which the finding could be based as to the location of the line of ordinary high tide on May 9 or June 10, 1927; (2) that the judgment deprives said defendants of property which had been sold to their predecessor Griffith prior to plaintiff's acquisition of said lot 9; (3) that the court erred in not holding that the phrase "line of ordinary high tide" should not be given its meaning commonly accepted rather than its technical meaning; (4) that giving precedence to the reference to the line of ordinary high tide, which was inserted by conjecture, produces an absurd result contrary to the manifest intention of the parties; (5) that the original sale of lot 8 to Griffith carried with it an easement, by implication, of access to the water across the beach in front of lot 9 and plaintiff took title subject to such easement.

I. The court found that said point in the common boundary 376 feet from the highway, mentioned in plaintiffs' said contract, was not in the line of ordinary high tide; but that by actual survey of the court's surveyor, A. J. Stead, it is shown that said common boundary does not intersect the ordinary or mean high tide line until it has been extended a distance of 581.45 feet from said highway, and that, contrary to defendants' contentions, no one of the parties acted under a mistake of fact that the point 376 feet from the said highway, on said common boundary, ended at the line of ordinary high tide or that the same was the entire northwesterly boundary of said lot 9 or that said 376 feet exactly represented the distance of the or dinary high tide line from said highway; but that they both believed that said distance was always more or less. Not only was said finding supported by the surveys made before and during the trial but as well by other scientific data, by observations, and by the history of said beach.

The plane of ordinary high tide is, itself, a fixed monument. It is the average height of all the high waters at a particular locality over a considerable period of time. (H. A. Marmer, Bulletin, Department of Commerce.) Speaking with scientific accuracy, ordinary high tide is a surface which is curved more or less in conformity with the spheroidal shape of the earth. For practical purposes, within a restricted area, however, it may be conceived as a level plane. The "line of ordinary high tide" is the intersection of said plane with the surface of the land. If the land at the line of said intersection consists of loose sand easily removed and easily deposited, then said line will have a variable position in relation to its horizontal coordinates. The mean high tide at said beach is 5.1 feet above "mean lower low water" or zero tide, as established by the United States Coast and Geodetic Survey.[1]



In order to ascertain its elevation on said beach, the surveyor began with data already ascertained by said Coast and Geodetic Survey, referred to in bench marks at points along the shore and which are on file in the Department of Commerce, in the District of Columbia. In this instance, the surveyor took the altitude of the nearest bench mark; surveyed down to the beach in front of lot 9; then ran his base line into said "cove". From that base line, he surveyed oceanward to the point 5.1 feet above zero tide. By fixing a series of these points along the shore, he was enabled to establish the 5.1 foot contour line as well as its coordinates at higher elevations, including that of 12 feet above zero tide. Inasmuch as the 5.1 line contacted the flat rock extending from the promontory into lot 9, at point "S", as shown in the accompanying map, it became necessary for the surveyor to follow along the promontory into the ocean until he reached said common boundary at the point "Y". The bedrock beneath the beach of said lot 9 at said common boundary, is higher than 5.1 feet above said zero tide. Hence, the plane of mean high tide could never intercept the common boundary within the "cove area" or at any point landward of the flat rock which juts from said cliff at the oceanward side of the cove into lot 9. But said bedrock is blanketed with loose sand from the toe of the cliff to the ocean floor. By reason of said sand, the lowest elevation on said common boundary within said cove is eleven feet above zero tide. While wind and wave at times remove sufficient of the sand temporarily to make the elevation of the mean high tide line along said beach vary, yet the lowest level of the sand could not be used as a means of fixing the elevation of the line of mean high tide because the sand removed will be replaced. However, the proof shows that there has been no substantial net change in the topography of said beach in the past 40 years. Upon this basis, the plane of ordinary high tide could not have intersected said common boundary at any point landward from said flat rock and consequently at no point other than that found by the court on the facts above recited and upon the testimony of the court's surveyor, at the end of said promontory in deep water. It is to be further observed that the 5.1 foot contour was computed conservatively as the elevation of the line of ordinary high tide on the beach of lot 9. In most of the bays and harbors along the coast of Southern California, the mean high tide is established by said geodetic surveys at lower levels than 5.1 feet.[2]

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[1] E. Lester Jones, in Bulletin 351 of the United States Coast and Geodetic Survey, issued by the Department of Commerce in 1926, states that, while the plane of mean low water has been adopted on navigation charts for the whole of the Atlantic and Gulf Coast, yet on the Pacific Coast, because of the diurnal inequality of the tides, the plane of mean lower low water has been adopted.

[1] In view of the history of this beach that this area between the toe of the cliff of lot 8 and the southwesterly boundary of lot 9 has been covered with sand in the past, sloping from an elevation of 12 feet or more above zero tide into the ocean floor, it is clear that the line of mean high tide could not have reached said common boundary at any point landward from the point "S" where the 5.1 line intercepts said flat rock. Where there is no evidence tending to prove that there has been a change in the location of the line of mean high tide, it is presumed that no change has occurred within many years. Hunt v. Barker, 27 Cal.App. 776, 151 P. 165; 1 Wigmore on Evidence, 2d Ed., 437. Moreover, where the surface of the bedrock along the coast is above the line of mean high tide, said presumption becomes practically conclusive because the emergence or subsidence of rocky formations is usually so slow as to be imperceptible in the course of centuries. The promontory and its abutting flat rock have stood as they now stand since the coastal uplift following the lower Miocene. They have neither emerged nor subsided and have suffered but slight erosion. Therefore, if the line of mean high tide along the shore southerly from said promontory (lot 8) has varied, such changes were caused solely by the deposition of sand on the area between the toe of the cliff and the line of mean high tide.

[2] In reversing the former judgment, the Supreme Court concluded that the mean high tide line, as of May or June, 1927, was a natural monument; that it fixed the southerly boundary of all these lots; that the evidence did not establish the line of mean high tide as of that date; and that said line will control the measurements found in the contracts. It, therefore, follows that there could have been no change in the location of said "natural monument" since November, 1926, the date of the survey preceding the sale; that the trial court has properly determined the length of said common boundary to be 581.45 feet; that it thereby established plaintiffs' title to the area between the lateral boundaries of lot 9 and the line of ordinary high tide, which is 5.1 feet above "mean lower low water".

[3] II. The contracts for the sale of lots 8 and 9 referred to a survey map in the following language: "being shown as a part of lot 9, recorded survey map filed in Book 3, pages 16 and 17, records of Orange County". Because of this map, defendants urge that the distances named in the field notes should govern rather than the monuments, in order to ascertain the intention of the parties. Also, because of said map reference, defendants contend that a portion of the land conveyed to Griffith by his contract of May 2, 1927, is taken from de-

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[2] Elevations of
Mean High Tide Along the Coast.
(Bulletin of the Department of Commerce,
U. S. Coast and Geodetic Survey.)

	feet
San Clemente Island	4.40
Catalina Harbor	4.50
San Nicholas Islands	4.20
Santa Barbara Islands	4.40
Anacapa Island	4.60
Santa Cruz Islands	4.30
Santa Rosa Islands	4.60
San Miguel Islands	4.50
San Diego Bay (La Playa)	4.84
San Diego Municipal Pier	5.10
National City	5.20
Mission Beach Bridge	3.70
Mission Bay Causeway	3.70
La Jolla	4.50
Newport Bay	4.40
Balboa	4.49
Newport Landing, Newport Bay	4.50
North Lagoon, Newport Bay	3.40
Orange County Wharf, Newport Bay	4.50
Santa Ana River	2.60
Long Beach Outer Harbor	4.60
Los Patos	4.00
San Pedro	4.71
Wilmington Inner Harbor	4.72

fendants by the judgment. But, considering the language used by the common grantor to define said common boundary, there is no doubt that said common boundary, as described in plaintiffs' contract, is the identical line described in the Griffith contract. Unfortunately, in drafting the description of the same line in plaintiffs' contract, after conducting the southeasterly lateral to the "line of ordinary high tide" the third call proceeds: "thence northwesterly along the line of ordinary high tide to a point located 376 feet south * * * from the point of beginning". Notwithstanding said map reference and the exactness of the length of said line, yet, under the law of the case, said common boundary extended to the line of mean high tide.

Moreover, if it had been the intention to sell lot 9 "as shown on the map" the bank trustee would never have gone to the pains of describing the parcel with such meticulous care by extending the southerly lateral to the line of mean high tide and then northwesterly "along the line of ordinary high tide". But the map reference contention was neatly disposed of on the former appeal when the Supreme Court said, 220 Cal. at page 441, 31 P.2d at page 382:

"The official map was conclusively shown to be inaccurate as to the location of the tide line and, in this behalf, it was entirely disregarded by the expert appointed by the court. The map, too, was off scale as much as 40 to 50 feet in some of its boundaries and the expert appointed by the court thought that the line here in dispute had that percentage of error on the map. Even taking the map as accurate, it does not purport to measure said distance either at 376 feet to the one point or 382 feet to the other. The measurements are given as exact only to the ocean bluff and the measurements from that point to the line of ordinary or mean high tide are only approximations. The engineer who made the survey was examined as a witness and his field-notes were placed in the record. He frankly admitted that the measurements, as the notes show, were only approximations from the bluff line to the tide line. In fact, he said that they were estimates made with the eye only, said observations being made from the top of the bluff overlooking the ocean. No measurements with chains or instruments were made and there was no effort to locate the tide line as of that day in any manner whatsoever. As already noted, this survey was as of November 15, 1926. These parties made their purchases in said subdivision in May and June, 1927. The court found that the line of ordinary high tide had not changed during this period. Yet the survey of one Peabody, made December 22, 1928, indicates that said line of ordinary high tide met the northwest boundary of lot 9 at a distance of approximately 415 feet from the point of beginning, or some 39 feet beyond the point found by the court as of June, 1927. It is strange that no sand or alluvium was deposited in the first year and that much was deposited in the second. Plaintiffs' witnesses fixed this line, by a survey made November 22, 1928, at 592 feet from point of beginning. Moreover, the pleadings admit that said line was in excess of 376 feet in length when this action was instituted on March 1, 1929. We are, therefore, utterly unable to find any evidence that even tends to support the finding in question or, in fact, any finding as to the location of said tide line previous to the fall of 1928. * * * We, therefore, conclude that the mean high tide line, as of May or June, 1927, was a natural monument, fixing the southerly boundary of all these lots and that no sufficient evidence whatsoever can be found in the record to establish the said line as of that date, if indeed any change at all has occurred in it since then. We further hold that said natural monument will control the measurement found in the contracts and conveyances made."

But, notwithstanding said positive language, defendants now contend that the doctrine of the law of the case does not apply; that it never extended beyond the exigencies which demand its application, citing Taylor v. Bunnell, 211 Cal. 601, 296 P. 288; Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Coats v. General Motors, Cal.App., 64 P.2d 1168; that said doctrine does not apply to points not actually presented on the first appeal (citing Trower v. City and County of San Francisco, 157 Cal. 762, 109 P. 617; People v. Hamilton, 103 Cal. 488, 37 P. 627); that it never applies when the evidence is substantially different on the second appeal (citing Sheets v. Southern Pacific, 1 Cal.2d 408, at page 411, 35 P.2d 121; Smellie v. Southern Pacific Co., 128 Cal. App. 567, 18 P.2d 97, 19 P.2d 982; Erlin v. Nat. Union Fire Ins. Co., 7 Cal. 2d 547, 61 P.2d 756) and that the doctrine involves procedure not jurisdiction and should not be adhered to when its application results in a manifestly unjust decision. Citing England v. Good Samaritan, 14 Cal.2d 791, 97 P.2d 813.

[4] The authorities cited are not in point. The opinion of the Supreme Court is the law of the case. The points determined in the former appeal are the points now under consideration and, therefore, said conclusions must be accepted as final on the retrial. 2 Cal.Jur. 1043. Where a dispute as to the location of a mining claim was decided in favor of the defendants, the Supreme Court, on remanding the case for a new trial, held that the extent of the claim should be determined by the extent of the occupancy. On a retrial, the lower court committed error in refusing to instruct the jury in accordance with the Supreme Court's pronouncement. Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548. It was later held "the doctrine of the law of the case is this: That where, upon an appeal, the Supreme Court * * * states * * * a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress * * * although in its subsequent consideration, this court may be clearly of the opinion that the former decision is erroneous in that particular. * * *" Tally v. Ganahl, 151 Cal. 418, at page 421, 90 P. 1049, at page 1050. It was a matter properly presented to the court for decision and one whose decision was proper as a guide to the court below on a new trial. Westerfeld v. New York Life Ins. Co., 157 Cal. 339, at page 345, 107 P. 699.

The application of the doctrine of the law of the case is not to be obviated here because new and additional evidence was received upon the second trial. Such evidence did not alter the issues as originally presented but merely added to the recorded evidence which was indicated by the Supreme Court as necessary to a proper decision of the case. It has been held that additional evidence, merely accumulative to evidence of the same class, received at the first trial and considered on the first appeal, does not interfere with the doctrine of the law of the case; but, on the other hand, to avoid application of the doctrine, a new and substantial fact must be brought into the case upon the retrial. Estate of Baird, 193 Cal. 225, 244, 223 P. 974.

[5] III. The third contention is that the phrase "line of ordinary high tide" should have been given its commonly accepted rather than its technical meaning. If such were the law, the line of ordinary high tide might be fixed at the toe of the cliff where, during the most violent storms, without doubt, the surf beats with fury. But there is nothing in all the negotiations of the parties to indicate that such was the intention. This claim was disposed of by the Supreme Court in its declaration "that the mean high tide line, as of May or June, 1927, was a natural monument, fixing the southerly boundary of all these lots" etc. "* * * there is no dispute as to the significance of the expression 'ordinary high tide.' * * * it is not the limit to which we refer when we speak of 'usual' or 'ordinary' high water mark". Forgeus v. City and County of Santa Cruz, 24 Cal.App. 193, 140 P. 1092, 1093.

While a contract may be explained by reference to the circumstances under which it was made, Civ.Code, sec. 1647, and although the language of a writing is to be interpreted according to the meaning it bears in the place of its execution, Code Civ.Proc. sec. 1857, yet there appears no reason for resorting to the rule of either code section or to the evidence of provincial misuse of a phrase in order to derive the significance of "ordinary high tide line" as used by said common grantor. If these words are understood in their ordinary and popular sense, Civ.Code, sec. 1644, there can be no doubt as to their meaning in any other sense. To accept the definition of the phrase as given by some witnesses that it meant "the line on the sandy beach to which the wash of the waves came" were as contrary to reason as to say that the average high water of the Mississippi is the line out in the valley reached by flood waters after a season's severest floods. Before physical geography and other scientific knowledge became widely read and literacy so universal, it might have been proper to prove the meaning of "ordinary high tide" in a remote community. But, with universal education and daily press comments concerning the tides and their ebb and flow, it is not reasonable to believe that in the year 1927 officers of a great bank in an enlightened community on the sea coast, carrying a subdivision tract of beach lots for sale, could have entertained the thought that the line of ordinary high tide meant the line made by the wash of the waves. One of the earliest lessons in natural science is that the moon pulls the water of the ocean; that where the pull occurs near the shore of a continent the rise of the water on the shore under the lunar force is the flow of the tide, and when it reaches the line of high tide, the force of the pull has been spent and the tide ebbs to sea level and to lower low water again.

[6] The facts that the pull of the moon along the California coast is stronger on some days than on others, and that the combined force of the sun and the moon at other times draws the tide to a still higher elevation than does the moon alone, does not avoid the conclusion that there is a mean or ordinary high tide which may be determined with a fair degree of accuracy, by a method of utilizing the data referred to in the "Tidal Bench Marks" along the coast of Southern California. Suffice it to say that the easy availability of said data renders unnecessary proof of the meaning of the phrase "ordinary high tide" in the vicinity of Laguna Beach.

[7] IV. Defendants argue that reference to the line of ordinary high tide was inserted by conjecture or mistake, and that giving precedence to this reference rather than to the distances named in the calls of the survey produces an absurd result. But, it is the rule that natural boundaries and monuments take precedence over courses and distancs contained in a description. Hunt v. Barker, supra; Swarzwald v. Cooley, supra. It is more likely that the result would be absurd if preference were given to distances. The second call in the description in plaintiffs' contract, to-wit: "thence southerly 59 degrees, 21 minutes, 30 seconds more or less to a point in the line of ordinary high tide of the Pacific Ocean" shows that one lateral bounding said lot 9 goes definitely to a point "in the line of ordinary high tide".

The third call in the description "thence northwesterly along the line of ordinary high tide to a point located 376 feet south 59 degrees, 21 minutes, 30 seconds west from the point of beginning" omitted, surely through an inadvertence, to have the figures followed by the words "more or less". Had that phrase been inserted as it was in defining said point on the common boundary in the Griffith contract, it is unlikely that any question as to the intention of the common grantor to extend said common boundary to the line of mean high tide would have arisen. But, inasmuch as the southwesterly boundary of lot 9 continued northwesterly along the line of ordinary high tide, no fair construction could draw the line of ordinary high tide to said point at 376 feet from the highway as we have already shown. In the case of Ferris v. Coover, 10 Cal. 589, at page 628, the court said: "* * * the lines actually intended by the parties, if they can be ascertained, are to control. The rules adopted in the construction of boundaries, are those which will best enable the Courts to ascertain the intention of the parties. Thus, preference is given to monuments, because they are least liable to mistake."

[8] The instant case proves the wisdom of said rule. Defendants cited the case of Goss v. Golinsky, 12 Cal.App. 71, at page 74, 106 P. 604, 605, to the effect that where monuments are called for by conjecture and not by actual running out of the lines upon the ground, course and distance should govern. But the line of mean high tide was not an imaginary line. The court there said: "If the only question were the relative importance of natural objects or monuments, clearly identified, and courses or distances, the former would be entitled to precedents * * * courses and distances control incidental calls for monuments, except where there is a clear intention shown to make such calls locative. * * * The calls for these natural objects are intermediate and apparently incidental calls." The call to the line of ordinary high tide in plaintiff's contract was not incidental or intermediate. It was sacramental to the contract. Plaintiffs were buying a private beach which meant a lot leading to the water's edge. While it is true that the line reached by the tide varies on the beach from day to day, the line of ordinary high tide has remained as constant as the coast itself.

The case of Miller v. Grunsky, 141 Cal. 441, 66 P. 858, 75 P. 48, also relied upon by defendants, was an action brought by plaintiff to quiet title to the west 20 chains of section 31, etc., in a certain township in Merced county. The description contained the call "thence west 6.50 chains to the Oristimba rancho". That description started from a definite point and extended exactly 6½ chains to a natural monument, the Oristimba rancho. The plaintiff failed in that case because he did not show the location of said ranch to be at any definite place, whereas the defendants demonstrated that the ranch was 6½ chains from the known point.

In the description contained in the contracts for the sale of lots 8 and 9, there is but one monument, to-wit, the line of mean high tide of the Pacific ocean. The call to that monument was for the purpose of establishing the southwesterly boundary of the lots sold in each case. Defendant's contention is that said reference to the map in the contract shows definitely that lot 9 extended only 376 feet from the state highway along said common boundary and that, therefore, said map reference should control. But upon the former appeal, the official map was held to be inaccurate as to the location of the line of mean high tide. Even taking the map as accurate, it does not purport to measure said distance either at 376 feet on the northwest lateral or 382 feet on the southeast lateral. The measurements are given accurately only to the toe of the cliff and the measurements from that point to the line of mean high tide are only approximates. There was no reason why he should, for it was an unchangeable monument without value except in case of dispute as to the length of the lateral boundaries.

[9-12] The rule obtaining in this jurisdiction with reference to the precedence of references is set forth in 4 California Jurisprudence 394, as follows: "where maps, plats or field notes are referred to in a description of the property, they are to be regarded as incorporated in the description and a part of it. In case of a conflict between the calls of the field notes and the calls of a survey, the calls of the field notes will prevail. Particularly where the calls of the field notes are for monuments and the calls of the survey are by course and distance. * * * In case of a discrepancy between field notes and a plat, the plat must give way to the field notes; and a plat may be corrected so as to conform thereto, and if corrected, such plat supersedes the original." Harrington v. Boehmer, 134 Cal. 196, 66 P. 214, 489; Tognazzini v. Morganti, 84 Cal. 159, 23 P. 1085. From the foregoing consideration, therefore, we cannot avoid the conclusion that the correct construction of the description of lot 9 as contained in the contract of sale to the plaintiffs is that the plaintiffs' southeasterly line extends to mean high tide and that the westerly boundary of said lot extends "along the line of ordinary high tide" to its intersection with the common boundary of lots 8 and 9 at the end of the promontory.

[13] V. Defendants contend that the original sale of lot 8 carried with it an easement by implication of access to the water across the beach in front of lot 9 and that plaintiffs took subject thereto; that when the common grantor sold lots 7 and 8 to Griffith and retained lot 9, an easement was vested in Griffith and his successors whereby the right to cross over the common boundary between lots 8 and 9 to reach the water was vested in Griffith at the time of his purchase. They base this contention either upon the claim that there was a well defined and obvious trail from lot 8 to the water in front of lot 9 or because the lots were sold with reference to a recorded map. In support of these contentions, the defendants cite Cave v. Crafts, 53 Cal. 135; sec. 1104, Civ.Code; Silveira v. Smith, 198 Cal. 510, 246 P. 58; Vargas v. Maderos, 191 Cal. 1, 214 P. 849; Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593. These authorities definitely establish the rule above recited but, by reason of the facts of the instant case, the rule supported by said authorities is not applicable for the reasons that: (1) the evidence in support of the easement is insufficient, and (2) the theory of an easement is raised for the first time upon this appeal.

[14-16] In order for an easement to arise by implication, it must be both apparent and continuous, or obvious and permanent. Civ.Code, sec. 1104. An easement which is apparent and continuous will pass as appurtenant without the use of the word "appurtenances"; but if it is not apparent and continuous, it is not included in the conveyance unless the grantor uses language in his deed sufficient to create the easement de novo. 19 Cor.Jur. 917. An apparent or obvious easement is one that is visible on the servient estate. It sometimes refers to an artificial or permanent structure on the servient estate.

"Many authorities declare that the word 'apparent,' as applied to an easement in this connection, does not necessarily mean visible, but refers to easements used by means of some artificial permanent structure on the servient tenement, such as a pipe, a sewer, or a ditch, as distinguished from those which use the servient tenement in its natural state, and at intervals, in the meantime leaving no visible sign of their existence, such as a way or a right of fishery or pasture." Rubio Canon Land

& Water Ass'n v. Everett, 154 Cal. 29, 96 P. 811, 813.

[17] From the language above quoted, it appears that to establish an easement by implication, there must be something upon the servient estate which is either visible or in the nature of a permanent artificial structure. But, in the instant case the trail which defendants say created the implied easement existed on lot 8 and not on lot 9. The trail descended down the side of the bluff, within the "cove", and was finally supplanted by a stairway with concrete steps at its base. This concrete base was at the foot of the cliff some 25 feet northwest from the common boundary line between lots 8 and 9. How, then, could the trail down the side of the bluff of lot 8 create an easement to cross lot 9? It could not create "in favor thereof [lot 8] an easement to use other real property [lot 9] of the person [plaintiffs] whose estate is transferred". Civ.Code, sec. 1104. Upon no fair construction of the facts as they existed, as shown by the exhibits in this case, could it be reasonably claimed that a person who purchased lot 9 in quest of a private beach be said to have had notice that a trail leading down the bluff of lot 8 onto an inaccessible portion of the same lot should be construed to imply a right to pass over lot 9 in order to reach the ocean.

[18] Defendants further contend that the map referred to in the Griffith contract of purchase and in the subsequent deed from a common grantor became a part of the deed and that the map shows that said common boundary ran "across the beach in the cove" and that, therefore, a private easement for access to the water is analogous to an easement acquired under such circumstances for access to a highway. Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024; 45 Cor.Jur. 500. But, if the common boundary line did run across the beach in the cove, this fact would not have conveyed to defendants the right to cross over into lot 9, but merely that they had access to the water fronting upon lot 8. This conclusion is emphasized by the fact that the status of this coastal area was altered, prior to the sales in question; it had been subdivided into lots, each apparently for the private use of one family. "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark." Sec. 830, Civ.Code.

[19] Finally, the contention that an easement arises by implication could not under any circumstances prevail for the reason that this contention is raised for the first time upon this appeal. Plaintiffs challenge the record to show that any theory was advanced or argument made to the effect that an implied easement to use the sands of lot 9 in order to reach the ocean was ever mentioned at any point in the course of the trial. We have been unable to find such argument. The pleadings and the briefs and the conduct of the trial indicate that the theory of the defendants at the trial was that title was vested in them in that portion of lot 9 which lay between a point 376 feet from the highway to the line of mean high tide. It is true that the court made a finding "that said parties mutually believed that 376 feet more or less was to a point in the high tide or ordinary high tide line of the Pacific Ocean" and "said parties did mutually believe that by reason thereof Raymond Griffith did own all of the land projecting into the sea beyond said northwesterly boundary of said lot 9 as ended by 376 feet, more or less, and that said Raymond Griffith would have free access to the Pacific Ocean from the southeasterly boundary of said lot 8 * * * and would have free access to the Pacific Ocean over lands southwesterly of the said 376 feet as ended by the ordinary high water mark, or high tide water mark, or shore line, the northwesterly boundary of said lot 9 as marking the ordinary high tide of the Pacific Ocean". But those findings were responsive to the allegations of the second count in the cross-complaint of the defendants drawn on the theory of title. The language last quoted indicates that Griffith believed he would have access over the property which he thought he owned and the language does not indicate that he thought he had access to the waters over the property of plaintiffs.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

39 Cal.App.2d 470

FOSTER v. WARREN et al.

Civ. 6382.

District Court of Appeal, Third District, California.

June 13, 1940.

1. Fraudulent conveyances 🔑308(8)

Where first mortgage foreclosure proceeding was commenced but no lis pendens was recorded, and before entry of judgment in foreclosure proceeding the mortgagor in consideration of an antecedent debt delivered to her son a note secured by second mortgage on the land, whether the second mortgage was executed with fraudulent purpose of defeating creditors was question of fact. Civ. Code, § 3442; Code Civ.Proc. § 409.

2. Appeal and error 🔑1011(1)

Where evidence regarding question of fraudulent intent of mortgagor who executed second mortgage after first mortgage foreclosure proceeding was commenced was conflicting, the reviewing court was bound by findings of the trial court. Civ.Code, § 3442.

3. Mortgages 🔑25(3)

A pre-existing debt furnishes a valuable "consideration" for execution of a mortgage.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Fraudulent conveyances 🔑88

Second mortgage which was executed in payment of antecedent debt which mortgagor had previously promised to secure, and after commencement of first mortgage foreclosure proceeding wherein no lis pendens was filed, was not void for want of consideration. Code Civ.Proc. § 409.

5. Fraudulent conveyances 🔑220

First mortgagee was not in position to question validity of second mortgage which was executed after commencement of first mortgage foreclosure proceeding wherein no lis pendens was recorded, where first mortgagee obtained judgment for full amount and procured sale of property to satisfy his lien, purchased the property at sheriff's sale for less than 40 per cent. of the appraised value thereof, obtained deficiency judgment, and a conveyance of the property subject to equity of redemption. Civ.Code, § 3441; Code Civ.Proc. § 409.

6. Mortgages 🔑271

In absence of fraud, mortgagor had absolute right to convey her equity in mortgaged property subject to the prior mortgage lien.

7. Lis pendens 🔑13

Mortgagor's sons who were not parties to action for foreclosure of first mortgage wherein no lis pendens was filed and to whom second mortgage was executed after the first mortgage foreclosure proceeding was commenced would be bound by the judgment in the foreclosure proceeding if the sons had either actual or constructive knowledge of that proceeding. Code Civ.Proc. § 409.

8. Lis pendens 🔑13

Evidence established that mortgagor's sons to whom mortgagor executed second mortgage after commencement of first mortgage foreclosure proceeding wherein no lis pendens was filed had actual knowledge of pendency of the foreclosure proceeding. Code Civ.Proc. § 409.

9. Appeal and error 🔑931(1)

On appeal from judgment determining that note secured by second mortgage was not invalid on ground of fraud, any conflict of evidence on issue whether second mortgagee had actual knowledge of pendency of first mortgage foreclosure proceeding at time of execution of the second mortgage was required to be resolved against appellant mortgagee.

10. Mortgages 🔑137

Second mortgage which was executed for valuable consideration and without fraud after commencement of first mortgage foreclosure proceeding wherein no lis pendens was filed conveyed to the second mortgagees at least an equity of redemption in the property, even though the second mortgagee, who had knowledge of the foreclosure proceeding, would be bound by the foreclosure judgment. Code Civ.Proc. § 409.

11. Mortgages 🔑586

A mortgage foreclosure sale extinguished claims of all defendants who were parties to the action except their rights of redemption and vested title to the property at the date of the mortgage subject to the redemption right. Civ.Code, § 2904; Code Civ.Proc. § 701.

12. Liens 🔑23

Any one who has a lien inferior to that of any other upon the same property has a right to redeem the property from the superior lien. Civ.Code, § 2904; Code Civ. Proc. § 701.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Alfred Milan Foster, an incompetent person, by M. Abbie Fuller, guardian of his person and estate, against Ellen C. Warren and others to cancel a note secured by mortgage and a quitclaim deed on ground that the instruments were procured by fraud. From the portion of judgment rendered against the plaintiff determining that the secured note was invalid because of fraud, the plaintiff appeals.

Affirmed.

Wm. J. O'Brien, John F. Poole, and H. E. Gleason, all of Los Angeles, for appellant.

Robert E. Austin, Leo M. Zinner, Joseph W. Pierce, and John N. Helmick, all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from that portion of a judgment which was rendered against him determining that a promissory note secured by a second mortgage on real property is not invalid on the ground of fraud.

This is a suit to cancel a note secured by mortgage on certain lots in Los Angeles known as the "Magnolia property" and a quitclaim deed to 86 acres of land called the "Newhall Ranch", on the ground that the instruments were procured by fraud.

On October 18, 1927, the defendant, Ellen C. Warren, and her husband, Charles, owned the Magnolia property in Los Angeles and resided thereon. They also owned a farm called the Newhall ranch. They had three grown children consisting of the defendant Sarah L. Murray, and the other defendants, Charles A. and John F. Warren. On the last-mentioned date Ellen C. Warren and her husband executed and delivered their promissory note for the sum of $3,000, payable to the plaintiff, secured by a mortgage on the Magnolia property. The mortgage was duly recorded. At various times prior to 1936, the two sons, Charles and John Warren, loaned their parents sums of money aggregating an amount in excess of $5,725, which was used for their maintenance and for improvements and operation of the Magnolia property and the Newhall ranch. The parents frequently told their sons they would execute a note and mortgage on the Magnolia property to secure the debt. The record leaves no reasonable doubt of the existence of that indebtedness. The husband of Mrs. Warren died August 13, 1932. The widow thereupon became the sole owner of the real property in question. At that time she possessed no other property except her household goods and several hundred dollars in cash. She was over eighty years of age at the time of the trial of this case. The Magnolia property was appraised in 1936 at a value of $4,100. The Newhall ranch, consisting of 86 acres of land, was valued at approximately $20,000.

In January, 1936, the plaintiff brought suit for foreclosure of his $3,000 mortgage against Ellen C. Warren for default in the payment of the note secured thereby. No lis pendens was recorded pursuant to section 409 of the Code of Civil Procedure. February 17, 1936, judgment was rendered in that suit against Ellen C. Warren for the sum of $3,517.46 and for foreclosure of the mortgage and sale of the Magnolia property to satisfy the judgment. Subsequently the property was sold at sheriff's sale to this plaintiff for the sum of $1,500, and a deficiency judgment was entered in favor of the plaintiff for the amount of the unpaid balance. Execution was thereafter issued and returned unsatisfied.

January 18, 1936, while the foreclosure proceeding was pending but before judgment therein was rendered, in consideration of her antecedent debt, and pursuant to her previous agreement, Ellen C. Warren executed and delivered to her sons, Charles A. and John F. Warren, her promissory note, payable to them in the sum of $5,725, secured by mortgage on the premises in question. That mortgage was recorded January 30th of the same year. For about one year prior to 1936, Mrs. Warren had been living with her daughter, Sarah L. Murray. On January 21, 1936, in consideration of an agreement for maintenance and care during her lifetime, Mrs. Warren executed and delivered to her daughter a quitclaim deed to her Newhall property, which was recorded January 30th of that same year. Mrs. Warren testified in that regard: "I deeded her this ranch for my keep, as long as she gave me a home, as long as I lived." The conveyance of the

Newhall ranch to her daughter left Mrs. Warren no property other than her equity in the Magnolia property and some cash amounting to five or six hundred dollars.

This suit was commenced June 11, 1936, to cancel both the note and mortgage to her sons and the quitclaim deed to her daughter, on the ground of fraud. It was tried by the court sitting without a jury. With respect to the Newhall property the court found that the quitclaim deed was given to Sarah L. Murray in consideration of her agreement to maintain and care for her mother during her lifetime, but that the conveyance was contrary to the provisions of section 3439 of the Civil Code and therefore amounted to constructive fraud against the plaintiff who was then a creditor of the grantor. The decree thereupon cancelled the quitclaim deed. No appeal was taken from the last-mentioned portion of the judgment and it has become final. The invalidity of that quitclaim deed is not an issue on this appeal.

With respect to the note and mortgage for $5,725 which were executed and delivered to Charles A. and John F. Warren January 18, 1936, the court determined that they were founded on adequate and valuable consideration consisting of an antecedent debt; that they were not executed or accepted contrary to law to defraud creditors; that the grantor was not then insolvent, and that the note and mortgage were valid, binding instruments in payment of a previous indebtedness. Judgment was rendered that plaintiff take nothing by his action against Charles A. or John F. Warren. From this last-mentioned portion of the judgment the plaintiff has appealed.

[1, 2] The evidence amply supports the findings and judgment of the validity of the note and mortgage of $5,725 which were given to Charles A. and John F. Warren January 18, 1936. There is no doubt the grantor owed them at least that sum of money, and that she had frequently promised to secure the indebtedness in that manner. There is also substantial evidence that she was not insolvent at the time she executed and delivered those instruments. The question as to whether the second mortgage was executed with the fraudulent purpose of defeating creditors is one of fact and not of law under the circumstances of this case. Since the evidence regarding that question is conflicting, we are bound by the findings of the trial court. Section 3442 of the Civil Code provides in that regard: "The question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration."

[3] It is the established rule in California that a pre-existing debt furnishes valuable consideration for the execution of a mortgage. Ekmann v. Plumas County Bank, 215 Cal. 671, 12 P.2d 433; Bradley v. Butchart, 217 Cal. 731, 744, 20 P.2d 693; 17 Cal.Jur. 955, § 240.

It is true that section 3442 of the Civil Code provides in part that: "* * * any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

[4] In the present case, however, the court has found, and for the purposes of this appeal we must assume, the mortgagor, at the time of the execution of her note and mortgage to her sons, was neither insolvent nor did she contemplate insolvency. And as we have previously said, she gave the note and mortgage for a valuable consideration, since they were executed in payment of an antecedent debt which she had previously promised to secure in that manner.

[5] Moreover, the plaintiff is not in a position to question the validity of the second note and mortgage, for we do not perceive that those instruments obstruct in any way the enforcement of his previous mortgage. Section 3441 of the Civil Code provided that: "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation."

[6] The respondents' mortgage did not obstruct the enforcement of appellant's foreclosure proceeding. He obtained his judgment for the full amount prayed for and procured the sale of the property to satisfy his lien. He purchased that property at sheriff's sale for less than forty per cent of the value thereof according to the appraisement of a reliable realtor. He had a deficiency judgment entered in his favor for the unpaid balance of his original loan. The property was conveyed to him by the sheriff subject only to the equity of redemption. In the absence of fraud

the grantor had an absolute right to convey her equity in that property subject to the prior mortgage lien. Even though it may be assumed the respondents were bound by the judgment of foreclosure, they may still be entitled to exercise an equity of redemption. At least, in the absence of fraud, which the court has specifically found did not exist, the respondents' note and mortgage are not invalid.

With respect to the question as to whether the respondents are bound by the judgment of foreclosure, which we think is not necessarily involved on this appeal, assuming that constructive notice of the action was not given as required by section 409 of the Code of Civil Procedure, by recording a lis pendens, and that they did not have actual notice of that foreclosure proceeding, they would not be bound by the judgment since they were not parties to the action. In 16 California Jurisprudence 655, section 10, it is said in that regard: "In the absence of notice, actual or constructive, one who takes title from the defendant pending the action is not bound by the judgment if not a party thereto." See Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278.

[7] It is true that notwithstanding the fact that the respondents were not parties to the action for foreclosure of the mortgage they would be bound by the judgment if they had either actual or constructive knowledge of that proceeding. Hibernia Savings & Loan Society v. Lewis, 117 Cal. 577, 580, 47 P. 602, 49 P. 714; sec. 1908, subd. 2, Code Civ.Proc.

[8-12] There is substantial evidence that the respondents had actual notice of the pendency of the foreclosure proceeding. If there is a conflict of evidence upon that issue, in support of the judgment it should be resolved against the appellant. But the determination of that question is not controlling with respect to the validity of the second note and mortgage. The respondents' note and mortgage may be perfectly valid in spite of the fact that they would be bound by the foreclosure judgment in the other suit. The appellant purchased the Magnolia property at the sheriff's sale subject to redemption. Since the second mortgage was executed for a valuable consideration without fraud, it conveyed to the respondents at least an equity of redemption in the property. They were not parties to the foreclosure proceeding. Their lien upon that land has never been foreclosed. It is true that the effect of the foreclosure sale extinguished the claims of all defendants who were parties to that action, except their rights of redemption, and vested title to the property at the date of the mortgage, subject to the right of redemption conferred by law. McNutt v. Nuevo Land Co., 167 Cal. 459, 464, 140 P. 6; 18 Cal.Jur. 217, § 506. Anyone who has a lien inferior to that of another upon the same property has a right to redeem the property from the superior lien. Sec. 2904, Civ.Code; sec. 701, Code Civ.Proc. We specifically refrain from determining the precise rights or remedies of the respondents under the circumstances of this case, for they are not necessarily involved on this appeal. We merely hold that the respondents have an equity in the property by virtue of their subsequent note and mortgage which renders the instruments valid.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

39 Cal.App.2d 506

O'HARE et al. v. PEACOCK DAIRIES, Inc.

Civ. 2550.

District Court of Appeal, Fourth District, California.

June 17, 1940.

1. Appeal and error ⚷440

While judicial errors cannot be corrected by trial court after appeal is taken, mere clerical errors or misprisions can be corrected by trial court in order to make record speak the truth.

2. Appeal and error ⚷440

The trial court could make nunc pro tunc order, after appeal had been perfected, to show that plaintiffs who sued for breach of contract had received in the open market for milk sold $27,574.04 instead of $49,822.85 as stated in finding, where by mathematical computation it appeared that if larger sum were correct, plaintiff would have suffered no damage, and court found that difference between selling price and contract

price was $22,248.81, and hence order sought to be corrected contained a "clerical mistake" which appeared upon face of record.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Mistake".

Appeal from Superior Court, Kern County; Louis C. Drapeau, Judge.

Action by James M. O'Hare and another, as copartners doing business under the firm name and style of O'Hare Brothers, against Peacock Dairies, Incorporated, to recover damages for breach of contract. From a judgment for plaintiffs, defendant appeals and plaintiffs move for diminution of record by including a nunc pro tunc order made by the trial judge correcting a finding of fact after the appeal had been perfected.

Motion granted.

Mitchell, Johnson & Ludwick, of Los Angeles, for appellant.

Joseph Scott, of Los Angeles, and Claflin, Dorsey & Campbell, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

In this action the respondents recovered a judgment for damages in the sum of $22,248.81 against the appellant. This amount was found and allowed as the difference between the contract price of a quantity of milk and the amount for which said milk was sold in the open market. In finding No. IX the court found that the contract was breached with respect to milk to an amount containing 71,175.50 pounds of butter fat; that the contract price was 70 cents per pound of butter fat; that the respondents received for said milk as sold in the open market the sum of $49,822.85; that the damage to the plaintiffs was the difference between the amount for which the milk sold and the contract price; and that this difference was $22,248.81.

After an appeal had been perfected the respondents moved the trial court, ex parte, to correct and amend "a manifest and patent clerical error inadvertently appearing in finding of fact No. IX", asking the court to change the amount "$49,822.85", as it appeared in said finding, so that it would read "$27,574.04", which amount was the true and correct amount received by the respondents from the sale of 71,175.50 pounds of butter fat in the open market and which amount represented the difference between the contract price of said butter fat, to-wit, $49,822.85, and the amount for which judgment was awarded, to-wit, $22,248.81.

In response to this application the trial court entered a "nunc pro tunc order correcting and amending clerical error in findings of fact" in which it recited that "to correct a patent and manifest clerical error and to make the record of this court speak the truth", it was ordered that finding of fact No. IX be corrected and amended "and that the sum of $49,822.85 appearing therein shall be corrected and changed to read the sum of $27,574.04".

Thereafter, the respondents, after notice, moved in this court for a diminution of the record by adding and including the nunc pro tunc order made by the trial judge correcting finding of fact No. IX in the respect above noted. The appellant resisted this motion on the ground that the change sought to be made by the nunc pro tunc order was a correction of a judicial error and not of a clerical error and therefore, one which could be remedied only through a motion for a new trial or on appeal.

[1] While it is settled that judicial errors cannot be corrected by the trial court after an appeal is taken it is equally well settled that mere clerical errors or misprisions can be corrected by the trial court in order to make the record speak the truth. Egan v. Egan, 90 Cal. 15, 27 P. 22; Halpern v. Superior Court, 190 Cal. 384, 212 P. 916, 917. In the last case cited it is said: "The right of a lower court to amend its record to conform to the truth is not suspended or impeded by an appeal, where the amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record."

[2] It is at once apparent that the error sought to be corrected through the nunc pro tunc order is a clerical mistake which appears upon the face of the record. By mathematical computation it appears that 71,175.50 pounds of butter fat at 70 cents a pound would be worth $49,822.85. The finding, as originally made, is that this exact amount was received for the milk in the open market. If those amounts were correct the respondents would have suffered no damage. But the court found that the difference between the selling price and the contract price was $22,248.81. By simple computation it thus appears on the face of

the finding that the price for which the milk sold in the open market should have been $27,574.04 instead of $49,822.85, which is the correction and the only change made by the nunc pro tunc order.

Not only was this correction made to make the record speak the truth but it sufficiently appears that the amendment made does not affect any substantial rights of the appellant. The amount for which the milk sold in the open market clearly appears in the record now before this court and if the motion for diminution of the record should be denied, this court, in considering the appeal on its merits, could not do otherwise than make a new finding which made the same correction in finding No. IX or direct that such correction be made by the trial court.

Under the facts here appearing the trial court had the right to make this correction in order to make its record speak the truth and that correction should now become a part of the record on appeal.

The motion for diminution of the record is granted and a duly certified copy of the nunc pro tunc order may be filed when presented.

I concur: MARKS, J.

39 Cal.App.2d 509

FULTON et al. v. WEBB et al.

Civ. 6377.

District Court of Appeal Third District, California.

June 18, 1940.

Hearing Denied Aug. 15, 1940.

1. Execution 🔑193

The fact that fraud had not been pleaded did not preclude court from determining that there had been a fraudulent conveyance of bonds by judgment debtor to third-party claimant where both sides understood issues involved and no claim was made of surprise, continuance was not requested, and no objection was made to admission of evidence tending to establish fraud. Code Civ.Proc. § 689.

2. Execution 🔑193

Where third party claim was filed as to bonds levied on, the gist of the action was the title of the third party claimant to the bonds, which included the manner in which she obtained such title. Code Civ.Proc. § 689.

3. Pleading 🔑166

Under statutory provision that statement of any new matter in answer must be deemed to be controverted by the opposite party, evidence of fraud may properly be introduced to avoid the effect of a sale set up in the answer. Code Civ.Proc. § 462.

4. Execution 🔑193

The filing of a third party claim put only the title in issue and alleged unlawful acts, if any, of sheriff who levied execution but who was not party to the action could not be made the subject of inquiry. Code Civ. Proc. § 689.

5. Execution 🔑193

In proceeding on third party claim, the court is not authorized to determine any question of lien, fraud or equities. Code Civ. Proc. § 689.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by J. E. Fulton and another against E. Townsend Webb, wherein Sally Ruth Purviance filed a third party claim asserting ownership of bonds which had been levied upon. From an adverse judgment, the third party claimant appeals.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Aubry Miller and Henry E. Phister, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1930 plaintiffs obtained a judgment of $4,000 against defendant E. Townsend Webb. This judgment remained unsatisfied until November, 1936, at which time an execution was issued, and by the sheriff levied upon the contents of a safe deposit box rented to Minona and Sally Ruth Purviance. By inadvertence the property so levied upon was released by the sheriff, and on February 10, 1937, a second execution was issued and again was levied upon the contents of the same safe deposit box. Under this levy the sheriff took possession of the property here in dispute, being three Merchants Exchange Building of Los Angeles First Closed Mortgage Bonds, with coupons.

Thereafter appellant Sally Ruth Purviance filed a third party claim in which she asserted ownership of the bonds and claimed to have acquired title to the same in the following manner: That her mother Mary J. Purviance had during her lifetime received these bonds as collateral security for a loan of $3,000; that the mother assigned her claim to Sally Ruth Purviance and delivered to her the mortgage bonds as collateral; that the loan was never paid, and the bonds were surrendered to her in satisfaction of the claim; and therefore Sally Ruth Purviance, claiming to be the owner thereof, demanded return of the bonds from the sheriff. The sheriff thereupon demanded security of respondents as provided in section 689 of the Code of Civil Procedure. No security was deposited, but respondents filed a petition for a hearing to determine title under that section. A hearing was had, and judgment was given in favor of respondent and against the claimant Sally Ruth Purviance, the court holding the property belonged to the judgment debtor, E. Townsend Webb, free and clear of any claim of lien of the third party claimant. From that judgment this appeal was taken.

[1, 2] Several points are urged in opposition to the judgment. The first is that no fraud having been pleaded, the court was without authority to find that there had been a fraudulent conveyance of the bonds by the judgment debtor to the third party claimant, or to predicate a judgment thereon. Both sides seem to have understood the issues involved, and no claim was made of surprise at the trial nor was a continuance requested, nor do we find that any objection was made by appellant as to the admission of any evidence tending to establish fraud. The gist of the action was the title of the third party claimant to the bonds, which included the manner in which she obtained such title.

[3] Furthermore the provisions in section 689 of the Code of Civil Procedure that the allegations of the third party claim shall "be deemed controverted" is in effect no different than the provisions of section 462 of the Code of Civil Procedure, that the statement of any new matter in the answer must "be deemed controverted" by the opposite party. Under this last section it has been held that evidence of fraud may properly be introduced to avoid the effect of a sale set up in the answer (Jose Realty Co. v. Pavlecevich, 164 Cal. 613, 130 P. 15); also evidence to avoid pleas of the statute of limitations may likewise be admitted. Williams v. Dennison, 94 Cal. 540, 29 P. 946; Sterling v. Smith, 97 Cal. 343, 32 P. 320.

A further point raised by appellant in a supplemental brief is that the third party claimant has been denied due process. This contention is based upon the following facts: The writ of execution under which the sheriff acted was issued February 10, 1937. On March 3, 1937, the sheriff made a return thereon to the effect that he did "On the third day of March, 1937, attach the following described personal property in the possession of Sally Ruth Purviance, but belonging to the defendant, viz: 'Three Merchants Exchange Building of Los Angeles, Inc., Closed First Mortgage 6½% Sinking Fund Gold Bonds, * * *'".

The third party claimant testified these bonds were taken by the sheriff from a bookcase in her room during her absence, and filed a claim with the sheriff that these bonds were unlawfully taken from her room upon the representation to a housekeeper that the court had issued an order for surrender of these bonds.

[4, 5] In reply, respondents point out the sheriff is not a party to this proceeding and his alleged unlawful acts, if any, cannot be made the subject of inquiry in this form of action, asserting appellant herself initiated this proceeding under section 689 of the Code of Civil Procedure by filing a third party claim with the sheriff, and the court, under that section, proceeded to try title to the bonds. With this contention we are in accord. If appellant felt the issues were unfairly restricted or desired to question the acts or authority of the sheriff, she should have proceeded by another method. By her own choice she put only the title in issue. Under section 689 of the Code of Civil Procedure the court was not authorized to determine any question of lien, fraud or equities. All the court did was, under conflicting evidence, to find that appellant did not own the bonds.

The case of Black v. Clasby, 97 Cal. 482, 32 P. 564, cited by appellant holds that, prior to the enactment of section 689 of the Code of Civil Procedure in 1891, such seizure as here described was a trespass ab initio, but expressly refused to pass upon the effect of the new section 689 of the Code of Civil Procedure. Neither are the cases cited by appellant applying to receivers, governing here. The rights of receivers, who are neither sheriffs nor judgment creditors, are not covered by the section under consideration. The third party claimant chose her remedy and has had her day in court. In McCoy v. Justice's Court, 23 Cal.App.2d 99, 71 P.2d 1115, the court points out the rights of the judgment debtor and the third party claimant and answers the contention here made that the section is unconstitutional.

An examination of the evidence, which we need not recite in detail, reveals it is conflicting, but ample to fully support the judgment.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

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39 Cal.App.2d 448

COPE et al. v. GOBLE et al.

Civ. 2284.

District Court of Appeal, Fourth District, California.

June 10, 1940.

Hearing Denied Aug. 8, 1940.

1. **Automobiles 🔑244(35)**

In action arising out of intersectional automobile collision, evidence established negligence of defendant motorist in respect to reasonable and prudent speed. Vehicle Code, § 510, St.1935, p. 176.

2. **Appeal and error 🔑930(1)**

Reviewing court must accept as true all evidence tending to establish correctness of the finding or verdict, and must consider evidence in the most favorable aspect towards prevailing party and give that party benefit of every inference that can be reasonably drawn in support of his claim.

3. **Automobiles 🔑168(6), 208**

In action arising out of intersectional automobile collision, if automobiles were both traveling at about same speed as they approached intersection, jury could take the circumstance of relative speed into consideration in determining liability, and the same rule applied to the speed of defendants' automobile in reference to negligence would also apply to plaintiffs' automobile.

4. **Automobiles 🔑244(43)**
Negligence 🔑135

In action by motorist and his guest arising out of intersectional automobile collision, evidence supported verdict for defendants on ground that plaintiff motorist was guilty of contributory negligence as a matter of law, in failing to decrease speed of automobile on approaching intersection, and failing to take proper precautions to ascertain location of approaching automobiles. Vehicle Code, §§ 510, 550, St.1935, pp. 176, 186.

5. **Negligence 🔑93(1)**

A person borrowing an automobile for a trip and permitting another to drive was a courtesy "bailee" of owner and as such stood in the same position as the owner would under the same circumstances as respects imputed negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Bailee".

6. **Automobiles 🔑242(6)**

Presumption arises from ownership of an automobile that automobile was being used for owner's purposes.

7. **Negligence 🔑93(1)**

In determining existence of a "principal and agent" relationship between automobile driver and passenger, governing factor is not actual direction and control of automobile but right to such direction and control.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal and Agent".

8. **Negligence 🔑136(30)**

Evidence, that passenger borrowed automobile to drive to a city where driver was to attempt to secure a job for passenger, warranted submission of issue whether "principal and agent" relationship existed between driver and passenger, so as to make driver's negligence imputable to passenger.

9. **Judgment 🔑648**

A judgment in a criminal prosecution may not be received in a civil action to establish the truth of the facts in which it was rendered except when defendant has entered a plea of guilty, in which case record is admitted not as a judgment establishing the fact, but as an "admission against interest."

See Words and Phrases, Permanent Edition, for all other definitions of "Admission Against Interest".

10. Appeal and error ⚿1053(2)

In action arising out of automobile accident, wherein counsel for defendants withdrew question objected to by plaintiffs because it allegedly intimated that criminal charges were pending against one of plaintiffs in violation of the statute making inadmissible, in a civil action, a conviction of any person for violation of vehicle code, and it was stipulated that question may "go out" and jury was so instructed, no prejudicial conduct occurred. Vehicle Code, § 755, St.1935, p. 243.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by W. B. Cope and Sam M. Fowler against W. E. Goble and Goble Disc Works to recover damages for injuries sustained in automobile accident, wherein defendants filed cross-complaints which were subsequently dismissed by them at the trial. From an adverse judgment, plaintiffs appeal.

Affirmed.

Rae B. Carter, and John D. Chinello, both of Fresno, for appellants.

Chester O. Hansen, of Fresno, for respondents.

GRIFFIN, Justice.

Plaintiffs appealed from an adverse judgment in a personal injury action. The complaint contained two causes of action, the first on behalf of plaintiff W. B. Cope, and the second on behalf of plaintiff Sam M. Fowler. In the first cause of action it was alleged that plaintiff Cope was injured on August 6, 1938, when a Lincoln sedan negligently driven by defendant Goble, as agent of the defendant corporation, collided with a Graham sedan driven by plaintiff Cope, at the intersection of highways 41 and 33 in Kings county. Major injuries resulted. In the second cause of action it was alleged that plaintiff Fowler was riding as a guest in the automobile driven by the plaintiff Cope and that he was injured in the same accident by the same negligence. A joint answer was filed by the defendants. Allegations of negligence, proximate cause, injuries and damages were denied. Applicable to the first cause of action there was a specific affirmation that the negligence of plaintiff Cope was the sole and efficient cause of the collision. As to the second cause of action, there was an allegation denying that Fowler was a guest and alleged that he was an *occupant* in the Graham sedan driven by plaintiff Cope and that Cope was driving for and on behalf of Fowler and at his special instance and request and as his servant, agent and employee. Applicable to both causes of action were affirmative defenses of (a) unavoidable accident; and (b) contributory negligence of plaintiff Cope, driving as agent of plaintiff Fowler. Cross-complaints of respondents were subsequently dismissed by them at the trial. On December 13, 1938, the jury returned a separate verdict on each cause of action. Each was against the plaintiff concerned and in favor of the defendants. Judgment was entered on the verdicts. A motion for new trial was denied.

For a reversal of the judgment appellants rely upon the following grounds: (1) That the evidence is insufficient as a matter of law to support a judgment for defendants; (2) that the judgment against Fowler should be reversed because it was prejudicial error to submit an issue as to agency to the jury; and (3) that there was prejudicial misconduct of defendants' counsel in intimating to the jury that criminal charges were pending against plaintiff.

Highway No. 41 is an ordinary paved highway about 18 to 20 feet wide with shoulders ranging from 11 to 14 feet, and runs northeasterly and southwesterly. Highway No. 33 is similarly constructed and runs northwesterly and southeasterly. They do not intersect at right angles but cross each other in the form of an X. Appellant Cope was driving southeasterly on highway No. 33 and respondent Goble was proceeding southwesterly on highway No. 41, about 5 o'clock in the afternoon. The day was clear, the roads were dry, and the sun was shining.

Appellant Cope testified that his version of the accident was to this effect: That in approaching the intersection he was driving on his right-hand side of the roadway; that when within 200 to 250 feet northwest of the intersection he saw two cars approaching on highway No. 41, one to his right and the other to his left. The one to his right and southwest of the intersection was the car driven by a Mr. O'Neill. The one to his left and northeast of the intersection was the Lincoln sedan driven by respondent Goble. The Goble car at the time was 400 to 450 feet northeast of the intersection, and when about 35 feet from the intersection he again looked to his left and saw the Lincoln sedan 80 or 90 feet northeast of the intersection and apparently slowing down; that he then looked to the right; that on again looking to the left and at a time when he was in the center of the intersection he saw the Lincoln sedan bearing down on him; that he swerved the Graham sedan to the right; that the impact of the two cars occurred south of the medial line of highway No. 33 and east of the medial line of highway No. 41; that the Goble car hit the Graham sedan about midway on the left front fender. On the question of speed he placed his own speed as uniformly around 35 miles an hour and he estimated the speed of the Lincoln sedan as varying from 50 to 70 miles an hour; that after the impact the Lincoln sedan came to rest on the east side of highway No. 41 something like 150 feet southwest of the intersection and that the Graham sedan came to rest east of the Lincoln sedan and off of the highways. On cross-examination he testified that "Goble was traveling twice as fast as I was" and "I proceeded on, drove on towards the intersection * * * I could not say positively that I did or did not slow down * * * I was traveling around 35 miles an hour at the time of the accident * * * I did not give much thought to him (referring to Mr. Goble) when I saw him up there. He was so far back I never thought about the man coming into the intersection * * * so I continued down the highway, keeping the same speed until I reached a point 40 feet from the intersection before I looked again * * * It looked to me like the man was going to stop. I judge he was (then) making around 50 to 55, something in that neighborhood. I would not be positive. * * * I looked back (to the left) after my car was entered into the intersection." The testimony of appellant Cope was corroborated by the testimony of appellant Fowler.

W. G. O'Neill testified that: "I, accompanied by my wife, was driving in a northeasterly direction on State Highway No. 41 (meeting Mr. Goble, who was going in the opposite direction) * * * I saw these two automobiles before the accident * * * I just seen them coming down the road and they run together, was all, and the Graham car hit the Zephyr right in the righthand side of the door, the front door * * *. The Zephyr was just about in the center of the intersection at the time it was struck, that is the way it looked to me * * * The Graham was going along about 40 or 50, I guess * * * I would judge the speed of the Zephyr at about the same * * * After the accident the Graham went right straight on across the road. It hit the other car and went right straight on across * * * The Zephyr rolled over about twice after it was hit."

The pertinent portions of the testimony of Mrs. O'Neill may be paraphrased as follows: We saw the two cars coming. One was a Graham and the other one was a Lincoln Zephyr, and the Zephyr was comng towards us and the other was coming from the other direction, and we were coming from Paso Robles and they were both just coming at ordinary speed, I would say nothing out of the ordinary to imagine they were going to have an accident or anything, and we just didn't realize it until they hit. And the one that was coming from the Avenal Road (the Cope automobile) hit the other one and it turned over twice or three times, I don't know which * * * I would say that the Goble automobile was almost across the intersection before it was hit because the other car ran on into the corner, right across the street onto the corner, from the corner where we were.

Respondent Goble testified generally that in approaching the intersection he was driving on his right-hand side of the roadway; that he passed the junction sign 835 feet northeast of the intersection and on his right-hand side of the highway but did not see it; that he was not aware that he was approaching an intersection until he was within about 25 feet of it; that he became aware of it through seeing the Cope car on his right approaching southeasterly on highway No. 33; that he was not earlier aware of the existence of the Cope car; that he estimated that he was 25 feet from the intersection when plaintiff Cope was 50 feet from it; that he formed no estimate of its speed; that he placed his own speed at 55 miles an hour in approaching the intersection; that before entering the intersection he commenced to swerve his car to the left; that the impact of the two cars occurred at a point south of the medial line of highway No. 33 and east of the medial line of highway No. 41; and that the Cope car hit the Lincoln sedan "flush" on the right rear.

The foregoing constitutes a general, rather than an exhaustive, statement of basic facts. From this evidence appellant argues that the record establishes as a matter of law that respondents were negligent and that their negligence was the sole proximate cause of the accident.

[1-4] Analyzing the evidence, if believed by the jury, it was shown that there was testimony that would establish the negligence of the respondent Goble and particularly respecting reasonable and prudent speed under the circumstances related. Sec. 510, Vehicle Code, St.1935, p. 176; Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 355, 58 P.2d 200; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. Whether the negligence of respondent Goble was the sole proximate cause of the accident was properly left to the determination of the jury if there was substantial evidence of contributory negligence on the part of appellant Cope. We will therefore discuss such evidence as may support such a conclusion. In doing so we must keep in mind the rule and accept as true all evidence tending to establish the correctness of the finding or verdict, and must consider the evidence in the most favorable aspect towards the prevailing party and give that party the benefit of every inference that can be reasonably drawn in support of his claim. Guided thereby, it may be properly said from the record of the evidence that the Graham car was traveling in excess of 45 miles per hour. The testimony of Mr. O'Neill would so indicate. He testified that appellants' speed was "about 40 or 50, I guess". He also said that both the Graham and the Zephyr cars were traveling "about the same". Appellants fixed the speed of respondents' car "around 65 or 70 miles an hour coming on up through there" and "around 50 or 55" near the intersection. If they were both traveling at about the same speed the jury would have the right to take the circumstance of relative speed into consideration. The same rule applied to the speed of respondents' car in reference to negligence would also apply to appellants'. Groat v. Walkup Drayage, etc., Co., supra. It should also be noted that the evidence relating to the precaution taken by appellant Cope as he approached the intersection was capable of being interpreted as negligence on his part, for he admitted that after seeing the Goble car he "did not give much thought to him" and that he did not look to his left again until he was some 40 feet from the intersection and that at that time he himself was traveling 35 miles an hour, going on to explain that the Goble automobile was then 80 to 90 feet from the intersection traveling 50 to 55 miles an hour; that he looked to his right and did not pay any further attention to the Goble automobile until he, Mr. Cope, was in the intersection. From the testimony of Mr. and Mrs. O'Neill, it is questionable as to which automobile entered the intersection first. Mrs. O'Neill's evidence would indicate that the Goble automobile was almost across the intersection before it was hit. The disputed question of the right of way under section 550 of the Vehicle Code became involved. Keyes v. Nims, 43 Cal. App. 1, 184 P. 695; Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312; 3 Cal.Jur., p. 836, § 67. From the foregoing we are convinced that the negligence of respondent Goble was not the sole and proximate cause of the accident and injury as a matter of law and that there was substantial evidence to support the verdict of the jury on the theory that plaintiff and appellant Cope was guilty of contributory negligence.

The next question presented is deserving of more merit and consideration. The question presented is whether appellant Fowler assumed the status of a passenger in the automobile driven by the appellant Cope. The court, after defining an agent, instructed the jury "that any negligence, however slight, on the part of plaintiff W. B. Cope, which directly and proximately contributed to the happening of the accident involved in this case, bars a recovery by him, * * *. And if you further find from the evidence that negligence on the part of plaintiff W. B. Cope, however slight, which directly and proximately contributed to the happening of the accident, also bars a recovery by plaintff Sam M. Fowler, provided you further find from the evidence that at the time and place of the accident the said plaintiff, W. B. Cope, was the agent of plaintiff Sam M. Fowler and was at said time and place acting as such agent in the course and scope of his employment * * * " that "If you find from the evidence that at the time of the accident involved in this case plaintiff W. B. Cope was driving a Graham sedan automobile in which said plaintiff, W. B. Cope, and plaintiff Sam M. Fowler were riding, for and on behalf and as the servant, agent and employee of said plaintiff, Sam M. Fowler, then I charge you that any negligence if any proved, on the part of plaintiff W. B. Cope must be imputed to said plaintiff, Sam M. Fowler."

[5] It is argued by appellants that the state of the evidence did not justify submission to the jury of an issue of principal and agent, master and servant, or employer and employee, and that it was prejudicial error to give the instruction on that subject, citing Stoddard v. Fiske, 35 Cal. App. 607, 609, 610, 170 P. 663. The undisputed evidence bearing on the question may be thus stated: Fowler was a son-in-law of Cope. Fowler had been out of employment for several weeks. He was seeking employment. Cope was distantly related to an employee of an oil company in Wasco. Fowler knew a Mr. McBride and he (Fowler) borrowed McBride's car to make the trip to see that relative about employment. Cope's testimony was in part as follows:

"Q. How did you happen to have that car that day, Mr. Cope? A. Mr. Fowler and I went over and *Mr. Fowler borrowed* the car from Mr. McBride for *us* to drive over to Wasco (italics ours).

"Q. What was the purpose of that drive * * *? A. I were going over there to try to get Mr. Fowler a job with the Shell Oil Company."

Fowler corroborated this testimony. It therefore appears that Fowler was a courtesy bailee of McBride, the owner of the car. Gochee v. Wagner, 257 N.Y. 344, 178 N.E. 553. As such, he stood in the same position as the owner of the car would under the same circumstances. Atchison, Topeka & Santa Fe Ry. Co. v. McNulty, 8 Cir., 1922, 285 F. 97; Masterson v. Leonard, 1921, 116 Wash. 551, 200 P. 320.

[6] In Randolph v. Hunt, 41 Cal.App. 739, 750, 183 P. 358, 361, where the owner was an occupant of the car, one of the important points in that case was whether there was, in fact, sufficient evidence to hold appellant, the owner and occupant, responsible for the acts of Triggs, the driver, in driving the car. Triggs borrowed the car to go to Sacramento in quest of employment and he invited appellant, the owner, to go along to recommend him at a certain garage in that city. The court held that from the ownership of the automobile by the defendant, there arises a presumption that it was being used for his purposes; and such presumption, being legally sufficient to support a verdict, is legally sufficient to create a conflict in the evidence, notwithstanding the plaintiffs introduced no evidence to rebut the testimony of defendants' witnesses that the machine was not being used for his purposes, and stated: "It is not disputed that from the ownership of the automobile the presumption arises that it was being used for appellant's purposes. West v. Kern, 88 Or. 247, 171 P. 413, 1050, L.R.A. 1918D 920; McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417." To the same effect is Owings v. Gatchell, 32 Cal.App.2d 482, 90 P.2d 368.

[7, 8] It is to be borne in mind that the governing factor is not actual direction and control but the right to such direction and control. Gochee v. Wagner, supra. The latter element was clearly present in the case at bar. It was to Fowler that the owner had entrusted his automobile. Fowler was substituted for the owner in directing the manner of its operation. Appellants cite but one case in support of their position, i. e., Stoddard v. Fiske, supra. That case merely holds that driving a car to do a friendly act does not establish an agency. The distinction between that case and the present one is that neither the owner nor the owner's representative were present in the car. There was consequently no principle upon which negligence could be imputed. In addition to the presumption raised, the evidence clearly establishes the fact that both Cope and Fowler were going on the trip for the one purpose of securing employment for Fowler. We therefore conclude that appellants cannot now complain because the trial court left the question of agency open for a determination by the jury. Its ultimate conclusion is sufficiently supported by the evidence.

[9] Finally, appellants complain of misconduct of defendants' counsel in intimating to the jury that criminal charges were pending against plaintiff Cope. It appears from the evidence that both drivers of the cars involved were given citations for some violation of law at the time of the collision and were ordered to appear at a subsequent date before the justice of the peace of Avenal township. Appellants, as part of their case in chief, produced the justice of the peace as a witness who

brought with him his docket containing on opposite pages, a record of the proceedings as to each defendant driver. On direct examination the justice was interrogated concerning the outcome of criminal proceedings against defendant Goble for violation of the Vehicle Code. Although the record is not clear, the facts and argument of counsel would indicate that the driver Goble, without ever entering a plea, deposited and forfeited a bail of $20. The nature of the charge against Goble is not shown. Under the authority of Burbank v. McIntyre, 1933, 135 Cal.App. 482, 27 P.2d 400, a judgment in a criminal prosecution may not be received in a civil action to establish the truth of the facts in which it was rendered except when the defendant has entered a plea of guilty, in which case the record is admitted not as a judgment establishing the fact, but as an admission against interest. Appellants, over strenuous objections, erroneously convinced the court that the forfeiture of bail under the circumstances related, amounted to a conviction which was admissable as an admission against interest. Section 755 of the Vehicle Code (1937) then in effect, provided:

> "No record of the conviction of any person for any violation of this code, nor any testimony of or concerning or produced at the trial terminating in such conviction, shall be admissible as evidence in any court in any civil action."

[10] The claimed misconduct of respondents' attorney was not in endeavoring to offer evidence of the fact that appellant was likewise charged with some violation of the Vehicle Code, but consisted in a question directed to a witness, the justice of the peace, inquiring if the record did not disclose that Cope was not the one who had appeared or deposited bail. It was the apparent contention of appellants that because Goble had posted bail and forfeited it, the evidence was admissible against him, and that because the appellant Cope had been successful in postponing his case for over four months and until after trial of the civil action without forfeiting bail, the record of his criminal charge was not admissible against him. The record indicates that counsel for respondents later withdrew his question relating to Cope's record and it was stipulated that it may "go out" and the jury was so instructed. The claim of prejudicial misconduct of respondents' counsel, therefore, in view of the provisions of section 755 of the Vehicle Code(1937), is without merit and falls by its own weight. What has been said sufficiently disposes of all the determinative questions raised on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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39 Cal.App.2d 444

GIAVOCCHINI et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 6343.

District Court of Appeal, Third District, California.

June 10, 1940.

1. Executors and administrators 🔑513(10)

The statute providing that order settling and allowing an account, when it becomes final, is conclusive against all persons interested in the estate, except persons under disability, would not entitle minors to recover from administrator for loss sustained by estate because of alleged negligent management of the estate by administrator, where minors had, through their guardian, filed objections to administrator's account, and probate court had denied the objections, and there was no allegation or proof of any fraud, irregularity, surprise, inadvertence, excusable neglect, or error of law in the probate proceedings. Probate Code, § 931; Code Civ.Proc. § 1908.

2. Judgment 🔑443(1)

Any judgment may be reopened or vacated in an equitable action for extrinsic fraud.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Albert Thomas Giavocchini and others, by Mary L. Giavocchini, their legal guardian, against the Bank of America National Trust & Savings Association and others to recover for loss sustained because of the alleged negligent and careless management of an estate by the named defendant as administrator. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

Frank F. Lamb, of Long Beach, for appellants.

Louis Ferrari, of San Francisco, Edmund Nelson, and G. L. Berrey, both of Los Angeles, George D. Schilling, of San Francisco, and Ray Meacham, of Long Beach, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The three minors herein were beneficiaries under the will of their deceased father, Albert Lawrence Giavocchini. The will was admitted to probate in the county of Orange where these minors, through their guardian, had appeared and filed objections to the second current account of the administrator, the defendant herein, Bank of America. After a hearing, the court allowed the account and denied the objections.

Thereafter these same minors by their guardian filed an action in the county of Los Angeles, charging as they had in their objections to the approval of the account before the probate court in Orange county, that Bank of America, as executor, had in 1929, obtained an order to sell certain stocks belonging to the estate of the deceased father, but through the negligent and careless management of the estate this personal property was not sold until 1931, and in the interval between 1929 and 1931 the market value of the accounts had fallen, resulting in a loss of over $10,000 to the estate. They also charged other acts of irregularity and mismanagement, and prayed for judgment against the defendant bank.

Defendant bank answered this complaint, denying the several allegations, and set up the objection to the account filed by the minors in the probate court in Orange county, and the order of the court overruling the objections, and averred that plaintiffs were estopped from proceeding in the action for damages by reason of such judgment in Orange county, and that that judgment was res judicata. After a hearing thereon the superior court in Los Angeles county found in favor of defendant bank, and held that plaintiffs were estopped from maintaining this action. From that judgment this appeal is taken.

Appellants claim they are persons under disability within the meaning of section 931 of the Probate Code, and entitled to be heard.

Section 931 of the Probate Code provides: "The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate, saving, however, to persons under legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator or his sureties, at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account."

[1] With this contention of appellants we cannot agree. It is admitted that the order settling the account was regularly obtained and no attempt was made to allege or prove any fraud, intrinsic or extrinsic, or any irregularity, surprise, inadvertence or excusable neglect, or error of law occurred in the probate proceedings.

Section 1908 of the Code of Civil Procedure sets forth the general rule of the effect of judgments, that is, that in the case of a judgment or order against a specific thing, or in respect to the administration of the estate of a decedent, or in respect to the condition of a person, the judgment is conclusive upon the title to the thing, the estate, or the condition of the person; in other cases the judgment or order is in respect to the matter directly adjudged, conclusive between the parties, provided they have notice of the pendency of the proceedings. The only exception to this rule is in section 931 of the Probate Code, which, as shown above, provides that an order settling an account is conclusive, "saving, however, to persons under legal disability, the right * * * to proceed by action against the * * * administrator * * * at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account."

While no cases from our state are cited as to the right of minors to reopen an intermediate account, we do find authorities from other states, which seem to have taken the position against the contention here urged by appellants. Matter of Hood, 90 N. Y. 512; Davis v. Crandall, 101 N.Y. 311, 4 N.E. 721; Matter of Tilden's Ex'rs, 98 N.

Y. 434; In re Hawley, etc., 100 N.Y. 206, 3 N.E. 68; Phillips v. Dusenberry, 8 Hun 348; In re Brick's Estate, 15 Abb.Prac. 12; see, also, Robison v. Floesch Const. Co., 291 Mo. 34, 236 S.W. 332, 20 A.L.R. 1239; Freeman on Judgments, 5th Ed. 878, and cases there cited.

The effect of judgments against minors is stated in 14 California Jurisprudence, page 165, as follows: "It is now, however, well settled that a provision giving an infant a day in court after reaching majority is unnecessary in a judgment, and that minors, like adults, are bound by final judgments to which they are parties. A minor has no further time than is granted an adult to attack the judgment against him for error. (Citing Reed v. Ring, 93 Cal. 96, 28 P. 851; Welsh v. Koch, 4 Cal.App. 571, 88 P. 604; Estate of Lamb, 6 Cof. 432.)"

In Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594, an action was brought by minors to set aside a decree of distribution on the ground they were pretermitted heirs, and by reason of not knowing their rights, had failed to appear. In sustaining a judgment upon a demurrer to the complaint the court pointed out that the jurisdiction of the probate court was in rem, and by giving the proper notice the world was before the court, and whether a person appeared or not the action of the court was conclusive.

[2] Section 931 apparently states no exception to the general rule in favor of minors except that it enlarges the time within which they may reopen the account. This section does not purport to state the grounds upon which the account may be reopened nor the allegations necessary to maintain an action. Such right is given them upon no less nor different grounds than are available to others, and the section in direct terms gives them such right to move to reopen for cause. Any judgment may be reopened or vacated in an equitable action for extrinsic fraud. Toberman v. Hildebrandt, 72 Cal. 313, 14 P. 20; Estate of Grant, 131 Cal. 426, 63 P. 731; Estate of McDougald, 146 Cal. 191, 79 P. 878.

Appellants cite and strongly rely upon Ringwalt v. Bank of America, 3 Cal.2d 680, 45 P.2d 967. They draw the deduction therefrom that because final distribution had been made, for that reason only the minors there were precluded from maintaining the action. We do not believe the court so held. It only held that the complaint was insufficient to vacate a judgment because it lacked allegations of extrinsic fraud. In the cited case final distribution had been entered, whereas in the instant case the objection was to an annual account, and also in the cited case the minors had not appeared and objected to the account as here.

Without considering the sufficiency of the complaint which respondents claim does not state a cause of action, we believe enough has been said to justify the judgment in their favor. The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

TAYLOR v. OAKLAND SCAVENGER CO. et al. *

Civ. 11178.

District Court of Appeal, First District, Division 2, California.

June 17, 1940.

Rehearing Denied July 17, 1940.

Hearing Granted Aug. 15, 1940.

1. Automobiles 🔑160(1), 216

The duties of pedestrian and vehicle driver in use of public streets are reciprocal and equal, and neither has right of way superior to the other.

2. Automobiles 🔑206

Though pedestrian has right to assume that vehicle drivers using highway will obey law, keep reasonable lookout ahead, and exercise ordinary care to avoid injuring him until his senses, exercised with reasonable diligence, inform him to contrary, he must exercise ordinary care, to be determined under all circumstances of case, for his own safety.

3. Automobiles 🔑217(5)

While pedestrian about to cross street or highway is not under positive duty to stop, look, and listen, regardless of circumstances, exercise of ordinary care generally requires that he look for approaching vehicles in direction from which danger is to be anticipated, and he must observe such care during all of time that he is crossing highway.

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* Subsequent opinion 110 P.2d 1044.

4. Schools and school districts 🔑89

School districts are not insurers of safety of pupils at play or elsewhere.

5. Negligence 🔑84, 85(3)

In determining whether injured person was sui juris for purpose of passing on question of his contributory negligence, particular acts done by him, as well as his age, must be considered.

6. Automobiles 🔑223(2, 3)
Schools and school districts 🔑89

A 16-year-old alert and active high school girl in full possession of all her senses and of more than ordinary intelligence was contributorily negligent as matter of law in running with her head down into side of moving truck on automobile road without marked crosswalks while going from school gymnasium to playground, so as to bar recovery of damages for resulting injuries from high school district, truck owners, or driver. Vehicle Code, §§ 562(a), 603(c), St. 1935, pp. 188, 196.

7. Automobiles 🔑223(3)
Schools and school districts 🔑89

It was duty of high school girl, running forward to cross automobile road, marked by guard posts, but without marked crosswalks, between school gymnasium and playground, to yield right of way to all vehicles on such road. Vehicle Code, § 562(a), St.1935, p. 188.

8. Appeal and error 🔑1175(1)

When it appears from whole evidence that trial court erred in denying defendants' motion for directed verdict, appellate court, on reversing judgment on jury's verdict for plaintiff, may order entry of judgment for defendant notwithstanding verdict, though defendants did not move for such judgment in trial court. Code Civ.Proc. § 629.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Eleanor Taylor, a minor, by her guardian ad litem, Frank B. Taylor, against the Oakland Scavenger Company and others, to recover damages for personal injuries. From a judgment on a jury's verdict for plaintiff, defendants appeal.

Reversed, and judgment entered for defendants notwithstanding the verdict.

Ralph E. Hoyt, Dist. Atty., of Oakland, Charles V. Barfield, of San Francisco, and Appelbaum & Mitchell, of Oakland, for appellant Oakland High School Dist.

Weinmann, Quayle & Berry, of Oakland, for appellants Oakland Scavenger Co., Albert Santucci, and Oresti Santucci.

Elliott Johnson and Crozier C. Culp, both of Oakland, for respondent.

STURTEVANT, Justice.

While attending the Castlemont high school as a student, the plaintiff ran into an automobile truck and was injured. She commenced an action to recover damages. In her complaint she named as defendants Oakland Scavenger Company, a corporation, Oresti Santucci, Albert Santucci and Oakland High School District of Alameda County, a public corporation. All of the defendants answered and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff fixing the damages at $25,000. The trial court reduced the amount to $20,000. From that judgment all of the defendants have appealed. We will discuss first the appeal taken by the school district.

Appeal of Oakland High School District.

Castlemont high school comprises over ten acres. On the east side it faces Foothill boulevard. In general the tract is in the form of a parallelogram. The main building faces the boulevard. Back of it stands the gymnasium building, which is separated from the main building by a court which is about 43 feet wide and 175 feet long. West of the gymnasium, 80 feet distant, is the eastern boundary of the athletic field which is in the shape of an oval and extends from the north side to the south side of the school property. A vehicular road enters about the middle of the southern boundary and leads along the western side of the gymnasium, turns around the north end of that building and leads to the court between the gymnasium and the main building. An examination of the exhibits does not disclose any fences but does show guard posts in different positions.

The defendant Albert Santucci was driving along the driveway provided for trucks making deliveries to the school cafeteria and was out from the gymnasium building about four or five feet. He sounded no horn as he rounded the corner and two of the witnesses placed the speed of the truck at 25 miles per hour. Santucci was thoroughly familiar with the plan of the courtyard, had seen the children on the playground, and knew that they went back and forth between the gymnasium and the playground. He had seen the girls and boys running around there; and had been going in and out of the school yard for about six years.

The plaintiff, Eleanor Taylor, was a minor of the age of sixteen years, in attendance at the Castlemont high school in Oakland at the time she was injured on the morning of September 29, 1936. One of her classes consisted of physical culture, which was compulsory for the students. The class assembled in the gymnasium, and after the girls had changed their clothes the roll was called in the gymnasium by the gymnasium teacher, who, in this instance, was Miss Miller. The teacher designated what game the class was going to play and the teams organized in the building and then proceeded to the playground. The plaintiff and her witnesses testified it was the ordinary custom and practice for the girls in their class, as well as in the other classes, to run to the playground. Miss Miller, the teacher in charge of the class, testified there was no regular custom or practice for them to run rather than to walk out and that very frequently the students just sauntered or made their way out in a leisurely fashion. In leaving the gymnasium and going to the athletic field the plaintiff and her associates passed through a door on the east side of the gymnasium, turned to the left and traversed a course almost directly north toward the corner of the building. Except some of the guard posts just mentioned, nothing obstructed their view of the court and the school grounds to the north including a part of the athletic field on which they were going to play. The plaintiff was familiar with the various structures and improvements on the school grounds and from time to time had seen vehicles using the road and court just described. The plaintiff had attended the school from early in January, 1936, until the accident happened, September 29, 1936. At times she had entered the Hillside gate and at different times had walked over the grounds of the high school. From time to time she had seen vehicles on the grounds and in the court above mentioned. She had seen vehicles come in from the Foothill gate but had never seen them come in from the Hillside gate. On many occasions she had crossed and recrossed the road between the gymnasium and the playgrounds. She knew it was an automobile road extending from the Hillside gate to the said court; that it was marked by dots placed on the edges and was designed for automobile travel. She had seen a large number of service trucks that had occasion to go into the school grounds. She knew there was no stop sign erected on the road and she knew at the time she was going to the playgrounds that it would be necessary for her to cross said roadway. At times she had seen a garbage can at the corner of the gymnasium.

On the morning of the accident the plaintiff left the gymnasium building and was proceeding to the playground with the purpose of playing volley ball with the other students of the class, which numbered about thirty-five. The plaintiff was one of the first girls out of the gymnasium door. She was running as fast as she could with her head down, trying to beat Elvina Vann over to the playground. As she ran she did not notice objects on her right or left. After running for a distance of about sixty-five feet, she approached the vehicular road which she knew was designed for the use of automobiles bringing supplies to the cafeteria. The plaintiff and Elvina Vann, with their heads down, both ran into the right hand side of the garbage truck, which at the time was being driven by the defendant Albert Santucci. The record shows that Elvina Vann hit the truck first at about the right hand front fender and the plaintiff hit the truck immediately afterwards at about the center of the cab door, buckling it in. No object would have obscured their vision of the truck if the girls had looked before they reached the corner of the gymnasium. But the plaintiff testified she saw the truck just the instant before she was struck. The truck was then two-thirds past the east line of the gymnasium building The plaintiff was examined and cross-examined. From that examination it clearly appears that she is in full possession of all her senses and has more than ordinary intelligence. She had at the time of the accident completed her first year in Castlemont high school. For two years or more she had taken dancing lessons in school and had also taken private lessons. In the junior high school she had given lessons in dancing. That she was alert and active is shown by the fact she was, at the time of the accident, leading the entire class in an effort to reach the playgrounds and secure the first choice of courts in which to play the game about to be played.

Claiming that the plaintiff was guilty, as a matter of law, of negligence which proximately contributed to the accident, the defendant, in the trial court, in due time made motions for a nonsuit, for a directed verdict, and for judgment notwithstanding the verdict. All of its motions were denied and it now makes many points including the one just mentioned. As we think the plaintiff was guilty of contributory negligence, as the defendant contends, we will address ourselves to that point only.

[1-4] Conceding, without deciding, that the school authorities had made no special conditions or regulations applicable to the traffic upon the vehicular road, it follows that the case is governed by the provisions of the Vehicle Code, sec. 603, subd. (c), St. 1935, p. 196, in so far as the issue of negligence is involved. As to the rights and duties of persons using the roads involved, the law is well settled. 13 Cal.Jur. 373; 13 R.C.L. 426; 29 C.J. 664. In 13 California Jurisprudence 373, Highways, section 61, the author says: "The duty cast upon both pedestrian and driver of a vehicle in their use of the public streets is reciprocal and equal, and neither of them has a right of way superior to the other. Although a pedestrian has a right to assume, until his senses, exercised with reasonable diligence, inform him to the contrary, that others using the highway will obey the law, and keep a reasonable lookout ahead and exercise ordinary care to avoid causing him injury, he is likewise required to exercise ordinary care for his own safety to be determined under all the circumstances of the case, an increase of care being required when there is an increase of danger. * * * While a pedestrian about to cross a street or highway is not under a positive duty to stop, look and listen, regardless of the circumstances, the exercise of ordinary care generally requires that he look for approaching vehicles in the direction from which danger is to be anticipated. The observation of ordinary care is imperative upon him during all of the time that he is crossing the highway." Closely connected with the foregoing rule it should be noted it is also settled that, "The law does not make school districts insurers of the safety of the pupils at play or elsewhere." Goodman v. Pasadena City H. S. Dist., 4 Cal.App.2d 65, 68, 40 P.2d 854, 855. Turning to the facts, we note that at about 10 o'clock in the morning on a clear day in a broad court, the plaintiff, without exercising any care whatsoever, ran forward as fast as she could run, with her head down, and plunged up against the cab door of the moving garbage truck. Such an act, if done by an adult, would clearly be negligence. Mayer v. Anderson, 36 Cal. App. 740, 743, 173 P. 174. An examination of the facts in the case cited will disclose that the plaintiff Mayer was not nearly so negligent as was the plaintiff in the present case. But the plaintiff contends she was a minor and that the same rule is not applicable. She quotes from 19 California Jurisprudence 605: "A child is required to exercise only that measure of care which children of the same age, and under similar circumstances, ordinarily exercise. The law has fixed no precise age at which it may be stated as a matter of law that an infant is accountable for his actions to the same extent as one of full age." She also cites Anderson v. Walters, 135 Cal.App. 380, 383, 27 P.2d 100. The injured person in that case was a child ten years of age. Again she cites Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 130–134, 23 P.2d 769. The person whose injury was involved in that case was ten and a half years old. This plaintiff was nearly sixteen years old. The authorities so cited differ in other respects as will presently appear. The position of the plaintiff is to contend that in the present case it was a question of fact for the jury to determine whether she was sui juris or non sui juris. The same contention was presented in Todd v. Orcutt, 42 Cal.App. 687, 183 P. 963. On page 690 of 42 Cal.App., on page 964 of 183 P., the court said: "An infant may be so very young that, like an idiot or a lunatic, no negligence may legally be imputed to him. But not all infants are in that class. 'It is,' says Mr. Beach, 'a question of capacity, and it has been found a very difficult question, and has been, in many cases, a very fruitful source of controversy as to what age is sufficient to constitute an infant sui juris. Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid damage, *the court will decide it as a matter of law.*' Beach on Contributory Negligence, § 117." (Italics ours.) In passing it may be remarked that the evidence hereinabove set forth shows no possible doubt as to the capacity of this plaintiff and there is no evidence to the contrary. On page 691 of 42 Cal.App., on page 965 of 183 P., the court said: "The ultimate question of fact is: Was he guilty of contributory negligence? And we must assume that, in solving that question, the court applied the correct rule

of law, which is that plaintiff was required to exercise the same degree of care, no more and no less, than would be expected from a child of his age, or which children of his years ordinarily exercise under like circumstances, taking into consideration, not only the boy's age, but his capacity for understanding. [Citing cases.]" Manifestly it was reasonable to expect that plaintiff and her associates would not perform such a rash act as she performed. In Moeller v. Packard, 86 Cal.App. 459, 261 P. 315, the injured child, without looking, ran out into the highway to recover some article that had blown from her hand. Having stated the facts, commencing on page 465 of 86 Cal. App., on page 318 of 261 P. the court said: "The rule applicable to circumstances such as are existent in the instant case is well stated in Depons v. Ariss, 182 Cal. 485, 188 P. 797. There the deceased stepped in front and in the path of the defendants' truck while the machine, operated by an employee of defendants, was traveling at a low rate of speed on a street in the city of Oakland. The general circumstances of that case it is not necessary to recite herein. It is sufficient to say that there was evidence strongly tending to show that the deceased took the perilous step without exercising the moderate care which would have at once suggested the dangerous consequences of such an act. After stating the facts in detail the court, on page 487 [of 182 Cal.] (188 P. 798) of the report, said: 'Under the facts stated we are asked to reverse the judgment. This we cannot do. It was shown that deceased left a position of safety and put himself directly in the path of the approaching truck. This evidence was sufficient to support the conclusion of the trial court. Under these circumstances no duty was imposed upon the driver of the truck to assume that deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine. [Citing cases.]'"

[5] In stating the rule applicable in determining whether the injured party is sui juris, nearly all of the authorities mention age as being one of the factors. But age is only one of the probative facts. Todd v. Orcutt, supra. The particular act being done is at all times one of the circumstances. In Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L.R.A.1915F, 638, a boy aged ten was engaged in a peculation of dynamite caps. The fact appeared as an allegation of his complaint. The trial court held that his act was contributory negligence as a matter of law and sustained a demurrer. That ruling was affirmed on appeal. Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660, involved the fact of a minor boy twelve years of age stepping backwards in front of an automobile approaching from one side. The jury returned a verdict against him. On appeal the court, after stating the facts, held that the boy was guilty of contributory negligence. Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445, involved the act of a boy about sixteen being injured in riding an unbroken mule. The defendant contended that he was guilty of contributory negligence. But the jury brought in a verdict in favor of the plaintiff. On appeal the judgment was reversed, holding that the plaintiff was guilty of contributory negligence as a matter of law. In Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A.L.R. 429, the defendant was charged with having wrongfully sold to a minor a quantity of powder. The plaintiff was about fifteen years old. Having stated the facts, on page 398, of 205 Cal., on page 99 of 271 P., 60 A.L.R. 429, the court said: "We can discern no ground whatever upon which minds could differ for an instant as to plaintiff's own patent negligence in causing the explosion which produced his injuries. If this is not a case of contributory negligence as a matter of law, then that rule cannot be held applicable in any case to a minor." Accordingly the court reversed the judgment in favor of the plaintiff and ordered the trial court to enter judgment in favor of the defendant.

The plaintiff speaks of the gymnasium building as constituting a "blind wall" obscuring her view of the northern portion of the vehicular road. But the accident did not occur north of the building. It occurred on the east side. The truck had turned the northern corner and the plaintiff testified "We just headed for each other." Apparently in excuse for her failure to use due care, the plaintiff testified she could see where she was going. By that expression she meant one of two things. If she meant she could see where she was stepping, that fact standing alone is not helpful. It does not in the least imply that she could see other persons or vehicles using the roadway. If she meant she could see the entire roadway, including the truck, and nevertheless she ran forward into the side door, that fact did not constitute an excuse for her conduct but was condemnatory thereof.

[6] We conclude, therefore, that the plaintiff was guilty of contributory negligence as a matter of law. It follows that the trial court erred in denying the defendant's motion that the jury be directed to bring in a verdict in its favor.

Appeal of Oakland Scavenger Company, Albert Santucci and Oresti Santucci.

[7] These defendants also claim the plaintiff was guilty of contributory negligence as a matter of law and we think their contention should also be sustained. In addition to what has been said above the following matters are appropriate. Section 562 of the Vehicle Code, St.1935, p. 188, provides as follows: "Crossing at Other Than Crosswalks. (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." So far as we have noted no oral evidence was introduced regarding any crosswalk being marked. Plaintiff's exhibits 2 and 5 purport to show the markings on the school grounds. Plaintiff's exhibit 2 shows that the court and the roads were marked by guard posts. There was no other evidence regarding the markings. As the plaintiff ran forward to cross the road it was therefore her duty to yield the right of way to all vehicles upon the roadway. She did not do so but ran into the side of the truck that was then using the roadway. A similar set of facts was before the court in the case entitled Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200. On page 443 of 7 Cal.App.2d, on page 201 of 46 P.2d the court said: "At that point it was plaintiff's duty to yield the right of way to passing vehicles, under the provisions of subdivision (c), section 131½, California Vehicle Act. (St. 1923, c. 266, p. 517, as added by St.1931, c. 1026, p. 2127). Plaintiff had no right to assume that drivers of such vehicles would slow down in order to give way to him. He was under the positive duty, under the provisions of the statute, to yield the right of way to others. He violated this statutory provision. Instead of allowing the automobile to pass in front of him, he stepped directly in front of it. The driver of the car was afforded no opportunity to stop after plaintiff stepped into the way. These acts upon plaintiff's part, being a violation of the provisions of the statute in that plaintiff instead of yielding the right of way claimed it for himself, constituted negligence per se. 19 Cal.Jur. 632. * * The most that plaintiff can reasonably claim in his own favor is that he looked directly toward the defendants' car, with unobstructed vision, in broad daylight, and failed to see it, although it was but a short distance away from him. To look in such a fashion and fail to see what is in plain sight is to look without a reasonable degree of care, and if plaintiff's looking was done in such a negligent manner he may as well not have looked at all. He was not confused, nor was his attention diverted from the matter of ascertaining whether automobiles were approaching from the west. There was no reason why he could not have made careful observation of the street toward the west from a point of safety. Viewed either as a violation of defendant driver's statutory right of way or as the act of one who deliberately steps from a place of safety into a place of danger without giving heed to the possible consequences of his act, plaintiff's conduct was negligent. This negligence proximately contributed to the accident. Had he not violated the law or had he used ordinary care for his own safety, the accident would not have happened. His negligence therefore bars his recovery." Genola v. Barnett, 14 Cal.2d 217, 221-222, 93 P.2d 109.

[8] These defendants did not move for judgment notwithstanding the verdict. However they did make a motion that a verdict be directed in their favor. That motion was denied and they appealed from the judgment. It follows that this court, when it appears from the whole evidence that a verdict should have been so directed by the trial court, may order a judgment notwithstanding the verdict. Code Civ. Proc., § 629.

It is therefore ordered that the judgment be reversed as to each defendant and that a judgment in favor of all of the defendants notwithstanding the verdict be entered.

We concur: NOURSE, P. J.; SPENCE, J.

In re HAMPTON'S ESTATE.

SLIFF v. HOUGHTALING et al.

Civ. 2368.

District Court of Appeal, Fourth District, California.

June 13, 1940.

Hearing Denied Aug. 12, 1940.

1. Wills ⚷163(4)

Where one who unduly profits by will as beneficiary thereunder sustains a confidential relation to testator and has actually participated in procuring execution of will, burden is on him to show that will was not induced by coercion or fraud, and in such case presumption of undue influence arises from proof of such facts.

2. Wills ⚷155(1)

Facts which are indicative of "undue influence" or a subversion of a decedent's volition are, the relations between one charged with exercising undue influence and decedent, affording former an opportunity to control testamentary acts, decedent's condition such as to permit of a subversion of freedom of will, former's activity in procuring instrument to be executed, and fact that he unduly profited as beneficiary under the will, and while none of circumstances standing alone has effect of creating presumption against validity of instrument, their probative force in combination is to impose upon proponent obligation of presenting evidence of volition and to make question as to undue influence one of fact for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

3. Wills ⚷163(1), 324(3)

If provisions of propounded instrument vary radically from testamentary intentions which decedent entertained previously to execution of the writing, such fact when unexplained is one of recognized indicia of imposition or "undue influence" and in conjunction with other facts such circumstance creates in favor of contestant a presumption requiring submission of case to jury, and which justifies a denial of probate when unrebutted by evidence of the proponent.

4. Wills ⚷157

One of recognized indicia of "undue influence" or subversion of decedent's volition is to be found in circumstances that alleged wrongdoer was in such relation with deceased as to be enabled to control testamentary act, and in combination with other acts, such circumstance creates presumption in favor of contestant and entitles him to have issue of undue influence submitted to jury.

5. Wills ⚷384

On appeal by will contestant from judgment of nonsuit, evidence must be accepted in light most favorable to contestant.

6. Wills ⚷163(1)

In will contest by testatrix' illegitimate daughter who claimed that will sought to be probated by nieces of testatrix' deceased husband was procured by undue influence, evidence constituted prima facie showing sufficient to cast upon proponents the burden to show that execution of will offered for probate was not induced by undue influence.

7. Wills ⚷324(2, 3)

In will contest, whether testatrix at time of execution of will was of unsound mind and whether will was executed because of undue influence, were for jury.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

In the matter of the estate of Katherine Hampton, deceased, wherein Hazel L. Sliff contested the probate of a will of which Bertha Houghtaling and another were the proponents. From a judgment of nonsuit, and from an order denying a motion for new trial, the contestant appeals.

Attempted appeal from order denying motion for new trial dismissed, and judgment reversed.

Stickney & Stickney and William H. Wylie, all of San Diego, and Clarence B. Smith, of El Centro, for appellant.

John W. Holler and Sloane & Steiner, all of San Diego, for respondents.

GRIFFIN, Justice.

This appeal is from a judgment and order admitting a will to probate after granting a motion for a nonsuit and involves a contest between appellant, Hazel L. Sliff, illegitimate child and sole heir at law of Katherine Hampton, deceased, and the respondents, Bertha Houghtaling and Mildred Hartley. One W. A. Bolton was the proponent of one will and the beneficiary of decedent's estate under an instrument alleged to have been executed by the decedent as her last will and testament on March 31, 1938. Respondents were nieces of C. E. Hampton, deceased husband of Katherine Hampton, and beneficiaries under an instrument alleged to have been executed by her on April 6, 1938. Each of these instruments was offered for probate in the present proceedings by the beneficiaries named therein, as Katherine Hampton's last will and testament. She died on April 7, 1938, at San Diego, from a gunshot wound, self inflicted, several hours after she had signed the instrument dated April 6, 1938. At the time of her death she was a widow, her husband C. E. Hampton having died on March 28, 1938, from a paralytic stroke after an extended illness. C. E. Hampton left no children or issue of children. He, under a will made some years prior to his death, bequeathed his entire estate to his wife, Katherine, and at the same time she executed a will wherein she bequeathed her entire estate to him. Katherine Hampton, for several years prior to her death, was afflicted with carcinoma of the stomach, which disease during the last few months of her life had reached a stage where she no longer was physically able to perform her household duties, attend to her financial affairs, or take care of her personal necessities and requirements, and by reason thereof she was compelled to rely upon and to place confidence in any one who would undertake to provide for her daily needs and to look after and manage her financial affairs. This situation was aggravated by the mental strain and worry caused by the realization of her husband's critical illness and inevitable early death. It is apparent that during this period Katherine Hampton was surrounded by her husband's brother, C. T. Hampton, Bertha Houghtaling, Mildred Hartley and W. A. Bolton, all eager to do whatsoever each thought was necessary to gain the favor of Katherine. Hazel Sliff, appellant, a daughter of Katherine Hampton, deceased, was born at a time when Katherine Hampton was 17 years old and unmarried. When appellant was approximately three months old, her mother placed her with a family residing in Kansas, and after paying for the care and support of her baby for several months Katherine left the community and sought her livelihood elsewhere. After a few years of moving from place to place she ultimately arrived at San Diego, where she married and thereafter maintained a residence for many years prior to her death. Katherine, for reasons of her own, kept within her own bosom the fact that she had a daughter, and as far as the record discloses never made any effort to ascertain the whereabouts of appellant, or whether appellant was living or dead.

W. A. Bolton was no relation to decedent, but according to his testimony was an advisor of Katherine Hampton of long standing. Bolton, at the time he obtained the signature of Katherine Hampton upon the instrument dated March 31, 1938, also obtained from her a deed to two parcels of real property, one known as the Fourth street property and the other as the Fifth street property, owned by Katherine Hampton, situated in San Diego and of the approximate value of $25,000, which deed conveyed the real property to W. A. Bolton, reserving a life interest therein to Katherine Hampton. Bertha Houghtaling is a daughter of C. T. Hampton, a brother of decedent's husband. Mildred Hartley is a daughter of a sister of decedent's husband. C. E. Hampton at the time of his death left him surviving four brothers and three sisters. All, except C. T. Hampton, resided outside of California. Bertha Houghtaling, prior to November, 1937, resided with her husband and family in Idaho, and had met Katherine Hampton for the first time in June, 1937, while in San Diego on a visit to her father. The physical condition of both C. E. Hampton and Katherine Hampton during November, 1937, became so serious that it was apparent that both must inevitably die within a very short time. Which one would go first was a problem which time alone could solve. In November, 1937, Bertha returned to San Diego and was a constant visitor at the Hampton home until January, 1938, when she remained continually with the Hamptons until Katherine Hampton's death.

It is argued that Bertha and Mildred's entrance into the Hampton home was prompted by a pecuniary interest in the estate of their uncle and later in the estate of his widow, which estate was about to pass to the next of kin of the survivor of them or to whomsoever might succeed in having himself or herself made the beneficiary of the survivor in his or her will. Mildred, on February 1, 1938, "heard that her uncle was so sick" that on the next day she left her husband and family to come to San Diego to make herself helpful in the Hampton home. She continued to remain in the household and to perform the duties of nurse until after the death of Katherine Hampton.

The evidence discloses that during this period Bertha and Mildred were continuously present in the Hampton household and rendered rather arduous services for the two individuals, and they were paid a small remuneration for their services. The decedent, on March 3, 1938, "authorized Bertha Houghtaling's signature to her bank account" and "thereafter Bertha Houghtaling made deposits in her bank account and when Katherine Hampton received checks * * * Bertha Houghtaling would endorse them and deposit them in the bank". During this period Katherine Hampton was dependent "almost entirely" upon Bertha and Mildred for comfort and the necessities of life. She could not prepare the necessary food and she needed attention at night.

W. A. Bolton, a stranger to Bertha and Mildred, shortly before the death of C. E. Hampton, unsuccessfully undertook to have Hampton execute a codicil to his will. On March 28, 1938, C. E. Hampton died and Katherine became the owner of her husband's estate. On the day of the funeral, March 30, Bolton went to the home of Katherine Hampton and discussed with her in private the matter of the disposition of her property. According to his testimony, he told Katherine that "the nice thing to do would be to arrange it so that C. T. Hampton" would receive a full release from an indebtedness of $1,500 that he owed C. E. Hampton, and "that she ought to give Bertha Houghtaling at least $500 out of something". After discussing the provisions that should be made for the Hamptons, the disposal of the real properties owned by Katherine Hampton was considered, and according to Bolton, Katherine made the following statement: "Now Bolton, I don't want my relatives to have anything, they have already taken from me and given me nothing and I just want to give them five dollars apiece;" that she then suggested that if he (Bolton) wanted the Fifth street property and the Fourth street property he could have them. Bolton testified that after taking notes as to the request and immediately after leaving the Hampton home on this occasion, he saw an attorney at the request of Mrs. Hampton and asked him to prepare a will for her from instructions given to him and to prepare a deed whereby Katherine Hampton would convey to Bolton the real property "on lower Fifth Street" and the "Fourth Street property". Bolton returned to the Hampton home the next day when respondents, Bertha and Mildred, were there, accompanied by an attorney other than the one drawing the will and deeds, together with the attorney's secretary who was a witness to the execution of the instrument. This attorney and the witness were conducted to the sick room by Bolton who, after making the proper introductions, went downstairs to wait for the deed and the will after both were signed by Katherine Hampton. Bolton left the Hampton home with the will and deed. Bertha and Mildred, a few days later, discovered that Bolton had procured from Katherine Hampton a will and a conveyance from her to himself of the Fourth and Fifth street properties above mentioned. About midnight on April 4, Bertha, Mildred and the decedent had a conversation in which Mrs. Hampton said "she had been double-crossed, that she didn't know that she had signed a will of that kind and she didn't know the Fourth Street property was in that deed"; she "talked about sending an attorney up there", meaning to Bolton's home. Bertha, in the early morning of April 5th, went to her father's home in San Diego and told him that Bolton had a will and the deed and that Mrs. Hampton wanted an attorney and that she, Bertha, "didn't know what Katherine Hampton was going to do except she said she wanted Mildred and I to have the Fourth Street property"; that she didn't know anything about her making out a will.

C. T. Hampton came to the Hampton home with one John Holler, an attorney, whose father was known to Hampton many years ago, at about 6 o'clock in the evening of April 5th, introduced him to Katherine Hampton, and remained in the room during the time that the attorney was present. The attorney on this occasion conversed with decedent and then dictated to Bertha a form of deed conveying the "Fourth Street property" to Bertha and Mildred, which deed was typewritten by Bertha. The attorney, while this deed was being written, prepared a will in his own handwriting, which instrument was signed by decedent in the presence of Bertha and C. T. Hampton before the attorney left.

The deed was presented to decedent for signature which she then executed. During that evening, at the direction and request of the decedent Katherine Hampton, C. T. Hampton, Bertha Houghtaling and the attorney went to the home of Bolton, where the attorney demanded a reconveyance of the Fourth street property to Katherine Hampton, which reconveyance Bolton refused to make. The attorney prepared a typewritten will to the same effect as the handwritten one, which he presented to decedent for signature the next day. All of the wills except the one written in the handwriting of the attorney contained a provision that the deceased purposely made no provision for any other person, whether claiming to be an heir of hers or not, and if any person, whether a beneficiary under the will or not mentioned therein, should contest the will or object to any of the provisions thereof, he should receive $1.

On April 11, 1938, Bertha Houghtaling filed her petition for probate of the instrument of April 6, 1938, as the last will and testament of Katherine Hampton, deceased. On the same date, Bertha Houghtaling, as special administratrix, filed suit against W. A. Bolton to cancel the deed to him dated March 31, 1938, on the grounds of fraud, unsound mind, and undue influence. April 20th Bolton filed his petition for probate of the instrument of March 31, 1938. On the same day he filed his opposition to the probate of the instrument of April 6th offered by Bertha Houghtaling, alleging undue influence, fraud, etc. May 4th Bertha filed her opposition to the probate of the instrument of March 31, 1938. June 20, 1938, attorneys for Bertha Houghtaling, as special administratrix, filed a petition for authority to compromise the suit filed against Bolton by dividing the properties described in the deed and will between Bolton and the estate. The contemplated division is hereinafter more fully set forth.

Through some advertising medium Hazel L. Sliff, daughter of Katherine Hampton, was located in the East and on November 2, 1938, she filed her petition for letters of administration and also filed opposition to probate of both wills, alleging generally in count 1, that the instruments offered for probate had not been executed in the manner or form provided by law for the execution of wills; in count 2, that the decedent at the time of the execution of each of the two instruments was of unsound mind and memory and did not possess testamentary capacity to make a valid will; in count 3, that each of the instruments was signed by Katherine Hampton while acting under undue influence and fraud of W. A. Bolton, Bertha Houghtaling, Mildred Hartley and others.

These allegations were in general denied by the proponents of the respective wills. The trial judge, at the commencement of the trial, limited the issues to that of whether the instrument offered for probate by Bertha Houghtaling, wherein she and Mildred Hartley were sole beneficiaries, was the last will of Katherine Hampton, deceased. Appellant introduced evidence in support of her opposition to the probate of said instrument and, after appellant closed her case, proponents moved for a nonsuit upon all three grounds of opposition, which motion was granted. Motion for new trial was made and denied. Judgment was duly entered upon the nonsuit, from which judgment this appeal has been taken.

Besides the claim of unsound mind of decedent, it is argued that the record contains substantial evidence sufficient to establish a confidential relationship, and that a prima facie showing of the necessary facts was made and that the burden was cast upon respondents to show that the instrument offered for probate by them was not induced by undue influence, citing In re Estate of Graves, 202 Cal. 258, 259 P. 935; In re Estate of Johnson, 31 Cal. App.2d 251, 87 P.2d 900; and In re Estate of Burns, 26 Cal.App.2d 741, 749, 80 P.2d 77.

Respondents maintain that there is no evidence of any direct act of undue influence in the record and that the activities on the part of the proponents as related were not sufficient to raise a presumption that they exerted undue influence in securing the will, and that in order to raise an inference of undue influence and oblige the beneficiaries to produce proof, it is vitally necessary for the contestant to prove that one or more of the beneficiaries under the will actively participated in procuring its execution, and cite In re Estate of Burns, supra; In re Estate of Ricks, 160 Cal. 450, 117 P. 532; Matter of Estate of Higgins, 156 Cal. 257, 261, 104 P. 6; In re Estate of Lavinburg, 161 Cal. 536, 543, 119 P. 915; and In re Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101.

[1, 2] Appellant argues that the question here presented is not whether the record contains any substantial evidence tending to prove that the instrument offered for probate was induced by undue influence, but whether the record contains substantial evidence tending to prove the necessary facts as stated in Re Estate of Graves, supra. Although the beneficiaries testified directly that Mr. Holler, the attorney who drew the will, was not employed by, nor did he act as attorney for them at the time of or prior to the execution of the will, and that neither beneficiary discussed with Mrs. Hampton the form or contents of the deed to be made by her, it is to be noted that Mrs. Hampton never knew Mr. Holler prior to the time he entered her room for the purpose of drawing a will and deed in which respondents were the beneficiaries and grantees. The evidence clearly shows that, assuming the truth of the statement that Mrs. Hampton asked to have an attorney sent up to Bolton's home because she had been double-crossed, it is apparent that this request could not be construed as an authorization and direction to secure an attorney to draw a will in which respondents were to be the beneficiaries and also execute a deed to them covering such property as had already been disposed of by a former deed. The only testimony bearing on decedent's desire to have respondents share in the Fourth street property for "taking care of her" was a claimed statement of decedent's made in the early morning of April 3d or 4th. Attorney Holler, since the filing of the will for probate, admittedly has represented respondents, and although a witness to the will, he never testified in reference to his employment or the condition of decedent's mind at the time of the execution of the will. Likewise, the other subscribing witness failed to testify as to decedent's mental condition. Referring to the deed to respondents and Mr. Holler's position in the matter, Mrs. Houghtaling testified on cross-examination as follows:

"Q. Did he (Mr. Holler) hand you this deed after it was signed? A. No, I don't think he did.

"Q. What was done with it. * * * A. To the best of my knowledge he took it with him.

"Q. You let him take it as your attorney? A. Yes, sir.

"Q. You let him take it and copy it as your attorney? A. Yes, sir."

It is argued by respondents that this statement was meant to apply to the relationship after April 5th, and although confusing, the record tends to support this argument. However, a conclusion, from all the facts and circumstances, that a confidential relationship existed, receives support under the facts and reasoning expressed in Re Estate of Graves, supra. There it was held that in a will contest, where the affairs of the decedent, the affairs of the person charged with using undue influence in securing the execution of the will, and the affairs of a third person were interrelated, it was proper in the grounds of contest to set out in detail the circumstances under which the one charged with undue influence became the confidant and business advisor of the other two persons, and from the facts the court might determine as a matter of law whether they constituted undue influence. Although it has been held that confidential relationship alone between a decedent and his descendants, his spouse or his parents is not, of itself, sufficient to cast upon his children, his wife or his parents the burden of showing that the will was not induced by undue influence (In re Estate of Lavinburg, supra; In re Estate of Donovan, 114 Cal.App. 228, 299 P. 816; and In re Estate of Flatau, 10 Cal.2d 701, 76 P.2d 506), the respondents in the instant case were not related by blood nor were they heirs at law of deceased, entitled to inherit from her estate. Under such circumstances, in determining the question of confidential relationship, the rule cited in Re Estate of Graves, supra, is particularly applicable, i. e., "the rule is well settled that where one who unduly profits by a will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud and in such a case a presumption of undue influence arises from proof of such facts". It is also stated therein (from the syllabus): "Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, are, [1] the relations between the one charged with exercising the undue influence and the decedent, affording the former an opportunity to control the testamentary act; [2] the decedent's condition such as to permit of a subversion of her freedom of will; * * * [3] the former's activity in procuring the instrument to be executed; and [4] the fact that he unduly profited as beneficiary under the will; and while none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination."

Considering the first fact, i. e., of opportunity to control the testamentary act, the evidence discloses that respondents, during the last months of Katherine Hampton's life, were in possession and control of the decedent's home where she was confined to her room, afflicted by a serious and fatal illness, and had sole and entire management of her financial affairs; that at the time the instrument offered for probate was procured from decedent respondents were, at decedent's request, endeavoring to have Bolton reconvey to her (decedent) certain real property that decedent claimed Bolton had her convey to him through fraud. Respondents were nurses who, during the last ten days of her failing life, rendered constant attention to decedent day and night. As to the second fact mentioned, the evidence discloses that Katherine Hampton, as early as March 3, 1938, realized that her condition was such that the time had come when "she might get so she wasn't able to sign checks" and on that day she surrendered control of her bank account and financial affairs to Bertha Houghtaling; that after the death of her husband she became bewildered as to how she should dispose of her estate in the event of her death, and her mental condition was such that she signed instruments at the suggestion of those who were in the home without reading the same or having any knowledge of their contents. Between March 31 and April 6 she signed three different instruments purporting to be her last will, as well as signing three various deeds conveying her real property. The physical condition of Mrs. Hampton during this period of time was such as to permit of a subversion of her freedom of will. The record clearly indicates that after decedent had executed the will and deeds in favor of Bolton that she claimed she had been "double-crossed" and demanded that Bolton be made to reconvey this property to her. She later claimed that the instrument was not her will; that she did not remember making such a will; and that she never intended to make such a will. On April 5, while insisting that the Fourth street property be conveyed back to her, nevertheless she signed another deed to the property conveying the same to Bertha Houghtaling and Mildred Hartley. This deed was typed by Bertha Houghtaling and acknowledged before Mr. Holler, the attorney brought to the Hampton home by C. T. Hampton. The conveyance was without consideration. As to the third fact, the evidence indicates that respondents, as well as Bolton, were all pressing the decedent to execute a will whereby they or some of them might acquire her estate. Their acts and conduct toward the decedent seemingly tended toward the subversion of Mrs. Hampton's freedom of will and to bring about a mental condition whereby they would dominate her will and control her action in the manner and method of distribution of her estate.

The testimony of a Mrs. Scott, a neighbor as to deceased, is of interest on the subject. She had known Mrs. Hampton for 13 years and they were the closest of friends. On the morning Mr. Hampton passed away she talked with Mrs. Hampton respecting her property and Mrs. Hampton told her that "she was figuring on giving Mildred the furniture in the house and that she was going to give Bertha a thousand dollars and she said that they owed some money on the Texas property—that is, Mr. Hampton's brother did—and she was going to let them have that. And then she said, 'You folks haven't got a car.' And she said, 'I am planning on giving Scott the car.' And she says: 'To you, Margaret, I am planning on something nice.' She didn't say what."

Neither Mrs. Scott nor her husband were beneficiaries under the will. Respecting a safe in the house, Mrs. Scott testified that Bolton said to her in the presence of Mrs. Hartley at the time the will was made in Bolton's favor, that they were going to open the safe the next day and "if you were here you could get in on the spoils too". She further related that after Bolton left the house she conversed with Mrs. Hampton and she said "she thought she took care of everything and she said if there was any dissatisfaction they (Hamptons) could fight over it". She further testified that Mrs. Hampton was in great pain that day, nervous and "not a bit contented"; that she remarked about respondents and expressed a desire that they "get out and leave her alone"; that on the day Katherine shot herself she inquired of Bertha as to why she shot herself and Bertha replied "Didn't you know she left everything to Bolton?"; that the respondents never told her about a new will in their favor; that they refused to allow her to go to the hospital to see Katherine shortly before her death but she went anyway; that while there she said to Katherine "Honey, what has happened?" and Katherine said "Margaret, they have been dogging the life out of me"; that she returned to the Hampton home and heard Bertha remark to Mildred "We are safe; and we are getting the Fourth Street property too"; that she was so tickled that she danced up and down and said "Goodie, goodie, goodie".

Incidentally, when respondents filed their petition for probate of the will, instead of setting forth the names of the decedent's heirs, they listed as her only heirs the brothers and sisters of her deceased husband and designated them as brothers and sisters of the deceased. This fact would conceal the names and addresses of her natural heirs, and notice of the probate of the will undoubtedly was not given to her heirs.

As bearing upon the questions involved, it is of interest to note that Bolton in his verified opposition to the probate of the will involved, alleged that decedent was, at the time of making the will, "bedridden, sick, weakened and distressed in body and mind by sickness, worry, and the recent death of her husband; * * * That * * * Bertha Houghtaling and Mildred Hartley, neither of whom is related to decedent, but who are or claim to be nieces of said deceased late husband, moved into the residence of decedent and took possession and control of said residence and of the care, custody and control of decedent, without the request or wish of said decedent who, in her distressed and weakened condition, was unable to withstand or avoid the domination and control by said two persons of her person and property."

Subsequently, after making the compromise agreement, and when called as a witness, Bolton's testimony was as follows: "And was what you said true in your opposition to that will? A. I certainly thought it was at the time.

"Q. Do you think so now? A. No. From what came up since, I have not been able to prove that she was not in her right mind; I thought she was not in her right mind when she shot herself or the day of this shooting. That was the impression I had at that time."

As to the last question, whether or not proponents unduly profited as beneficiaries under the will, it should be noted that they received practically the whole estate appraised at about $20,000. Bertha Houghtaling, a stranger to the blood, whose acquaintance with decedent covers a period of about four months prior to her death, was during that time nurse and housekeeper. Mildred Hartley, also a stranger, whose acquaintance covered about two months at the time she joined Bertha Houghtaling, likewise helped in nursing and keeping house for decedent. Neither of the proponents was the "natural object of decedent's bounty" (In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456), nor has it been established that either of them has any peculiar or superior claim to the decedent's bounty.

[3, 4] Respondents have proposed, by their petition, to compromise and to settle the contest with Bolton, to the detriment of contestant, for the consideration of a trust deed in the sum of $2,200 in favor of Bolton on the Fourth street property, in addition to allowing him to retain title to the Fifth street property and the automobile. The rule stated in 26 California Jurisprudence, page 655, section 25, is particularly applicable to the facts in the instant case: "If the provisions of the propounded instrument vary radically from testamentary intentions which the decedent entertained previously to the execution of the writing, this fact, when unexplained, is one of the recognized indicia of imposition or undue influence. In conjunction with other facts the circumstance in question creates in favor of the contestant a presumption which requires a submission of the case to the jury, and which justifies a denial of probate when unrebutted by evidence of the proponent."

And at page 650, section 21, in reference to confidential relations, it is said: "One of the recognized indicia of undue influence or a subversion of the decedent's volition is to be found in the circumstance that the alleged wrongdoer was in such relations with the deceased as to be enabled to control the testamentary act. In combination with other facts this circumstance creates a presumption in favor of the contestant, and entitles him to have the issue of undue influence submitted to the jury."

[5-7] Accepting the evidence in the light most favorable to contestant, which the court is impelled to do under settled and established principles, we are firmly convinced that the foregoing excerpt from the evidence constitutes a prima facie showing sufficient to cast the burden upon the respondents to show that the execution of the instrument offered for probate was not induced by undue influence; that the cause, as to the last two counts, was one for the jury to decide. It is therefore apparent that the motion for nonsuit should not have been granted. The attempted appeal from the order denying the motion for new trial is dismissed.

Judgment reversed. Appellant to recover costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

39 Cal.App.2d 503

PEOPLE v. NORWOOD.

Cr. 455.

District Court of Appeal, Fourth District, California.

June 17, 1940.

Rehearing Denied July 1, 1940.

1. Criminal law 🔑55

A defendant forming specific intent to commit crime and carrying out specific intent without delay between forming intent and acting on it is guilty of the crime, notwithstanding that he loses possession of his faculties during actual commission of the crime because of voluntary intoxication, since such intent continues to control the act.

2. Criminal law 🔑53

A defendant's voluntary intoxication after defendant formed specific intent to rob gasoline filling station was not a defense in first degree robbery prosecution, where defendant immediately began preparations for robbery after forming the intent and went to scene of crime while sufficiently conscious to act on such intent.

3. Criminal law 🔑1173(2)

In first degree robbery prosecution, refusal to give requested instruction on defense of voluntary intoxication was not prejudicial, where defendant formed specific intent to rob, and immediately began preparations for robbery and went to scene of crime while sufficiently conscious to act on such intent, notwithstanding that defendant may have lost possession of his faculties during actual commission of crime because of such intoxication.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Wayne Norwood was convicted for first degree robbery, and he appeals.

Affirmed.

Newton F. Rozzelle, Jr., of San Diego, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment finding defendant guilty of robbery in the first degree, and from an order denying his motion for new trial.

Defendant was charged with robbing Paul Martinowsky of $70.58 in San Diego on February 5, 1940. He was charged with having suffered two prior convictions and that he had been confined in the penitentiary on one of them. He admitted the prior convictions and pleaded not guilty to the charge.

Defendant did not deny the fact of the robbery. He relied on the defense of voluntary intoxication to an extent that he was unable to have had an intent to steal.

The trial court excluded much of defendant's evidence on the question of intoxication and refused to give his requested instructions on the subject. This was held to be reversible error under the facts disclosed in the case of People v. Crowl, 28 Cal.App.2d 299, 82 P.2d 507.

There is little conflict in the evidence. Defendant and Daniel Dillon committed the robbery. They were arrested shortly after the commission of the crime. The next day, when defendant was seemingly in possession of his faculties, they made statements to the San Diego police which were taken down by a reporter and which were read in evidence. Defendant does not question the correctness of the reporter's notes nor of his transcription of them. A number of the facts which we will summarize will be taken from these statements.

Dillon and defendant had been acquainted for about ten years. They spent the larger part of February 5, 1940, repairing defendant's automobile. They drank whiskey during the day. We quote the following from Dillon's statement made in the presence of defendant: "I don't know, I believe I suggested that we rob this filling station. * * * The filling station on Highland and El Cajon. We decided that we would have to steal a car. We walked down here, I can't tell you to what street it was; Mr. Norwood went down by a house and I stood on the street and he came out and motioned to me to come in and we got into this car and drove away. * * * We drove out El Cajon and drove around considerable. We drove by this place two or three times and once we drove in and didn't stop. Then we drove around some more and came back and parked on Highland Avenue right by the side of it and we got out and went to the back of the station. This attendant started across to the toilet and Mr. Norwood hit him with his fist and knocked him down and I went in and opened the cash register and took the money. We got in the car and drove around the block and ran the car into the back end of a parked car and then we left the car and walked down Fairmont Avenue to University and took the street car to Park Boulevard."

The following appears in the statement made by defendant:

"Q. Now you have just heard the statement made by Dillon, what have you got to say in regard to this statement? A. By and large, I think it is a true statement of fact with possibly the exception I think the word 'get a car' was most likely used than 'stealing a car', because I had driven this car several times before with permission.

"Q. Norwood, it is true then that you and Dillon had planned this service station robbery before you went out in that neighborhood? A. I think so. I am very vague about the whole thing as far as the names of the streets that Mr. Dillon remembers. I know the streets in my ordinary state but I was so much in a muddle that I couldn't have remembered. If the man hadn't said where the station was this morning, I couldn't have driven back to it.

"Q. Then Norwood, I will ask you this question, do you remember having been at the oil station on El Cajon and Highland Avenue last night in company with Dillon? * * * A. Do I remember that, I do.

"Q. And while in this service station, you remember striking the attendant and knocking him down? A. You are coming to the place where I want to talk to my wife —the answer is no."

In his testimony defendant admitted that Dillon had proposed robbing the service station; that they obtained another's car and went to the service station; that the two went into the service station; that another car drove in; that the two left; that shortly thereafter he had no recollection of his actions or anything that happened between that time and the time he woke up in jail the next day.

It is thoroughly established that Dillon and defendant formed the specific intent to rob the service station of what money there was on hand; that while defendant was sufficiently conscious to still act on this intent they immediately made preparations for the robbery and went to the scene of the crime; that they robbed the service station and stole the money in the cash register.

[1-3] The specific intent to commit the crime was admitted by defendant. The crime was actually committed in carrying out that specific intent without delay between forming the intent and acting on it. Because he lost possession of his faculties during the actual commission of the crime, if true, cannot relieve defendant from the result of his criminal intent and criminal act. The act was an immediate result of the intent, and the intent, being admitted, continued to control the act. See, People v. Price, 207 Cal. 131, 277 P. 316. It follows that defendant's voluntary intoxication that caused him to lose consciousness after the intent was formed and acted on and during the commission of the crime, can furnish him no legal defense here. That the specific intent was formed and immediately acted on is sufficient. Under the facts be-

fore us he was not prejudiced by the questioned rulings of the trial court.

The judgment and order are affirmed.

I concur: BARNARD, P. J.

39 Cal.App.2d 512

McLEAN v. ELLIS et al.

Civ. 6286.

District Court of Appeal, Third District, California.

June 18, 1940.

1. Mines and minerals 🔑101

Evidence supported finding that money was procured by defendants from plaintiff's assignor for use in mining venture as a loan, and that plaintiff's assignor never became bound by written instrument subsequently prepared and sent to her by defendants by terms of which plaintiff's assignor would become a party to mining venture, and hence plaintiff was entitled to recover from defendants money advanced to them by plaintiff's assignor.

2. Mines and minerals 🔑101

That plaintiff's assignor, who had loaned money to defendants for use in mining venture, retained written agreement subsequently prepared by defendants by terms of which assignor would become a party to mining venture did not constitute an "acceptance" of the offer, so as to bind assignor by the agreement and preclude recovery by plaintiff from defendants for money advanced to them, especially where assignor immediately sent a letter of protest to one of defendants instrumental in securing the loan and asked for something "more legal."

See Words and Phrases, Permanent Edition, for all other definitions of "Acceptance".

Appeal from Superior Court, Nevada County; Warren Steel, Judge.

Action by Geraldine McLean against Ernest W. Ellis and others for recovery of amount alleged to have been loaned to defendants by plaintiff's assignor. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Proctor K. Perkins, of Los Angeles, and John L. Larue, of Grass Valley, for appellants.

Ivan C. Sperbeck, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was brought for the recovery of $5,000, less a credit of $1,200 which was alleged to have been loaned to appellant and others, by the assignor of respondent.

Appellant claims that respondent's assignor, Mrs. Jessie Moore, had entered into a joint mining venture with himself and the other named defendants, and that the right to be repaid was controlled by a conditional agreement which had been executed and received by Mrs. Moore.

The court found that Mrs. Moore had loaned the $5,000 to defendants at their request and that she was not bound by the written agreement sent to her by the appellant, Mr. Ellis. The court concluded that she had not entered into any joint mining venture, and judgment was rendered in favor of respondent and against appellant for $3,800, the amount of the balance remaining unpaid.

Mrs. Moore, a resident of the state of Texas, first met Mr. Ellis in Los Angeles in September, 1934. This meeting was a result of correspondence between Mrs. Moore and her nephew, Mr. Sears, who was interested in a mining venture at Grass Valley with Mr. Ellis and other associates.

It had been previously determined that $5,000 was needed to carry on the mining venture, and Sears told Ellis that the money might possibly be obtained from his aunt, Mrs. Moore. Sears testified that Ellis explained the mining venture to Mrs. Moore at the meeting in Los Angeles, and that Mrs. Moore told Ellis she was not interested. Mrs. Moore testified that at that time Ellis asked her for a loan of $5,000, but she refused. Ellis returned from Los Angeles without any assurance that the money might be obtained. Further correspondence was carried on between Sears and his aunt, and in the latter part of October, 1934, Mrs. Moore sent a check for $5,000 to Mr. Sears. At this time Mrs. Moore had not received any note or any other evidence of indebtedness from Mr. Ellis or any of the defendants. Mrs. Moore testified that the check for $5,000 was sent to her nephew after having received a letter from him which assured her that it would only be a "short time" loan, and that the money had been sent to him on this assurance.

The $5,000 check was retained by Mr. Sears for some time, and then after a talk with Mr. Ellis, it was turned over to him on November 12, 1934. A discussion took place between Ellis and Sears as to "an agreement" or "legal note" which was to be sent to Mrs. Moore. On November 13, 1934, Ellis wrote a letter to Mrs. Moore in which it was stated that a loan was sought from the government and that the $5,000 would be paid back as soon as the loan went through. The letter stated that a bonus of $1,000 would be paid after the government had received their money. The letter also referred to a $2,500 bonus, and then spoke of a $5,000 bonus in the event that the government loan failed to go through. Mrs. Moore testified that prior to this letter there had been no discussion of any bonus or government loan and that she had no knowledge of any such arrangement prior to the receiving of this letter from Mr. Ellis. The check for the $5,000 cleared the bank on November 14, 1934.

Mr. Sears testified that his aunt wrote to him during the latter part of December, 1934, and requested that she be sent a "legal note". Sears spoke to Ellis in this regard and was assured that a note would be drawn up and sent to Mrs. Moore. No note was ever drawn up in favor of Mrs. Moore, but an agreement, which was admitted into evidence as plaintiff's exhibit No. "1", was prepared by Mr. Ellis and signed by himself and the other defendants. This agreement was dated January 18, 1935, enclosed in a letter written by Ellis of the same date, and sent to Mrs. Moore, where it was received by her at her home in Texas. Mrs. Moore did not make any reply to Ellis upon receipt of this agreement, nor write any letter of protest to Ellis. The agreement was retained in her possession up until the time of trial. Mrs. Moore testified, however, that she did write a letter of protest to Mr. Sears very soon after receiving the letter and agreement of January 18, 1935. Upon cross-examination Mrs. Moore testified that she may have written to Sears in regard to this letter and stated that the letter "was good news", but she also testified that she didn't like the agreement and would not accept it.

This agreement of January 18, 1935, was not an unconditional promise to repay the $5,000, but payment was conditioned upon the receiving of the government loan. The agreement also provided for a bonus of $2,500 to be paid from the operation of the venture. It was also provided that a bonus of $5,000 would be paid from the operation of the mining lease if the government loan failed to go through. The agreement did not purport to hold any of the defendants personally liable for repayment of the $5,000.

The government loan which was relied upon to carry out the mining venture was never granted, and financial difficulties which arose brought the mining venture to an end in November, 1935. Certain equipment which had been used in connection with the mine was subsequently sold for $1,200, and the proceeds were turned over to Mrs. Moore.

Mrs. Moore demanded payment of the $3,800 alleged to be due, and upon a refusal by the defendants to pay, she assigned all of her right, title and interest in said alleged loan to the respondent, Geraldine McLean. Suit was commenced on September 29, 1936, and the defendant J. R. Sears, filed a confession of judgment on the day the case was called to trial.

The trial court having found that Mrs. Moore was not a party to the mining venture, but that she made a loan of $5,000 to the defendants, and further finding that she had never entered into the written agreement executed by the defendants, the sole question is one of sufficiency of the evidence to support those findings.

[1] We are of the opinion that the findings are supported by sufficient evidence.

The question of acceptance of the agreement of January 18, 1935, is directly affected by the intent of the parties at the time of entering into the original transaction. If the parties intended that the $5,000 constitute a loan, then the written agreement prepared by Ellis and sent to Mrs. Moore was in effect an offer to enter into a new contract, and would not be binding upon her unless the evidence showed that she had accepted such offer. Mrs. Moore and Mr. Sears both testified that it had been understood that the transaction was to be a "short time loan". There is no evidence in the record that indicates that Mrs. Moore believed she was entering into the mining venture. The appellant, Mr. Ellis, does not testify that it was intended that Mrs. Moore was to become a party to the mining venture. In fact, the letter of January 30, 1936, written to Mrs. Moore by Ellis after the mining venture had come to an end, indicates that Ellis was under the belief that a straight loan had been made by Mrs. Moore. Mr. Ellis speaks about "paying off the loan" and "cutting down the amount remaining to be paid".

[2] A loan of the money having been intended by the parties, the written agreement prepared by Ellis constituted an offer to enter into a new contract, and this offer never having been accepted by Mrs. Moore, she cannot be held to be bound by the written agreement. The written agreement evidenced a conditional right to recovery of the $5,000, and in order for it to be binding upon Mrs. Moore it would have been necessary to show an unqualified acceptance. The evidence fails in such respect. The fact that Mrs. Moore received this written agreement and retained it in her possession does not constitute an acceptance of the offer so as to bind her by the agreement. 6 Cal.Jur., p. 53, sec. 30; Hunkins-Willis Co. v. Los Angeles, etc., 155 Cal. 41, 99 P. 369.

The case of Fidelity, etc., Co. v. Fresno Flume, etc., Co., 161 Cal. 466, 119 P. 646, 37 L.R.A.,N.S., 322, cited by appellant is clearly distinguishable from the instant case. That case involved the acceptance of an insurance policy. The court held that the insured could not vary the terms of the written policy which had been accepted by parol evidence. In the present case the evidence indicates that a loan of money was intended, and the written agreement, if accepted, would have constituted an entirely new and different type of agreement. There is no attempt in the present suit to vary the terms of the agreement prepared by Ellis, as the action had not been brought upon this instrument.

Mrs. Moore testified that although she retained the written agreement sent by Ellis, that she immediately sent a letter of protest to Mr. Sears, and asked for something "more legal". Mr. Sears corroborates this testimony. Although Mrs. Moore might have written a letter of protest to Mr. Ellis or may have returned the written agreement, the written protest to Mr. Sears was sufficient. Mr. Sears was one of the defendants and his signature appeared upon the agreement prepared by Ellis. Moreover, Sears had been one of the moving parties in procuring the money. Mrs. Moore had every reason to believe that a letter of protest to Mr. Sears would be sufficient notification of her dissatisfaction with the written agreement. There is no evidence that Sears had been given any authority to bind Mrs. Moore by an agreement such as the one prepared and sent to her. The evidence supports the findings that the money was procured as a loan, and that Mrs. Moore never became bound by the written agreement prepared and sent to her by Mr. Ellis. The record discloses ample evidence to support the finding that the transaction was a loan to defendants.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

39 Cal.App.2d 478

BERDAN v. BERDAN.

Civ. 2378.

District Court of Appeal, Fourth District, California.

June 13, 1940.

Hearing Denied Aug. 12, 1940.

1. Frauds, statute of ⇔115(2)

The fact that notation on back of father's letter to son was signed "Mother", and that the notation, which referred to father's having signed both his name and "Dad", indicated mother's belief that "Dad" was not a legal signature, was evidence that mother's "signature" was insufficient, for lack of intention that it should constitute her legal signature as required by statute, to validate letter as an agreement by mother to leave one-half her property by will to son.

Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Signature".

2. Frauds, statute of ⚷115(2)

A "signature" sufficient to satisfy statute of frauds requiring agreement to leave property, or to make provision for any person by will, to be in writing and subscribed by party to be charged, consists both of the act of writing the party's name and of the intention thereby of finally authenticating the instrument. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

3. Appeal and error ⚷1008(3)

Where trial court's construction of an instrument appears to be reasonable and consistent with intent of party making the instrument, appellate courts will not substitute another interpretation even though it seems equally tenable.

4. Wills ⚷58(1)

Letter to son wherein father stated that he had made a will more than two years before leaving everything to mother and that mother would of course leave everything at her death to son and another son only, was not a "contract" between parents to leave property by mother's will to son, and even if it were so intended, mother was not obligated to leave property to the two sons equally, but merely to the two sons exclusively. Civ.Code, §§ 1636, 1641.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

5. Wills ⚷58(1)

Property held by mother in joint tenancy with father at time of father's death could not be claimed by son under alleged agreement between parents to leave son one-half of property left to mother by father's will.

6. Wills ⚷692(7)

The ultimate beneficiary of a power of appointment in a will is regarded as receiving the property from the donor of the power and not from the donee.

7. Wills ⚷672(3)

Before any direction may be construed as creating a trust in executor of will for the benefit of a beneficiary, the language creating the trust must be directed to the executor or to the law.

8. Wills ⚷672(1), 692(1)

Father's letter to son stating that father's will left everything to mother who on her death would of course leave everything to son and son's brother only, was insufficient to create any "trust" in executor of mother's will for benefit of son, so as to warrant application of doctrine of "illusory appointments" requiring that beneficiary receive a substantial share of alleged trust property.

See Words and Phrases, Permanent Edition, for all other definitions of "Illusory Appointments" and "Trust".

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Elra Greenlees Berdan against Cedric Harrison Berdan, and Cedric Harrison Berdan as executor of the estate of Ada Sherwood Berdan, deceased, to impress property with a trust in favor of plaintiff pursuant to an alleged agreement by deceased to leave one-half her property by will to plaintiff. From judgment for defendant, plaintiff appeals.

Affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondent.

GRIFFIN, Justice.

This is an appeal by the plaintiff and appellant from a judgment in favor of defendant and respondent. The case involves the construction of an agreement in the form of a letter, which letter was written and signed January 2, 1935, by Elra A. Berdan (since deceased), father of appellant Elra Greenlees Berdan and respondent Cedric Harrison Berdan. The typewritten letter, directed to appellant, reads in part as follows:

"Dear Son:

"* * *

"This leads me to tell you something of a personal nature and I hope you will understand and appreciate what I have done. A year or more ago I tho't it necessary to make a new will which I did. By the terms of this will I leave all real and personal property to your Mother with the exception that she is to give you and Harrison an $100.00 if I should pass out before she dies. You will understand that Mother and I are getting along in years and neither of us is therefore able to earn anything and therefore it will be my pleasure to provide for Ada to the extent of by ability. If I should pass out before your Mother of course she will leave all she possess, when it comes to her her time to pass out, and YOU AND HARRISON ONLY. Harrison expresses himself as being perfect~~ical~~ly satissfied with what I ahve done and I hope you will understand my purpose and action in protection your Mother as best I can and I hope my action will be understood and appreciated by you as it was by Harrison * * *

"As this is a personal letter and getting rather long I will close and send this letter to your place of business and you can use your own judgment as to whether or not to make mention of it * * *

"Sincerely yours,
"(Signed) Elra A. Berdan
"Dad."

On the reverse side of the foregoing letter appears the following handwriting in ink: "Dad singed this with his signature and also 'Dad' below. The signature in case you might want to use it. Lawfully. Mother."

In January of 1935, the respondent was residing with his father and mother in San Diego. The appellant was, at the time the letter was written, residing in New York City. Appellant's father passed away in San Diego on January 12, 1936, leaving a will dated October 14, 1932, wherein he devised and bequeathed all his property to his wife, Ada Sherwood Berdan, with the exception of a bequest of $100 each to the appellant and respondent. Appellant's mother visited him and his family in New York during the fall of 1936. At that time on several occasions his mother stated to both appellant and appellant's wife, according to their testimony, that the respondent was being named as the executor in her will because he was familiar with her affairs, but that "he (Cedric) would see that everything would be divided equally". Appellant's mother passed away in San Diego on July 15, 1937. By her will, which was dated November 2, 1935, she left everything to the respondent with the exception of $200, which was bequeathed to the appellant. The inventory of the father's estate shows that the appraised value was $12,399.02, consisting mostly of stocks and bonds. The inventory further shows that the value of the property which the father held with his wife in joint tenancy at the time of his death was $20,739.39. The inventory of the mother's estate shows that the property in her estate was appraised at $7,131.11, and further shows that the value of the property which was held by her and the respondent in joint tenancy was $21,266.58. No evidence was introduced by respondent, and the court rendered a judgment in his favor. The complaint prayed that a trust be declared in favor of plaintiff in one-half of the property which Ada Sherwood Berdan received from the estate of Elra A. Berdan. The answer substantially denied that the plaintiff was entitled to any relief. The court made a finding that "it is not true that either the said will or the said devise to Ada Sherwood Berdan was made in consideration of any agreement between Elra A. Berdan and Ada Sherwood Berdan in consideration of said Elra A. Berdan so bequeathing and devising said property to Ada Sherwood Berdan, the latter agreed to execute a will whereby she would devise and bequeath all property so received by her from Elra A. Berdan to the plaintiff and defendant herein share and share alike, or in consideration of any agreement of similar import or in consideration of any agreement at all; that it is not true that there was any agreement either written or oral between Elra A. Berdan and the said Ada Sherwood Berdan with respect to said property."

Appellant now claims that the evidence does not support the finding, and that construing the letter, it is clear that it was the intent of the parties that Ada Sherwood Berdan should leave the property equally to the two sons. In support of this contention he cites Staples v. Hawthorne, 208 Cal. 578, 582, 283 P. 67, 69, where it is said: "It is well settled by the decisions of this court that any agreement to make a will in favor of a certain person is valid and binding upon the person making said agreement, and that upon the death of the latter said agreement will be enforced against those who have succeeded to the property of said decedent contrary to the terms of said agreement." See, also, Estate of Rath, 10 Cal.2d 399, 404, 75 P.2d 509, 115 A.L.R. 836; Stewart v. Smith, 6

Cal.App. 152, 91 P. 667; Keefe v. Keefe, 19 Cal.App. 310, 125 P. 929.

Appellant argues that a beneficiary of a contract to make a will or leave property may sue for the enforcement of such a contract where the contract is made for his benefit, citing Staples v. Hawthorne, supra; 73 A.L.R. 1395.

Appellant contends that the entire instrument must be so construed as to give effect to the mutual circumstances and the relationship of the parties, citing Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004; Civ.Code, secs. 1636, 1641; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 480, 19 P.2d 785; Tennant v. Wilde, 98 Cal. App. 437, 444, 277 P. 137; and Hansen v. D'Artenay, 121 Cal.App. 746, 750, 9 P.2d 889. It is appellant's contention that the letter, considered in connection with the declarations of the mother under the rules expressed in the cited cases, conclusively shows that the parties intended that the two sons were to be treated equally. Steinberger v. Young, 175 Cal. 81, 165 P. 432. It is further argued that the doctrine of illusory appointment should be applied as in the case of Barret's Ex'r v. Barret, 166 Ky. 411, 179 S.W. 396, L.R.A.1916D, 493. This doctrine was referred to in this state in In re Sloan, 7 Cal.App.2d 319, at page 340, 46 P.2d 1007, at page 1017, wherein the court stated: "* * * the law is fairly well established that in the absence of controlling statute to the contrary, in exercising the power of appointment, no member of a class designated by the donor of the power may be entirely excluded by the donee of the power from at least a substantial participation in the distribution of the trust fund or estate."

Respondent contends: (1) that the claimed contract is not signed by Mrs. Berdan; (2) that neither the father nor the mother intended it to be a contract; (3) that the trial court was justified in holding that the evidence did not warrant a finding of an agreement to leave the property to the two children equally; and (4) that even assuming that the letter might be considered to be a contract between the father and the mother, nevertheless, by its terms the only obligation imposed upon Mrs. Berdan was to leave the property to the two children *exclusively*, which she did, and that the letter did not bind her to leave the property to them *in equal shares.*

[1, 2] In discussing the first contention, respondent cites section 1624, subdivision 6, of the Civil Code and section 1973, subdivision, 6, of the Code of Civil Procedure to the effect that any agreement to leave property or to make any provision for any person by will must be "in writing and *subscribed* by the party to be charged". Respondent concedes that as a matter of law the word "Mother" may constitute a legally binding signature if so intended by the party using it, but the question that the court was called upon to determine was not what might be a *legal signature,* but rather whether Mrs. Berdan intended the word "Mother" to constitute *her legal signature,* authenticating the *writing.* The question then before us is to determine if the trial court erred in its construction of the writing, which construction was to the effect that Mrs. Berdan did not intend the word "Mother" to constitute her legal signature binding her to any agreement to give the proceeds of her husband's estate by will to the two sons equally. The very language used by her shows that she did not believe that the word "Dad" was a legal signature. She apparently believed that it was necessary for her husband to write Elra A. Berdan, in order to sign the letter legally. This is some evidence that she did not sign the letter in a manner sufficient to satisfy the statute of frauds, since a signature consists both of the act of writing the party's name and of the intention thereby of finally authenticating the instrument. 58 Cor.Jur. 718, 719; 27 Cor.Jur. 288; Estate of Manchester, 174 Cal. 417, 163 P. 358, L.R.A.1917D, 629, Ann.Cas.1918B, 227; Estate of Bernard, 197 Cal. 36, 239 P. 404; Estate of Devlin, 198 Cal. 721, 247 P. 577.

In reference to the claimed intent of the father and mother to agree to make a will in favor of both sons equally, it should be noted that the letter was written more than two years after the execution of the will of Elra A. Berdan. If Mr. Berdan left his property to Mrs. Berdan only because of her agreement evidenced by this letter to leave it equally to the two children, why did he do so more than two years before the letter was written? This sentence seems to emphasize the fact that the will was executed 27 months before the letter was written and that the writing of the letter and the mother's statement on the back of it apparently had no influence on the execution of that will. The letter is a narration of a past event; it is not an agreement inducing the performance of an act. The fourth sentence of the paragraph explains why the will was made, namely, because "* * * Mother and I are getting along in years and neither of us is therefore able to earn anything and therefore it will be my pleasure to provide for Ada to the extent of my ability". Mr. Berdan could not have chosen any more appropriate language to indicate that he had changed his will simply because he recognized that his primary obligation was to care for his wife and to so arrange matters that "our income" would go to her after his death. The sentence upon which appellant most strongly relies, "If I should pass out before your Mother, of course she will leave all she possesses, when it comes her time to pass out, to you and Harrison only", is a mere expression of Mr. Berdan's *belief* as to what his wife would do. He does not say "Your mother has agreed to leave the property to you and Harrison only." He merely states: "Of course she will leave it to you and Harrison only." Naturally he believed this, but the letter does not indicate that he changed the will because his wife had bound herself by a contract with him to so dispose of the property. As we have already noted, all that the letter states is that Mr. Berdan believes that Mrs. Berdan will leave the property to the children. Mr. Berdan does not state that she has definitely agreed to leave the property to them. Such a statement as is contained in the letter was expressly held to be insufficient to create a contract in Crawford v. Briant, 10 Cir., 53 F.2d 754. This was an action to enforce an alleged agreement to leave property by will. In affirming the judgment for defendant the court said 53 F.2d on page 757: "Declarations of testamentary intentions and purposes of themselves are not sufficient to constitute a contract to make a will. [Citing cases.] They must at least be made under circumstances which give the proposed beneficiary the right to assume that they are made in consideration of a promise or an act on his part and with the intention to contract, and so assuming he must act thereon to his detriment. [Citing cases.] None of the witnesses testified that Sugg said he had promised or agreed to give plaintiff such stock and real estate, but only that he was going to give it to her. There is no competent proof that Sugg ever expressly promised or agreed to will such property to plaintiff."

So here the letter at most states that Mrs. Berdan is going to make a certain disposition of her property, not that she has promised so to do. See, also, Cromwell v. Simons, 2 Cir., 280 F. 663, 670; Blanc v. Connor, 167 Cal. 719, 141 P. 217. Furthermore, Mr. Berdan nowhere in the letter states that he has agreed to leave his property to his wife nor that he has agreed not to revoke the will made in her favor. He states only that he has executed a will, leaving the property to her. Despite anything contained in the letter, if the father had revoked the will and had executed another will leaving nothing to his wife, she would not, from this letter alone, have had any cause of action against him for breach of contract or to have a trust declared in his estate on the ground that he had broken a contract with her whereby he was required to leave his estate to her. Unless the letter would support such an action by her against his estate in such event, it is obvious that it could not have been intended to be, and in fact was not, a contract binding upon either Mr. or Mrs. Berdan. It is therefore apparent that there is nothing in the letter as a whole, or in any portion of it separately, which indicates that Mr. Berdan in 1932 executed his will in reliance on any contract by his wife concerning her disposition of the property.

[3, 4] When the construction given an instrument by the trial court appears to be reasonable and consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245; Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193. We therefore find no legitimate reason to disturb the finding of the court in this regard.

Even if we indulge in the assumption that the letter did constitute a binding contract between the parents of appellant and respondent, nevertheless Mrs. Berdan has fully carried out any obligation imposed upon her by its terms. Mrs. Berdan was obviously bound to do only what was set forth in the letter, viz., to leave the property "*to you and Harrison only*", i. e., to leave it to appellant and respondent *exclusively*. In other words, Mr. Berdan intended his wife to leave her property to the two children to the exclusion of all others. He did not intend her to leave it to her collateral relatives or to strangers. This does not prove that he necessarily intended her to leave it to the boys in equal shares. Biggins v. Lambert, 115 Ill.App. 576, Id., 213 Ill. 625, 73 N.E. 371, 104 Am. St.Rep. 238.

Respecting the claimed statements made by the mother as to how she was making her will, it appears therefrom that the mother was leaving her estate to respondent. However, at no place in the conversation or by the terms of the will is he directed to divide the property equally. She said: "I am making Harrison the executor of my will because he is familiar with the lock box and the papers where everything in the west coast is kept; *but he will see* that it is equally divided between you. * * *" And during that conversation she again mentioned that "Harrison was being made the executor and that *he would divide* everything equally and that I had nothing to worry about nor be concerned about". (Italics ours.) Appellant, in a letter dated September 22, 1937, before commencing suit, wrote Cedric respecting personal belongings of his mother and father and added: "Mother said while she was here that her coat or a ring and similar possessions I was to mention to you and inasmuch as you cannot use them you would be only too glad to send them to us. *This was when she explained that everything was being left to you and your judgment.* * * *" This indicates that neither appellant nor his mother believed that such action on her part would be in violation of any agreement between her and her husband. This statement is also inconsistent with appellant's present contention, and by it he has indicated his construction of the letter that it was not intended as an agreement binding his mother to divide the property equally.

[5] From the facts stated it is immediately apparent that the bulk of the father's estate passed to the mother through the joint tenancy deed. There could be no contention therefore that appellant was entitled to any portion of that property under the claimed agreement or the will of the father. Respondent acquired the greater portion of the mother's estate through joint tenancy, leaving only approximately $7,131.11 for the payment of estate obligations and distribution under her will. This remainder was distributed as follows: $200 to appellant and the balance to respondent under the terms of her will.

[6-8] Finally, appellant contends that the doctrine of illusory appointments should be applied as an aid in the construction of the letter. The trial court has determined this issue contrary to appellant's contention. In the case of the power of appointment the ultimate beneficiary is regarded as receiving the property from the donor of the power, not from the donee, while in the instant case, not even appellant contends that he is receiving the property from his father's estate.

In Estate of Davis, 13 Cal.App.2d 64, 56 P.2d 584, where the provisions of a will distributed all of decedent's property to one son to be distributed to decedent's other sons and grandchildren *as he deems best,* this court decided that the one son who was designated in the will as executor was invested with the power of determination as to what share of the estate he should distribute to each of the persons falling within the class to which the testatrix directed the distribution to be made In affirming the judgment this court said, 13 Cal.App. at pages 68 and 69, 56 P.2d at page 586: "It is too clear to permit of argument that it was the desire and intention of the testatrix to invest the trustee named in the will with the power to determine what share of the estate he would distribute to each of the persons composing the class specified in the instrument. * * *"

We do not have in the instant case any such instruction in either will, to the executor thereof, to so distribute the property as contended by appellant. Any claimed suggestion as to the manner of distribution arises under the letter in evidence and is directed not to the executor of any will, but to a contemplated beneficiary under the mother's will. Before any direction may be construed as creating a trust in the executor for the benefit of the beneficiary such language as creates such a trust must be directed to the executor or to the law. Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071; Estate of Tooley, 170 Cal. 164, 167, 149 P. 574, Ann.Cas.1917B, 516; Estate of Mallon, supra. The trial court was justified in concluding that the language used by the testator was entirely insufficient to create a trust.

For the reasons expressed the judgment is affirmed. Respondent to recover costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

15 Cal.2d 569

MAMER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

WEST et al. v. SAME.

ANDERSON et al. v. SAME.

S. F. 16438.

Supreme Court of California.
June 20, 1940.

1. Appeal and error 🔑417(1), 439

Where petitioners, after judgments were entered against them as plaintiffs in action in superior court, filed with clerk of court notices and demands for transcripts pursuant to statute, and each document stated "You are hereby notified that the plaintiffs above named intend to appeal from the judgment," notices and demands were, in effect, "notices of appeal," and hence Superior Court was without jurisdiction to thereafter hear and determine petitioners' motions to set judgments aside. Code Civ.Proc. §§ 940, 953a.

See Words and Phrases, Permanent Edition, for all other definitions of "Notices of Appeal".

2. Courts 🔑90(5)

A change, if any, in rule concerning language to be contained in a notice of appeal was to be made by Legislature and not by Supreme Court in overruling prior decisions, the effect of which would be to jeopardize if not destroy appellate jurisdiction in cases pending on appeal. Code Civ.Proc. §§ 940, 953a.

◆

In Bank.

Proceeding by Faye C. Mamer and another against the Superior Court of the state of California, in and for the county of Los Angeles, by Kathleen West and others against the Superior Court of the state of California in and for the county of Los Angeles, and by Andrew Anderson and others against the Superior Court of the state of California, in and for the county of Los Angeles, for a writ of mandamus to compel respondent Superior Court to hear and determine motions of petitioners to set aside judgments entered against them as plaintiffs in their action against the Lockheed Aircraft Corporation.

Alternative writ discharged and peremptory writ denied.

W. I. Gilbert, of Los Angeles, and Cooley, Crowley & Supple, of San Francisco, for petitioners.

J. H. O'Connor, County Counsel, Jennings & Belcher, and Newlin & Ashburn, all of Los Angeles, for respondent.

SHENK, Justice.

This is an application for the writ of mandamus to compel the respondent superior court to hear and determine the motions of petitioners to set aside judgments entered against them as plaintiffs in their action against the Lockheed Aircraft Corporation.

Demurrers to second amended complaints were argued and submitted on April 9, 1940. On April 29, the demurrers were sustained without leave to amend. Actual notice of this ruling was received by the petitioners' attorneys in San Francisco on April 30, whereupon they commenced immediately to prepare notices of motions for leave to file third amended complaints, but before the preparation of the papers was completed judgments were, on May 3, entered against them. On May 6, notices of the entry of said judgments were served. On May 15, the petitioners served and filed with the clerk of the respondent court in each case a notice of motion to set aside the judgment and for leave to file a third amended complaint. On the same day they filed with the clerk of the court a notice and demand in each case for a transcript pursuant to the provisions of section 953a of the Code of Civil Procedure. The pertinent part of each document reads as follows: "You are hereby notified that the plaintiffs above named intend to appeal from the judgment given, made and entered in the above entitled action in said superior court, on or about the 3rd day of May, 1940 * * *."

When the motions to set aside the judgments came on for hearing on May 21, counsel for the defendant interposed an objection on the ground that the court was without jurisdiction to hear or determine the motions for the reason that the aforesaid notice and demand for a transcript constituted a notice of appeal and had the effect of removing jurisdiction from the superior court to the reviewing court. The objection was sustained,—whereupon this proceeding was instituted.

[1] The question is whether the notice and demand for a transcript in the language above quoted is, in effect, a notice of appeal. The petitioners insist that it is not. The respondent contends that by an unbroken line of decisions since the amend-

ment of section 940 of the Code of Civil Procedure in 1921 it has been held by this court and the District Courts of Appeal that a similar notice and demand for a transcript constitutes a notice of appeal.

The position of the respondent must be sustained. Commencing with the case of Purity Springs Water Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810, this court has consistently held that a notice and demand under section 953a which contains the clause "You will please take notice that plaintiff in the above-entitled action desires and intends to appeal from the judgment heretofore given * * *" is sufficient as a notice of appeal. It was also stated in that case, 203 Cal. at pages 287 and 288, 263 P. at page 810: "It is no objection to a notice of appeal that it is a part of the same paper that directs the clerk to prepare the record and, in recent decisions, considering the precise language above quoted, it has been held that 'while it would be more satisfactory if the notice had been more explicit, * * * it must be held sufficient to give the appellate court jurisdiction.' Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65; Wright & Hogan, Inc., v. Heide, 72 Cal.App. 16, 236 P. 219."

The Purity Springs Water Company case was followed with approval in Magruder v. City of Redwood, 203 Cal. 665, 265 P. 806, and Kiekhoeffer v. United States National Bank, 2 Cal.2d 98, 39 P.2d 807, where the same language was employed in the notice to the clerk as was before this court in the Purity Springs Water Company case. To the same effect is Lierly v. McEwen, 81 Cal.App. 676, 254 P. 587.

It is true that in each of the cases above cited the language of the notice and demand contained the words "desires and intends to appeal", while in the proceeding now before us the wording is that the plaintiffs "intend to appeal". However, in substance and effect they are the same. It would be too much of refinement in an important matter of procedure to say that the words "desires and intends to appeal" constitute a sufficient notice of appeal and vest jurisdiction in the reviewing court, but that the words "intends to appeal" do not have the same effect. In Re Forthmann's Estate, 118 Cal.App. 332, 5 P.2d 472, 473, the District Court of Appeal held that the words "desires or intends to appeal" employed in the notice to the clerk were sufficient to transfer jurisdiction to the reviewing court, notwithstanding the use of the word "or".

It therefore appears that for over seventeen years, and under the authority of uniform decisions in this court and in the District Courts of Appeal, a notice and demand to the clerk to prepare a transcript under section 953a of the Code of Civil Procedure in substantially the same form as the one here involved has constituted a sufficient notice of appeal.

The case of Phillips v. Byers, 189 Cal. 665, 209 P. 557, relied on by the petitioners, is not controlling. It was there held that a notice to the clerk to prepare a transcript under said section 953a was sufficient as a demand for a transcript even though it did not state that the party giving the notice desired or intended to appeal or that he had appealed from the judgment. The sufficiency of the notice as a notice of appeal was not properly involved in that case.

[2] The petitioners have presented an argument possessed of much merit to the effect that from the standpoint of proper and uniform practice any notice of appeal should contain language definitely stating that the party "appeals" from the judgment or order as contemplated by section 940 of the Code of Civil Procedure as amended in 1921. However persuasive the argument of the petitioners may appear to be, we are confronted with a situation where by a long continued practice, approved by our reviewing courts, a notice and demand substantially the same as the one here involved has been considered a sufficient notice of appeal. Undoubtedly there are many appeals pending in this court and in the District Courts of Appeal taken in reliance on the decisions now sought to be overruled and wherein the power of review depends on such a notice as a prerequisite of appellate jurisdiction. If any change is to be made in the rule it is desirable that it be made by the legislature, the effect of which would be prospective, and not by the court in overruling prior decisions, the effect of which would be to jeopardize if not destroy appellate jurisdiction in cases so pending on appeal.

The alternative writ is discharged and the peremptory writ is denied.

We concur: GIBSON, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; SPENCE, J. pro tem.; KNIGHT, J. pro tem.

MORRISON v. MUTUAL LIFE INS. CO. OF NEW YORK.

S. F. 15818.

Supreme Court of California.

June 27, 1940.

Rehearing Denied July 25, 1940.

1. Insurance ⟹203, 239, 586, 587

The naming of beneficiary in a life policy has effect of giving such beneficiary a vested right in policy, so that he becomes in fact owner of contract and is protected against any interference with his rights by later acts of insured, or insurer, and insured may in such case neither change beneficiary nor assign policy and cannot surrender or cancel it, but where, by terms of policy, a power is reserved giving insured right to change beneficiary such change may be made and former beneficiary's ownership thereby wholly divested.

2. Insurance ⟹203, 239, 586, 587

Where power to change beneficiary in life policy is reserved to insured by terms of policy, beneficiary has an expectancy, and will receive proceeds of policy if it is in force at insured's death, with beneficiary unchanged, but in meantime insured's control is absolute and he may pledge, assign, or surrender the policy at will.

3. Insurance ⟹239

Where insured's wife was named as beneficiary in life policy which was governed by New York law, and policy reserved to insured a right to change beneficiary upon notice to insurer, wife did not have a "vested right" in policy, as owner thereof, which deprived insured of power to surrender policy for its cash surrender value without wife's consent, notwithstanding New York statute permitting a married woman to cause the life of her husband to be insured. Domestic Relations Law N.Y. § 52.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

4. Insurance ⟹239

Where ownership of an insurance policy is once brought home to insurer, whether ownership is established by taking out policy in name of owner, or by assignment or by contract or gift, insurer is bound to recognize rights of lawful owner, on the question of insured's right to surrender policy.

5. Insurance ⟹239

Where insurer under life policy had paid out cash surrender value of policy to insured prior to insured's death, insurer was immune from liability on another claim by beneficiary if at time insurer paid money to insured, it was not already obligated to beneficiary.

6. Insurance ⟹242

In wife's action as beneficiary on husband's life policy which husband, before death, had surrendered for cash surrender value thereof without wife's consent, where evidence showed that as between wife and husband, wife was not only the named beneficiary in policy but actual owner thereof, and policy was governed by New York law, evidence was insufficient to establish that insurer, when it paid proceeds to husband, had such knowledge or notice of wife's ownership of policy as to require recognition of wife's rights. Domestic Relations Law N.Y. § 52.

7. Insurance ⟹242

The mere fact that insurer under life policy received premiums on policy from insured's wife did not establish knowledge on part of insurer that wife was owner of policy.

8. Insurance ⟹242

An insurer under life policy could not be charged with notice of ownership of policy in conflict with its provisions merely by reason of casual discussion between alleged owner of policy and insurer's original soliciting agent.

9. Insurance ⟹242

In wife's action as beneficiary on husband's life policy which husband, before death, had surrendered for cash-surrender value thereof without wife's consent, where wife claimed to be owner of policy which was governed by New York law, wife's proffered testimony as to alleged conversations with "head men" in insurer's office concerning provisions of policy should not have been excluded on ground that testimony was inconsistent with provisions of policy specifying manner in which ownership of policy could be established, since authorized agents of insurer, or agents with apparent authority, might charge insurer with notice of ownership of policy despite provisions of policy. Domestic Relations Law N.Y. § 52.

10. Estoppel ⟹87

Where insured's wife, who was named as beneficiary in policy covering insured's life and who claimed to own policy, made inquiry at insurer's office respecting provisions of policy before insured's surrender of policy for cash value thereof, if responsible officers in charge of office, after being informed of facts surrounding policy and being requested to clarify rights of parties thereunder, stated on behalf of insurer that insured could not surrender policy without wife's consent, and wife thereafter relied upon the statement, in wife's action on policy after insured, before death, had surrendered it for cash value thereof, insurer was "estopped" to deny representations as to wife's rights under policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

11. Insurance ⚷242

In wife's action as beneficiary on husband's life policy which was governed by New York law and which husband, before death, had surrendered for cash surrender value thereof without wife's consent, wife's offer of proof concerning conversations with alleged agents of insurer as to provisions in policy was sufficient prima facie for introduction of wife's testimony as to such conversations, although wife did not name persons claimed to be agents, where wife's proffered testimony stated that when she went to insurer's office she had asked for the "head men" and was conducted to an inner office where those purporting to have authority to speak for insurer stated to wife the nature of her rights. Domestic Relations Law N.Y. § 52.

12. Insurance ⚷92

In wife's action as beneficiary on husband's life policy which was governed by New York law and which husband, before death, had surrendered for cash-surrender value thereof without wife's consent, where wife claimed that before surrender of policy insurer's agents had assured her, when she inquired at insurer's office, that husband could not obtain policy without wife's signature, wife's proffered testimony that she asked for and was directed to the "head men" in charge of office, was sufficient to make out a prima facie case of apparent authority of alleged agents to receive notice on behalf of insurer which would lead to waiver or modification of terms of policy. Domestic Relations Law N.Y. § 52.

13. Appeal and error ⚷1056(1)

Where trial court erred in sustaining objections to plaintiff's offered testimony which, if uncontradicted, would have tended to establish plaintiff's right to recover, sustaining of objections was reversible error, and warranted reversal of judgment for defendant in order that plaintiff might be permitted to give rejected testimony.

14. Estoppel ⚷70(2)

Where wife's testimony, in her action as beneficiary on husband's life policy which husband, before death, had surrendered for cash-surrender value thereof without wife's consent, showed that before husband surrendered policy wife had presented her claims to insurer's representatives, and that she had relied upon their assurances that husband could not obtain money on policy without wife's signature, defenses of "laches" and "estoppel" were not availing to insurer on theory that wife had knowledge of husband's assertion of sole ownership of policy and failed to take action to establish her interests.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches" and "Estoppel".

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Julia F. Morrison against the Mutual Life Insurance Company of New York to recover the amount of an insurance policy on the life of plaintiff's husband. From a judgment for defendant, plaintiff appeals.

Reversed.

Rehearing denied; CARTER, J., disqualified.

Prior opinion, 92 P.2d 1024.

A. Don Duncan, of San Francisco, for appellant.

F. Eldred Boland, Knight, Boland & Riordan, and R. M. Sims, Jr., all of San Francisco, for respondent.

GIBSON, Chief Justice.

This is an action by plaintiff, the beneficiary under a policy of insurance on the life of her husband, to recover the amount of said policy from defendant insurance company. The company defends on the ground that prior to his death the insured surrendered the matured policy and received its cash surrender value.

Plaintiff Julia F. Morrison and the insured John W. Morrison were married in Leadville, Colorado, in 1893. The marriage continued until the death of John Morrison on May 20, 1932. However, the parties separated in 1918 and lived apart thereafter.

In June, 1904, John Morrison made a written application to defendant company for a policy of life insurance in the sum of $2,000, payable to his wife as beneficiary. The policy, known as a "Twenty Payment Life", was duly issued. It provides that after payment of twenty yearly premiums it would be fully paid up. It contains provisions for cash surrender value and a reservation by the insured of the power to change the beneficiary, as follows: "The insured may, from time to time during the continuance of this policy change the beneficiary or beneficiaries by written notice accompanied by this policy, to the Company at its Head Office in New York City. * * *"

The policy was formally executed in the New York office of defendant company, and delivered by the soliciting agent in Colorado to plaintiff, the beneficiary. She paid all of the premiums out of her own earnings and kept the policy until December 3, 1918. At this time her husband, apparently without her knowledge or consent, obtained possession of it and never returned it.

In June, 1924, the policy was fully paid up. Sometime in April, 1925, John Morrison, the insured, exercised the right of surrender to obtain its cash value from the company. A check in the sum of $1,372, representing payment in full of such cash surrender value, was issued to the joint order of the insured and the beneficiary. John Morrison forged his wife's name, indorsed his own and cashed the check, using the proceeds for his own purposes.

In March, 1933, some months after her husband's death, plaintiff made demand on the company for the proceeds of the policy. After some negotiations the company refused, relying on its prior payment to the insured of the full cash surrender value. The present action followed, in which the lower court made findings against plaintiff on all of the material issues, and gave judgment for defendant.

Plaintiff attacks the judgment on two theories: First, that the named beneficiary is under the law the owner of the policy; and second, that she became the owner by virtue of an agreement with her husband.

[1] The first theory is based upon the well-established rule that the naming of the beneficiary in a life insurance policy has the effect of giving that beneficiary a vested right in the policy, so that he becomes in fact the owner of the contract and is protected against any interference with his rights by later acts of the insured or the company. The insured may in such a case neither change the beneficiary nor assign the policy, and he cannot surrender or cancel it. See Vance on Insurance 2d Ed., pp. 542, 548, 551. The establishment of this rule made it clear that if the insured wished to retain control over the policy he would have to make special provision in the policy therefor. Accordingly it became customary in many policies to reserve to the insured the power to change the beneficiary, and also other powers, such as the power to pledge the policy to secure loans, to assign it, or to surrender it and obtain the cash surrender value. The most common and the most important reservation, however, is that dealing with change of beneficiary. Where this power is reserved, the question arises as to its effect upon the rights of the beneficiary as owner of the policy.

[2] It is perfectly clear that where the power is reserved, such change may be made, and the beneficiary's ownership is thereby wholly divested. If in the instant case the insured had exercised his power to change the beneficiary in accordance with the provisions of the policy, the beneficiary's rights would have been terminated. But the insured did not change the beneficiary, and the question is whether the reserved power to make such change has the effect of destroying what would otherwise be a vested right under the policy. On this point there is some conflict among the authorities. A few courts take the view that the beneficiary remains the owner of the policy with an interest which is vested and absolute until the power of change is exercised. Under this view the unexercised power has no effect upon the beneficiary's rights, and therefore until the change is made the insured may not assign or surrender the policy. See, e. g., Roberts v. Northwestern Nat. Life Ins. Co., 143 Ga. 780, 85 S.E. 1043; Hill v. Capitol Life Ins. Co., 91 Colo. 300, 14 P.2d 1006; Indiana Nat. Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N.E. 289, 45 L.R.A.,N.S., 192. This view has been strongly criticized on principle, and has been rejected by the great majority of the courts. The modern view is that the insured, by reserving power to change the beneficiary, has retained complete control over the policy, and in consequence the beneficiary has only an expectancy and not a vested right. The actual exercise of the power to change the beneficiary is not important, but is a mere formal requirement for the protection of

the company. The company may, as against the insured, insist that this procedural step be taken, but the beneficiary's right is subject to termination in other ways, whether the formal change is made or not. In short, where the power to change beneficiary is reserved, the beneficiary has an expectancy and will receive the proceeds of the policy if it is in force at the insured's death with the beneficiary unchanged; but in the meantime, the insured's control is absolute, and he may pledge, assign, or surrender the policy at will. See Antley v. New York Life Ins. Co., 139 S.C. 23, 137 S.E. 199, 60 A.L.R. 184; La Londe v. Roman Standard Life Ins. Co., 269 Mich. 330, 257 N.W. 834; Davis v. Modern Industrial Bank, 279 N.Y. 405, 18 N.E.2d 639; Vance on Insurance, 2d Ed., pp. 561, 562, 568; note, 24 Corn.L.Q. 607.

These conflicting views have been stated in order that the nature of the problem may be clearly understood. However, it is unnecessary for us to engage in any extended examination of the decisions throughout the country generally. The policy was executed in New York at the head office of the company, and by its terms it is provided that premiums are to be paid at such head office, and that proceeds are likewise to be paid there upon proof of death. The application, expressly made a part of the policy, provides that the proposed contract is subject to the laws of New York. And appellant herself insists that New York law governs. We therefore in accordance with this concession limit our inquiry to the right of the wife-beneficiary under the law of New York.

Plaintiff relies upon the New York Domestic Relations Law, Consol.Laws, c. 14, section 52, which provides: "A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property * * *." Plaintiff argues that the statute has the effect of establishing the wife's vested right in the policy as owner and deprives the husband of the power to surrender the policy without her consent. That this is the ordinary effect of the statute seems clear; the beneficiary's right as owner, particularly under such a statute, is unquestioned. But the beneficiary's right as owner has also been upheld in the absence of such a statute. And, as pointed out above, the majority view is that the beneficiary's ownership disappears when the power to change the beneficiary is reserved. In other words, it is not enough to say that the statute gives the beneficiary rights of ownership. The question is whether it gives such rights even where the power to change the beneficiary is reserved in the policy. The statute itself is silent on this point and there are cases holding that the benefits of such a statute do not apply where the policy contains the reserved power. See Vance on Insurance, 2d Ed. p. 561, note 90.

Both plaintiff and defendant have cited New York decisions in support of their respective positions, and considerable conflict appears in these decisions. This conflict was, however, recognized and resolved by the New York Court of Appeals in the recent case of Davis v. Modern Industrial Bank, supra. A straight life policy was procured by Clarence Davis, the husband, naming his wife, Eleanor Davis, as beneficiary. The policy contained clauses reserving the right to change beneficiary, and the right to assign. The husband assigned the policy to Griffiths as security, without knowledge of the beneficiary. After his death, in an interpleader suit, the insurance company paid the proceeds into court, and the assignee claimed them. It was held that he was entitled thereto. The court reviewed the important American decisions representing the majority and minority views, admitted that the New York cases contain conflicting expressions, and declared that there was no controlling decision on the question. The court then proceeded unequivocally to adopt the majority rule in the following language [279 N.Y. 405, 18 N.E. 2d 642]:

"It seems to us that upon principle as well as weight of authority * * * that the insured, having reserved the right to change the beneficiary and assign the policy, did all that the law required him to do to constitute a valid transfer of the proceeds of the policy to the assignee, to the extent of the indebtedness thereby secured, in the absence of objection on the part of the company. * * *

"From an every day, practical standpoint it is desirable to hold that an assignee of a policy containing a clause permitting a change of beneficiary and an assignment of the policy secures a right in the proceeds of the policy superior to the rights of the named beneficiary. If an assignee, in the absence of the consent of the beneficiary, does not obtain such right it will be practically impossible for an insured to borrow on a policy in time of need of financial aid in those cases where compliance with the form prescribed in the policy cannot be followed. No bank or individual would be likely to lend on the security of a policy where the right to enforce the reduction of the security to cash would only mature in case the insured outlived the beneficiary, and where the continued life of the policy depends upon the payment of the annual premium. * * *"

Plaintiff suggests that the Davis case is distinguishable on two grounds. The first is that it is not a "surrender" case, i. e., that the insured did not surrender the policy and take the cash value, but merely assigned it. It is said that assignment, changing the ownership but leaving the policy intact, is less drastic than surrender, or cancellation of the contract. This may be true as a description of the transaction, but the distinction has no relevancy here. The power of the insured to assign for value and to surrender are similar in one important respect: each represents a beneficial use of the value or proceeds of the policy by the insured, and each terminates the right of the beneficiary to such value or proceeds. It is immaterial, so far as the beneficiary is concerned, whether the policy remains in existence (assignment) or is cancelled (surrender). Since he receives nothing in either case, it makes no difference to him who does. In short, the basic question is whether the beneficiary has a vested right in the policy which cannot be defeated by act of the insured. If it cannot be defeated, neither assignment nor surrender is valid; if it can, both are valid. The Davis case, holding that the beneficiary under a policy reserving power to change has no vested right, is therefore in point on the issue of this case.

[3] The second asserted ground of distinction is that in the Davis case there was no claim that the beneficiary paid the premiums or was named as beneficiary pursuant to a contract. These are, of course, important factors, but they relate to the other issue of this case to be discussed hereinafter. On the first issue, whether the beneficiary has a vested right under New York law merely by reason of being named as such in the policy, the Davis case is conclusive.

[4] We now come to a consideration of the second main contention of plaintiff, that she became the owner of the policy by virtue of a contract with her husband. Her testimony was that she urged her husband to procure insurance; that he refused but declared that if she wished to pay the premiums he would make the application, and said "it is your insurance." Plaintiff then had Mr. Johnson, the soliciting agent, call at her home where she described the situation to him, and it was determined that insurance should be obtained. She paid the first premium out of her earnings from her rooming and boarding house. Some time later she received the policy from the soliciting agent and placed it in a locked drawer. She continued to pay premiums from personal funds and all receipts from the company were mailed to her personally. After 1918 when she had moved to San Francisco, she made payments at the local office personally, and the receipts were handed to her. This evidence was not disputed, and it shows that as between plaintiff and her husband, she was not simply the named beneficiary in the policy, but the actual owner thereof, despite the clause reserving power to change the beneficiary. If she had sued the insurance company before the proceeds had been paid, and plaintiff and the insured were contending between themselves for the proceeds of the policy, under the evidence just recited plaintiff would be entitled to those proceeds and could prevent the insured from surrendering the policy. In other words, once the true ownership of the policy is brought home to the insurance company, whether that ownership is established by taking out the policy in the name of the owner, or by assignment, or by contract or gift, the company is bound to recognize the rights of the lawful owner.

[5] But in the instant case the company has already paid out the money to the named insured. It is immune from liability on another claim by plaintiff if at the time it paid the money to the insured it was not already obligated to the plaintiff. The question is whether at the time the company paid the proceeds to the insured, it had such knowledge or notice of plaintiff's ownership of the policy as to require a recognition of plaintiff's rights. It is conceded by defendant company that if there was such a contract making plaintiff the owner of the policy, adequate and proper notice thereof would be binding upon it. On this question the findings of the court are against plaintiff, and plaintiff's contention

is that the evidence, including some excluded by the court, demonstrates the error of these findings.

[6-8] The testimony reviewed above is not, in our opinion, sufficient to establish knowledge on the part of the company. It is possible that plaintiff might have paid the premiums voluntarily without contract, or that she might have paid them out of funds of the husband. The mere fact of receipt of the premiums from her cannot establish knowledge on the part of the company that she was the owner of the policy. Nor can the company be charged with notice of ownership of the policy in conflict with its provisions merely by reason of the casual discussion with the original soliciting agent.

The remaining testimony is, however, much more significant. It consists of three conversations, in which plaintiff and agents of defendant company allegedly participated, which conversations were excluded by the trial court on two grounds hereinafter discussed. In June, 1924, just before the policy matured, John Morrison came to San Francisco and wanted to cash in the policy, but plaintiff refused. Upon its maturity they went to the San Francisco office of the company to inquire as to their options under the policy. There then followed the conversations which plaintiff offered to prove and which the trial court excluded. The formal offer of proof recited that she called at the office of the company with her husband, and they had a conversation with two men purporting to represent the company as agents in charge of its business in San Francisco. Mr. Morrison stated that he wanted the proceeds paid to him and the policy surrendered, but plaintiff stated that she would not permit this because the policy was hers; that she had paid the premiums and she wanted it to remain as paid-up insurance. One of the defendant's representatives then gave an explanation to plaintiff and her husband of the options in the policy and its value as paid-up insurance. Plaintiff notified them that this was the way she wanted the policy to remain. Plaintiff went back the next day and had a further conversation with the same man who assured her that her husband could not get the money without her signature. As to each conversation, plaintiff's testimony was that she asked for the "head man" and spoke with "two of the head men" from "one of the offices", in a private office behind the counter.

[9, 10] This was the offer of proof which the court rejected on three grounds. One ground was that the proffered evidence was inconsistent with the provisions of the policy, and an attempt to show rights in a manner not permitted by the provisions of the agreement. This objection is untenable. Despite the provisions of the policy specifying the manner in which ownership of the policy may be established, and the general provision that no agent has authority to make representations or waive any provisions of the policy, properly authorized agents of the company, or agents with apparent authority, may charge the company with notice. See generally, Vance on Insurance, 2d Ed., pp. 431, 445; 2 Couch, Cyclopedia of Insurance Law, p. 1648. And in the present case, if the responsible officers in charge of the company's San Francisco office, after being informed of the facts surrounding the issuance and maturity of this policy, and being requested to clarify the rights of the parties thereunder, stated on behalf of the company that the insured could not surrender the policy without the consent of plaintiff beneficiary, and plaintiff thereafter relied upon such statement, the company is certainly estopped to deny those representations as to plaintiff's rights under the policy. Had it not been for these assurances, plaintiff might at that time have taken the necessary steps to regain possession of the policy, or to establish her rights thereunder. In short, the matters set forth in the offer of proof, unless controverted, were sufficient to raise an estoppel. See Vance, supra, p. 534; 2 Couch, Cyclopedia of Insurance Law, p. 1508.

[11] But this assumes that the offer of proof did show representations by responsible agents of defendant, and that raises the second objection, relating to the identification of the parties concerned. Plaintiff did not name any specific person and the question is whether her description of her call at the office and her conversations in the inner office with the "head men" was a sufficient identification. In our opinion the offer was sufficient, prima facie, for the introduction of the testimony. There is no reason why plaintiff should be compelled to ascertain the names of those persons; that is but one method of identification. There is nothing fatally uncertain in the description of the individuals or of her conversations. If she could only say that she spoke to someone

in the office, that someone might be a stenographer or clerk, not competent to bind the company. But she pointed out that she asked for those in charge, and that she was conducted to an inner office where those purporting to have authority to speak for the company stated to her what her rights would be. In the absence of any contradiction by the defendant company, this identification should be sufficient.

[12] The remaining objection is the failure to prove that these individuals had authority to receive notice on behalf of the company which would lead to a waiver or modification of the terms of the policy. Plaintiff was not in a position to prove actual authority, but her testimony was, in our opinion, sufficient to make out a prima facie case of apparent authority. She asked for, and was directed to the "head men", that is, those in responsible charge of the San Francisco office of defendant company. This was the office at which she had paid her premiums and received receipts therefor for many years. This was where she obtained her dividends. This was, indeed, the office at which the insured filed his request for the surrender of the policy.

[13] It follows that the court erred in sustaining objections to this line of testimony, and since the testimony, if uncontradicted, would tend to establish plaintiff's right to recover, the sustaining of the objection was reversible error. The judgment should therefore be reversed in order that plaintiff may be permitted to give the rejected testimony on this issue of notice to the company of her rights. It will then be possible for defendant to impeach or contradict this evidence by any means available.

[14] Under the view we take of the case, the defenses of laches and estoppel set up by defendant are without substance. Defendant contends that plaintiff had knowledge of her husband's assertion of sole ownership of the policy many years before her suit, and failed to take any action to establish her interests. But if her testimony is believed, she did take affirmative action by presenting her case to the representatives of defendant company in San Francisco, and she relied upon their assurances that she was fully protected.

The judgment is reversed.

We concur: CURTIS, J; SHENK, J.; KNIGHT, J. pro tem.

I concur in the judgment: EDMONDS, J.

CARTER, J., deeming himself disqualified, did not participate in the consideration or decision of the foregoing opinion.

15 Cal.2d 590

PEOPLE v. LONG.

Cr. 4286.

Supreme Court of California.

June 27, 1940.

Rehearing Denied July 25, 1940.

1. Homicide 🔑**18(2), 74**

A fatal abortion, to constitute murder, must be one that is not necessary to preserve the life of the woman aborted, while to constitute manslaughter it must be a lawful abortion but one performed without due caution and circumspection. Pen.Code, §§ 192, 274.

2. Homicide 🔑**241, 254**

In murder prosecution, evidence was sufficient to have sustained finding that abortion was not rendered necessary to preserve life because of diseased heart condition of aborted woman, and that resulting death was murder in the second degree. Pen.Code, § 274.

3. Homicide 🔑**309(6)**

Where main theory of prosecution is that death resulted from an illegal abortion, but some substantial evidence of want of due caution and circumspection is offered and received, an instruction on manslaughter may properly be given. Pen.Code, §§ 192, 274.

4. Criminal law 🔑**1137(1)**

Where, after considerable argument, trial judge informed accused and counsel that both murder and manslaughter were involved in abortion charge, no claim of surprise or of being misled could be made on appeal. Pen.Code, §§ 192, 274.

5. Homicide 🔑**236(1)**

In murder prosecution, evidence showing lack of due caution and circumspection in producing abortion was sufficient to sustain conviction of manslaughter. Pen.Code, § 192.

6. Criminal law ⚷823(15), 1172(8)

In murder prosecution based on death occurring while defendant was performing an abortion on deceased, reasonable doubt instruction which in effect told jury that it would have to find that defendant had established his defense beyond a reasonable doubt was erroneous, but as the erroneous portion of instruction was requested by defendant and court made an addition containing a correct statement of the law, leaving, however, possible confusion of jury as to degree, defendant, who was convicted of manslaughter only was not prejudiced.

7. Criminal law ⚷834(5)

In murder prosecution, where first part of reasonable doubt instruction, as proffered by defendant, consisted of a purported statement of law complete in itself as did the latter part which was given by court of its own motion, by giving the latter part of the instruction which contained correct statement of law, the court did not modify the first part, which was erroneous, so as to compel the invocation of the rule that where a trial court modifies a proposed instruction, if erroneous, the error becomes that of the court.

8. Criminal law ⚷822(1)

An instruction must be considered in its entirety.

9. Criminal law ⚷822(14)

In murder prosecution based on death occurring while defendant was performing an abortion upon deceased, instruction, containing statement that jury "may regard the testimony of an expert as merely advisory" and disregard altogether the testimony of such expert, was not prejudicially erroneous when considered in its entirety. Pen.Code, § 1127b.

10. Criminal law ⚷942(1)

Newly discovered evidence which would tend merely to impeach a witness is not of itself sufficient ground for granting a new trial.

11. Criminal law ⚷945(1)

To warrant the granting of a new trial on ground of newly discovered evidence, it must be such as to render a different verdict reasonably probable on a new trial.

12. Criminal law ⚷942(1)

In murder prosecution based on death occurring while defendant was performing an abortion upon deceased, denial of new trial for newly discovered evidence was not an abuse of discretion where purpose of proposed newly discovered evidence was to impeach testimony of the husband of the deceased.

13. Criminal law ⚷957(3)

In prosecution for murder based on death occurring while defendant was performing an abortion upon deceased, on motion for new trial, on ground of misconduct of jury, trial court properly refused to consider affidavits of four of the jurors, asserting that during deliberation certain jurors had read a newspaper article pertaining to the "flaying of abortionists" by a witness called by the prosecution, on ground that jurors could not impeach their own verdict.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Claude C. Long was convicted of manslaughter, and he appeals.

Affirmed.

Rehearing denied; CARTER, J., dissenting.

For prior opinions of District Court of Appeal, see 96 P.2d 354, and 96 P.2d 1021.

Edward A. Cunha and John J. Taaffe, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., William F. Cleary and Seibert L. Sefton, Deputy Attys. Gen., and Matthew Brady, Dist. Atty., and John J. McMahon, Asst. Dist. Atty., both of San Francisco, for respondent.

PER CURIAM.

Appellant herein was charged with having committed the crime of murder. On the trial of the cause the jury found him guilty of the crime of manslaughter, and this appeal was taken from the judgment which thereafter was rendered, as well as from an order denying a motion for a new trial. Following a decision rendered by the District Court of Appeal, a hearing was granted by this court in order that further consideration might be given to the question of prejudice assertedly suffered by defendant as a result of the giving of certain instructions. After a careful review of the entire record, it is the conclusion of this court that with respect to certain of the questions presented by the appeal the decision of the District Court of Appeal, 96 P.2d 354, 355, rendered on November 29, 1939, is correct. Therefore, that portion of said decision with which this court is in agreement is adopted herein, as follows:

"Appellant Dr. Claude C. Long, his wife, and one Ann Fisher, were charged with the murder of Genevieve Arganbright. Admittedly the death occurred while Dr. Long was performing an abortion upon the deceased. The jury acquitted Mrs. Long and Ann Fisher, but found Dr. Long guilty of manslaughter. * * *

"Appellant urges three main contentions on this appeal:

"1. That the evidence is insufficient to show either murder or manslaughter; that the cause was tried solely on the theory that the death resulted from an illegal abortion; that there is no evidence to show that the operation was performed without due caution and circumspection; that under such circumstances it was error to instruct on manslaughter; that the conviction for manslaughter constituted an implied acquittal on the murder charge, and constituted a determination that the operation was lawful; that the manslaughter verdict, based on the theory of a lawful operation performed without due caution and circumspection, is totally unsupported by the evidence.

"2. That the trial court erred in the giving of several instructions. * * *

"The evidence shows that Dr. Long, a duly licensed physician, maintained two offices—one on Valencia street and one on Haight street, both in San Francisco. The Valencia street office was in the middle flat of the building, had the doctor's name on the window, and his telephone was listed in the directory. The defendant Fisher, who is related to the Longs, was in charge of this office. When visited by the police, after the homicide, no medical or surgical equipment of any kind was found in this flat. Dr. Long testified that he seldom saw any patients at this office; that patients called there, or telephoned, and that Mrs. Fisher made appointments for them. The evidence also shows that in the flat above the offices occupied by Long on Valencia street there lived a Mrs. Spence, who was married to Mrs. Long's brother. She testified that defendant Fisher resided at the rear of the offices, and that in the time that she had been living there she had never seen Dr. Long on the premises.

"Doctor Long admittedly used the Haight street premises for seeing and treating his patients. These premises had been rented by Mrs. Long under the name of Young. A telephone was located at these premises under the name of Young, but at the request of the Longs the number was not listed in the telephone directory. The appellant frequently parked his automobile in a garage about seven blocks from the Haight street flat. On occasion the garageman accompanied Long to within a half block of the flat, where Long would get out of the car and the garageman would return the automobile to the garage. When arrested Long had in his possession keys to the back doors of these premises, but none fitted the front door. When visited by the police, after the homicide, an operating table and accessories, and various medicines used in connection with operations on women were found in the flat. Some instruments used in performing abortions were found in a closet, but the actual instruments used by the appellant in performing the abortion on Mrs. Arganbright were admittedly removed by him the night she died and turned over to the police later at the time of his arrest.

"The husband of the deceased testified that his wife was two and one-half months pregnant, was apparently in good health, and that she possessed none of the visual symptoms of a bad heart. He further stated she was athletic and took long hikes, danced, liked to swim and play tennis, and, although she worked for the W. P. A. during the day, performed the usual household tasks. On May 19, 1937, the deceased, in the presence of her husband, telephoned to Dr. Long's Valencia street office and asked the woman who answered the phone for an appointment. She was told to call at that office between two and four o'clock. Mr. and Mrs. Arganbright called that afternoon at the Valencia street office, where they were admitted by defendant Fisher. In the presence of the husband, Fisher asked the deceased her name, and questioned her concerning the identity of her companion. The husband was placed in one room and the deceased and Fisher went into another. The husband overheard Fisher ask the deceased how long she had been pregnant, and also heard Fisher tell his wife not to bring her husband along when she returned the next night.

"The next day, May 20, 1937, Mrs. Arganbright went to work and returned home at the usual hour. She left home at about quarter to seven in the evening, telling her husband she was going to have an abortion performed by Dr. Long; that she was going by street car to the Valencia street office, where she was to be taken by a chauffeur to some place on Haight street. When she left her home she had with her $50 which she had borrowed, which sum Fisher had told her the day before was necessary for the operation.

"Late in the evening of May 20, 1937, Mrs. Arganbright died at the Haight street premises while the appellant was performing an abortion upon her.

"So far as the prosecution's case is concerned, chronologically, the next pertinent testimony was given by Dr. Goldsand. He testified that between 10:20 and 10:30 p. m. he received a telephone call from defendant Fisher; that she asked him to come immediately to the Haight street premises to see a very sick patient; that he arrived in eight or ten minutes; that Fisher admitted him and told him to hurry up the stairs; that he was ushered into a bedroom where he saw Dr. and Mrs. Long and the deceased, who was lying on a bed, attired in her street clothes, her lower extremities being covered with a blanket. The appellant asked Dr. Goldsand to examine the patient. Upon such examination Dr. Goldsand ascertained that Mrs. Arganbright was dead. He administered ephedrin sulphate, but it did not revive the patient. He then told Dr. Long the woman was dead. He testified that Long then asked him to sign the death certificate, but he refused, informing Long that because he was the physician who had attended the deceased during her lifetime, it was his, Long's, duty to sign the death certificate. Long, he stated, remained silent, whereupon he, Goldsand, left the premises. Dr. Long testified that he understood Dr. Goldsand to state he would sign the certificate. This conflict, in view of the conviction, must be resolved in favor of the prosecution.

"The next link in the prosecution's chain of evidence was furnished by an employee of an undertaking establishment in San Francisco. He testified that he and a fellow employee went to the Haight street flat to get a body in response to a telephone call; that he arrived at about 2:30 a. m. of the morning of May 21st; that he met Mrs. Long and Ann Fisher there; that Dr. Long was not there; that he was informed by the two women that they were not members of the deceased's family but were 'very dear friends'; that the relatives had left and would complete arrangements with the undertaking parlor in the morning; that Dr. Goldsand had been the attending physician and that he had been in attendance for at least half an hour before she passed away; that the deceased had died from a heart attack. In response to an inquiry as to whether there was a telephone in the flat from which he could phone Dr. Goldsand for verification he was told that there was no telephone; that Dr. Goldsand had stated everything was in order and that he would sign the death certificate in the morning. The next morning the body was embalmed, and in the afternoon, when no relatives had called or death certificate had been signed, the matter was referred to the coroner. Both Dr. Goldsand and the employees of the undertaking establishment testified as to the physical appearance of the body. The conditions testified to were consistent with the defense's theory that the deceased had died from heart failure.

"On the morning of May 21st the appellant and his wife registered at the Chancellor Hotel in San Francisco under the false and assumed names of Mr. and Mrs. C. Young of Sonora, California. At the time they registered they were informed that all rooms had been engaged for that night and that they must give up their room by 4 p. m. They left the Chancellor Hotel before 4 p. m. and went to the Cecil Hotel where they again registered under false and assumed names.

"Late in the afternoon of May 21st the husband of deceased telephoned the Valencia street office of appellant. Defendant Fisher answered the telephone, and told him that she knew nothing of his wife's whereabouts, and that Dr. Long was out of town. Later the police arrived, and he then discovered his wife was dead.

"Dr. and Mrs. Long were arrested at the Cecil Hotel on May 22d. At that time, after telephoning to their attorney, they had changed their registration and were registered under their proper names. Defendant Fisher left San Francisco and was located several weeks later in Nevada City.

"On the trial neither Mrs. Long nor Ann Fisher took the witness stand. Appellant Long did take the stand in his own behalf, and testified in detail concerning the facts and circumstances surrounding the death.

[1] "It was the main theory of the prosecution that Genevieve Arganbright had died as the result of an illegal abortion; that the abortion was not necessary to preserve her life; that she died as a result of surgical shock and from hemorrhage caused by the abortion; that she did not die as a result of a heart condition. However, although this was the main theory of the prosecution, it was not the only theory. As will later appear in detail, the prosecution from the very first of the trial refused to limit itself to this theory, and offered testimony that the death resulted from an abortion performed without due caution and circumspection. This distinction becomes important because, so far as this case is concerned to constitute murder, an abortion must be an illegal abortion—that is, one not necessary to preserve the life of the woman aborted (sec. 274, Pen.Code), while to constitute manslaughter, an abortion must be a lawful abortion, performed 'without due caution and circumspection'. Sec. 192, Pen.Code. The main theory of the defense was that the operation was necessary to preserve the life of the deceased; that the deceased had an ailing heart resulting from a mitral stenosis; that this heart might decompensate at any time; that this heart could not stand the burdens of full pregnancy and of childbirth; that the interruption of the pregnancy was necessary to preserve her life; that the operation was performed with due caution and circumspection; that Mrs. Arganbright died from the heart condition.

[2] "There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis—that is, the mitral valve of the heart had become infected and had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate.

"In support of his defense Dr. Long testified that the deceased first visited him in March of 1937; that he had then examined her and found she had a mitral stenosis; that her heart was a border-line heart; that the compensation was fairly good, but decompensation might occur at any time; that he was not sure at that time she was pregnant; that he formed the opinion at that time that if she were pregnant an abortion was necessary to preserve her life; that he told her to return in two weeks; that he did not see her again until the night of her death. The appellant produced no office record of this visit, but contended that such a record had been made, but that he had been unable to find any such record after the police had visited the premises. We are of the opinion that the jury might well have disbelieved all of this testimony concerning the March visit. The jury might well have believed from the testimony of the husband concerning the facts surrounding the telephone conversation and the visit to Dr. Long's office of May 19th, that this was the first visit of the wife to Dr. Long's office.

"The appellant further testified that on the evening of May 20th when decedent returned, she explained that she was definitely sure that she was pregnant; that she suffered from a constant tired feeling, from precordial pain and shortness of breath, and that she had a definite palpitation of the heart—all definite indications of a diseased heart. He also testified that he again examined the heart and found the murmurs and thrill which indicated a definite mitral stenosis; that he thereupon concluded that a therapeutic abortion was necessary to preserve her life; that he told the deceased of this conclusion; that she consented to the abortion. Again it is proper to stop and comment on this testimony. We think from all the surrounding circumstances that the jury might well have concluded that this testimony to the effect that he had examined the heart of the deceased and discovered the mitral stenosis was false. The method used by the defendant in his business; his actions in attempting to get Dr. Goldsand to sign the death certificate; his attempt at flight and concealment; his failure to notify the husband of the deceased; his failure to sign a death certificate—all lead to but one inference, and that is that appellant thought he had performed an illegal operation and that the deceased had died as a result thereof. His actions all demonstrate a consciousness of guilt. However, the mere fact that appellant may have believed or intended to commit an illegal abortion, if in fact it was a legal abortion to preserve life, probably would not make the resulting homicide murder. We may assume, for the purposes of this opinion, that, even though the jury could have found that appellant did not know of the existing heart condition, if in fact the heart condition was such that an abortion was necessary to attempt to preserve her life, this would be a complete defense to the murder charge.

"Dr. Long then testified as to the method used in performing the operation and as to what then happened. He testified that while performing the operation the patient's heart failed and that he was unable to revive her. The balance of his testimony in which he attempted to explain the reasons for his method of conducting his business; his assuming a false name; his failure to sign the death certificate; his attempt at concealment, etc., need not be here commented on. The jury might well have believed, and apparently did so believe, that such testimony was false.

"As already indicated, it is appellant's main contention that the evidence without conflict established that the heart condition was such that an operation was necessary to attempt to preserve the life of deceased; that she died from the heart condition; that there is no evidence to sustain either a murder or manslaughter verdict; that in any event he was acquitted of the murder charge and convicted only of manslaughter; that to sustain the manslaughter conviction there must be evidence of lack of due caution and circumspection in the performance of the operation; that there is no such evidence in the record.

"There is no need to review at length the evidence that demonstrates that, had the appellant been convicted of murder, the record would sustain such a conviction. All of the witnesses for both prosecution and defense agreed that the deceased had a mitral stenosis, but there was a sharp conflict as to whether the mitral stenosis had progressed to the point where an abortion would have been necessary, and there was a sharp conflict as to the cause of death. The autopsy surgeon and the pathologist in the coroner's office both testified that the condition of a heart during life could be ascertained from a gross or from a microscopic examination after death; that they had made such an examination; that this heart was not enlarged; that it was not decompensating prior to death but was functioning properly; that the heart condition was an old one and was not progressing; that the heart was in such a condition that the deceased could have gone through a normal labor. The pathologist, Dr. Carr, and several other doctors testified positively that the operation was not necessary to preserve the life of the deceased. Dr. Carr and Dr. Leland testified that deceased did not die from the heart disease but died from the abortion —from surgical shock and hemorrhage caused by the abortion. The husband of the deceased, members of her family and several of her coworkers testified that deceased possessed none of the visual symptoms that would tend to indicate a dangerous condition of the heart. There was a clear conflict in the evidence as to whether the deceased was in danger from the heart condition, and whether the heart condition caused death. The evidence also showed that in 1932 the deceased gave birth to a child at St. Mary's hospital. The records of that hospital, and the testimony of the doctors there in charge, showed that, although the deceased then had a mitral stenosis, she had a normal labor and delivery; that the heart doctor had then determined that the patient had a well compensated mitral stenosis, which means that the heart was then taking care of itself and there was no sign of decompensation. The doctors then in attendance testified that if her heart was the same in 1937 as in 1932 an abortion was not necessary; that most doctors require some evidence of decompensation before they will abort. They conceded, however, that some doctors advocate an abortion in all cases of mitral stenosis. This was denied by several prosecution witnesses. Several of the doctors testified that correct medical practice would require sending a patient suffering from mitral stenosis to a heart specialist for treatment.

"It is true that there was considerable expert testimony offered by appellant in addition to his own testimony to the effect that an abortion was reasonably required in the instant case. After laying the proper foundation, portions of various medical books were read into evidence, their general tenor being that some doctors recommend abortions in all cases of mitral stenosis. It also appeared that in November, 1933, deceased visited the Mt. Zion Hospital Clinic. At that time she apparently believed that she was pregnant. Her symptoms were then such that, coupled with the doctors' clinical examination then made of her heart, they testified that, had she been then pregnant, they would have recommended an abortion. It was later discovered she was not then pregnant, so that no abortion was required.

"This review of the record demonstrates that there was sufficient evidence upon which the jury could have found the abortion was not necessary to preserve life, and, therefore, illegal, and that the resulting death was murder in the second degree.

"Appellant contends that even if it be admitted that the evidence was conflicting on whether the abortion was necessary to preserve life, that by the conviction of manslaughter he was acquitted of murder, and therefore the jury determined this conflict in his favor—that is, determined that the abortion was necessary to preserve life. Based on this premise it is next urged that there is no evidence at all of lack of due caution and circumspection in the performance of the operation, and, therefore, there is no evidentiary support for the verdict of manslaughter. The same contention is also made in a slightly different form—that is, that it was error for the trial court to instruct on manslaughter for the reason that there was no evidence to support such a verdict. In support of these contentions, the appellant mainly relies on People v. Huntington, 138 Cal. 261, 70 P. 284. In that case, which was a prosecution for a homicide growing out of an abortion, the prosecution's only theory was that the abortion was illegal and that the offense, if any, was murder, and, apparently, offered evidence only on this issue. The trial court instructed on, and the defendant was convicted of, manslaughter. This conviction the Supreme Court reversed. The court emphasized that 'The statements of the district attorney, and the whole course of the trial, show that the case was tried upon the sole theory that appellant, who is a physician, caused the death of the deceased by attempting to commit a felony,—to wit, an abortion.' The court recognized that, generally speaking, under an indictment for murder the defendant may be convicted of manslaughter, but held that that rule does not apply when the theory and evidence does not justify a manslaughter verdict. The court held it error to have thus injected manslaughter into the case, and further held that it was error, in view of the record there presented, having instructed on manslaughter, not to have further instructed on the degree of care required to show lack of due caution and circumspection, and that this was not cured by lack of request by appellant for an instruction on that point. The cause was remanded for a new trial. The district attorney then attempted to retry the defendant for murder, apparently on the theory that on this trial he could prove murder, but could only secure a manslaughter conviction on the murder evidence. In Huntington v. Superior Court, 5 Cal.App. 288, 90 P. 141, it was held that the original conviction of manslaughter constituted an acquittal of murder, and that he could not again be tried for murder. The defendant was then tried for manslaughter and was convicted. In People v. Huntington, 8 Cal.App. 612, 97 P. 760, his conviction was affirmed. On this last trial, the court instructed the jury that if they believed that the evidence showed murder they could convict of manslaughter. There can be no doubt that there is language in each of these three cases inconsistent with language found in the other two. The courts, in more recent cases have attempted, rather unsuccessfully, to reconcile these conflicts. There have been several abortion cases holding that a manslaughter instruction is properly refused where there is no evidence of want of due care. People v. Balkwell, 143 Cal. 259, 76 P. 1017; People v. Northcott, 45 Cal.App. 706, 189 P. 704; People v. Hickok, 28 Cal.App.2d 574, 83 P.2d 39; see, also, People v. Wright, 167 Cal. 1, 138 P. 349. In People v. Kelley, 24 Cal.App. 54, 140 P. 302, the theory of the first Huntington case was reaffirmed, and a conviction of manslaughter, based on murder evidence in a non-abortion case, reversed.

[3] "The respondent, in support of the contention that it is not reversible error to instruct on manslaughter, even in the absence of evidence of lack of due caution and circumspection, mainly relies on several non-abortion cases where the Huntington cases have been somewhat critically discussed. People v. Wolcott, 137 Cal.App. 355, 30 P.2d 601; People v. Warr, 22 Cal. App. 663, 136 P. 304. He also relies on the general rule, frequently stated by the courts, that manslaughter is an offense in-

cluded within murder, and that a manslaughter verdict based on murder evidence will be upheld because the error in instructing on manslaughter, if any, is favorable to defendant and, therefore, he cannot complain. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Shimonaka, 16 Cal.App. 117, 116 P. 327; People v. Roselle, 20 Cal.App. 420, 129 P. 477; People v. Tugwell, 32 Cal.App. 520, 163 P. 508. We do not find it necessary to pass on this contention. Whatever may be the rule in cases where the defendant is tried solely on the theory that death resulted from an illegal abortion, and no evidence is offered of lack of due caution and circumspection, there can be no doubt that where the main theory of the prosecution is that death resulted from an illegal abortion, but some substantial evidence of want of due caution and circumspection is offered and received, an instruction on manslaughter may properly be given. This problem was involved and fully discussed in People v. Wright, 167 Cal. 1, 138 P. 349, and in People v. Mount, 93 Cal.App. 81, 269 P. 177. In the first case the trial judge instructed on both murder and manslaughter. The jury convicted of murder, and on appeal it was held not to have been error to instruct on manslaughter, there being some evidence of lack of due caution and circumspection. In the second case, on similar instructions, the jury convicted of manslaughter. This was affirmed on appeal, on the ground that there was evidence of negligent performance of the operation.

"In our opinion, the present case falls within the rule of these last two cited cases. For that reason we do not have to decide now whether in a case where no evidence of lack of due caution and circumspection is offered and received, a manslaughter verdict can be supported solely on murder evidence, or whether, in such a case, it is reversible error to instruct on manslaughter.

[4] "It is true that the respondent seeks to support the verdict solely on the theory above discussed that murder evidence may support a manslaughter verdict, and that no contention is made that there is any evidence that the appellant was guilty of lack of due caution and circumspection in the performance of the operation—in fact, in discussing another point, at page 48 of the brief of the attorney general it is stated: 'in this case the question of malpractice was not in issue; nor was there in this case any question presented during the trial concerning the performance of the operation without due caution and circumspection'. This concedes entirely too much. A reading of the record demonstrates two things —first, that from the very first of the trial the prosecuting attorney refused to limit himself to the theory of murder; and second, that there is substantial evidence from which the jury might well have inferred that appellant did not use due caution and circumspection in the performance of the operation, and that the death resulted therefrom. In his opening statement to the jury the prosecuting attorney referred to the fact that he would prove, among other things, that the cervix of deceased was 'torn, dilated and mutilated'. Before a witness was sworn, the attorney for defendant demanded to know whether one of the theories of the prosecution was to be lack of due care on the part of Dr. Long. The court refused to compel the prosecutor to definitely state, pointing out to counsel that they could not now complain of surprise because they were being warned in advance that they would be expected to defend against that theory. Finally, after considerable argument, the trial judge informed defendant and his counsel that both murder and manslaughter were involved in the charge. No claim of surprise or being misled can now be made.

[5] "Now as to the evidence. As already indicated, the main theory of the prosecution was that death resulted from an illegal abortion, and the major portion of the evidence introduced was introduced on this theory. However, all of the medical witnesses for the prosecution were asked questions and were cross-examined on points relating to the charge of lack of due caution and circumspection.

"Dr. Carr, pathologist to the coroner's office, testified that one of the causes of death was shock and hemorrhage following an interrupted pregnancy; that the mitral stenosis had existed since childhood and was not progressive; that the cervix shows a lateral laceration on either side, meaning 'that the cervix has been manually torn by an instrument'; that 'the cervix had been actually torn from the opening to the uterus and blood had run from these areas into the tissue adjacent to the tear'; that 'part of the placenta that was nourishing this baby had actually been pulled out through the cervix into the vagina'; that 'apparently an attempt had been made to enter her cervical canal, and by some false jabbing the upper vaginal reflection had actually been born'; that a proper therapeutic abortion is performed in a hospital; that in a proper operation the uterus is dilated slowly with progressive dilators; that progressive dilators will not tear the cervix; that the tears here present indicate progressive dilators were not used. Dr. Long admitted using a type of dilator which Dr. Carr testified was not the proper or approved type. Dr. Carr also testified that, according to approved practice, a therapeutic abortion is performed in a hospital because, among other things, an oxygen tank and carbon dioxide are available for emergencies. These emergency facilities were not present at the Haight street flat of appellant. Dr. Carr also testified that the tearing and mutilation and puncturing of the cervix, described by him, is a painful and shocking procedure, and would produce shock in the entire body, and that deceased died from shock; that it is the usual custom and practice of doctors to give a general anesthesia when performing an abortion, for the reason that this reduces shock; that with 'the mutilation and the perforation one sees here, a rather deep anesthesia would be required to reduce the pain'. Dr. Long testified he did not use a general anesthesia. There was other medical testimony that if a person possessed the symptoms of a decompensating heart testified to by Dr. Long, that approved practice, before performing the abortion, would be to send the patient to a heart specialist and to hospitalize her for some time to build up her heart so it could stand the abortion; that the type of local anesthetic used by appellant would not render the patient immune from pain.

"Other testimony could be referred to from which the jury could have inferred that appellant did not exercise that care and circumspection required in such cases. The testimony recited is sufficient to support the manslaughter verdict."

Appellant also contends that the trial court committed prejudicial error in the giving of certain instructions. With regard to the question of reasonable doubt the trial court instructed the jury as follows:

"If you find from the evidence beyond reasonable doubt that the defendant Claude C. Long performed or attempted to perform an operation upon the person of the deceased for the purpose of delivering an unborn child and that the operation or attempted operation was performed with due caution and circumspection, and if you believe from all of the evidence that the operation was necessary to preserve the life of the decedent and that death resulted from such operation, you shall nevertheless find the defendant not guilty; *but on the other hand,* if you believe beyond a reasonable doubt that due caution and circumspection were not exercised and if you believe that the operation was not necessary to preserve the life of Genevieve Arganbright and that death resulted from such operation, then it is your duty to bring in a verdict of guilty." (Emphasis added.)

[6, 7] The first portion of that instruction, which in effect told the jury that it would have to find that defendant had established his defense "beyond reasonable doubt" before he could be found not guilty, was clearly erroneous. However, that portion of the instruction was requested by defendant. Of its own motion the court added the latter portion which begins with the words in italics, and which constitutes a correct statement of the law, though not as clear as might be desired. In other words, by its addition to the instruction the court was thereby informing the jury that should it find beyond a reasonable doubt that the operation was not performed with due care and circumspection it should bring in a verdict of guilty of manslaughter,—whereas if it found beyond a reasonable doubt that the operation was not necessary to preserve life it should bring in a verdict of guilty of murder in the second degree. The joining of those two theories in one instruction, although perhaps confusing, could have caused no prejudice to defendant because, by reason of his acquittal on the second degree murder charge, it could not now be argued that the jury may have been misled into bringing in a verdict of guilty on said charge, though only a showing of lack of due care and circumspection may have been made and found by the jury. But with reference to the instruction considered as a whole, defendant seeks to invoke the rule that where the court modifies a proffered instruction, if erroneous, the error becomes that of the court. Although the rule is as stated, this is not a case where a change made by the trial judge has brought about the error complained of. Here the language added by the court was correct in itself, as hereinbefore explained. The substance of the erroneous instruction as requested by defendant was not altered in any respect. The only change made by the court was by way of addition to that which had been

proposed by defendant. Had the two portions of the instruction been separated by a period, it is improbable that a claim of modification would have been made. Also, the first part of the instruction, as proffered by defendant, consisted of a purported statement of the law complete in itself, as did also the latter part which was given by the trial court of its own motion. In those circumstances, therefore, it cannot successfully be argued that by the giving of the latter part of the instruction the trial court modified the first part, so as to compel invocation of the rule that where a trial court modifies a proposed instruction, if erroneous, the error becomes that of the court. Baker v. Borello, 131 Cal. 615, 63 P. 914; 2 Cal.Jur., pp. 848, 849.

Another instruction complained of by appellant related to the subject of expert testimony. It reads as follows:

(1) "Duly qualified experts may give their opinions on questions in controversy at a trial to assist the jury in deciding such questions. The jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

(2) "You are instructed that in considering the expert testimony which has been offered in this case, you should weigh it with all the other evidence in the case; you are not bound to determine any fact in accordance with the opinion of such expert, if not convincing to your mind.

(3) "You are instructed that you may regard the testimony of an expert as merely *advisory,* and you are instructed that *you may disregard altogether the testimony of such expert,* and you may form your own conclusions from all the evidence submitted to you.

(4) "After considering all these things, and any other circumstances in evidence, you are to give such testimony such weight as you, in your judgment, think it is entitled to, and if convincing and carrying with it a belief in its truth act upon it; if not, you may and you have a right to reject it." (Emphasis added.)

[8, 9] The first paragraph of that instruction is substantially identical with the provisions of section 1127b of the Penal Code. However, the language of that portion of the instruction to which appellant directs his criticism is that which appears in italics in paragraph three. Unquestionably this was an unfortunate choice of words resulting in possible ambiguity, but when considered in its entirety, as any instruction must be considered, it was not prejudicially erroneous. Certainly, "the jury may disregard altogether the testimony of such expert" if it is not based upon substantial reasons or there are circumstances justifying a determination that it has no probative value or it is unreasonable. We must assume that the jurors, as persons of ordinary intelligence, understood that the testimony of an expert was not to be disregarded capriciously but should be considered in accordance with the rules which had been stated to them. The cases of Pearson v. Crabtree, 70 Cal. App. 52, 58, 232 P. 715, and Hirshfeld v. Dana, 193 Cal. 142, 153, 223 P. 451, cited by appellant in support of his contention that the instruction was erroneous and prejudicial to his rights, were civil cases which had been decided prior to the enactment of section 1127b of the Penal Code.

[10-12] Appellant further contends that the trial court erred in refusing to grant defendant a new trial, the motion for which was made on the grounds of (1) newly-discovered evidence, and of (2) asserted misconduct of the jury. The purpose of the proposed newly-discovered evidence was to impeach the testimony of the husband of the deceased. It has been ruled that newly-discovered evidence which would tend merely to impeach a witness is not of itself sufficient ground for granting a new trial. People v. Granillo, 140 Cal.App. 707, 719, 36 P.2d 206; People v. Vejar, 93 Cal.App. 259, 269 P. 671. To warrant the granting of a new trial on the ground of newly-discovered evidence it must be such as to render a different verdict reasonably probable on a new trial. People v. Shaver, 7 Cal.2d 586, 593, 61 P.2d 1170; Brannock v. Bromley, 30 Cal.App.2d 516, 520, 86 P.2d 1062. In the opinion of this court such a result would not have been accomplished herein if a new trial had been granted. Under all the circumstances it cannot be said that the trial court abused its discretion in that respect.

[13] In support of his motion for a new trial on the ground of asserted misconduct of the jurors, defendant introduced the affidavits of four of the jurors in which each asserted that during the deliberations of the jury certain jurors had read a newspaper article pertaining to the "flaying of abortionists" by a witness called by the prosecution. The trial court refused to consider those affidavits on the ground that the jurors could not impeach their own verdict. There is no error in that ruling. People v. Wong Loung, 159 Cal. 520, 114 P. 829.

It is unnecessary to consider other points advanced by appellant in support of his contention that the judgment should be reversed. An examination of the entire record, including all of the evidence, reveals no prejudicial error.

The judgment and order are affirmed.

CARTER, Justice (dissenting).

I dissent.

In my opinion the giving of the instruction to the jury: "that you may regard the testimony of an expert as merely *advisory*, and you are insructed that *you may disregard altogether the testimony of such expert*, and you may form your own conclusions from all the evidence submitted to you", constituted prejudicial error and justifies a reversal of this case.

The majority opinion states: "There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis—that is, the mitral valve of the heart had become infected and had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate."

In other words, the principal issue in the trial of this case and the sole foundation stone upon which the defense was based, namely, that the performance of the abortion was necessary to preserve the life of the deceased, was of necessity, and in the very nature of things, predicated solely upon expert testimony. Common sense as well as legal reasoning dictates that no one without expert knowledge and skill in the subjects of anatomy and medical science would be qualified to testify on this subject, and it has been the settled law of this state for decades that when the sole issue in a case is the subject of expert knowledge of medical science, that such issue must be decided solely upon the testimony of those learned in the practice of medicine and surgery. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Arnold v. Hopkins, 203 Cal. 553, 265 P. 223; Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128; Dameron v. Ansbro, 39 Cal. App. 289, 178 P. 874; Pearson v. Crabtree, 70 Cal.App. 52, 232 P. 715; William Simpson Construction Company v. Industrial Accident Commission, 74 Cal.App. 239, 240 P. 58; Ingamells v. Goodfellow, 109 Cal.App. 62, 292 P. 162; Roberts v. Parker, 121 Cal.App. 264, 8 P.2d 908.

In a very able and exhaustive opinion written by my learned associate, Mr. Justice Curtis, in the case of Pearson v. Crabtree, supra, when he was a member of the District Court of Appeal of the Second Appellate District, this very sound proposition of law was enunciated, and its soundness or the justness of its application to cases of this character has never been questioned. In that case the plaintiff sued the defendant, a physician, for malpractice and recovered a verdict in the trial court. The court refused to give the following instruction requested by the defendant [70 Cal. App. 52, 232 P. 718]:

"The court instructs you that in considering whether the defendant in his examination, diagnosis, treatment, and care of plaintiff's injured limb exercised ordinary care and skill, you cannot set up a standard of your own, but must be guided in that regard solely by the testimony of physicians; and if you are unable to determine from the testimony of the physicians introduced as experts, what constitutes ordinary care and skill under the circumstances of this case, then there is a failure of proof upon the only standard for your guidance, and the evidence is therefore insufficient to warrant a verdict for the plaintiff." But on its own motion gave the following instruction:

"You are instructed that the opinions of the doctors who have testified in this case as experts are merely advisory, and you are not bound to accept such opinions as true. You should accord to such opinions such weight as from all the facts and circumstances in the case you may believe they are entitled to receive; or you may altogether disregard such opinions in so far as you may believe from all the facts and circumstances in the case that such opinions are unreasonable." In that case Mr. Justice Curtis stated:

"The authorities from other jurisdictions appear to be in accord upon this question with the rulings of the Supreme Court of the state of Colorado and that of our own state. It necessarily follows, therefore, if this instruction refused by the court correctly stated the law, then it was prejudicial error for the court to give the second instruction above set out, which it gave upon its own motion. For in this second instruction the court told the jury that they might disregard altogether the opinions of the experts testifying in the case, if, from all the facts and circumstances in the case, they believed that such opinions were unreasonable. In other words, the court in effect instructed the jury that if there were facts and circumstances in the case, testified to by lay witnesses, which the jury believed and which rendered the opinions given in the case by expert witnesses unreasonable, then the jury were at liberty to reject altogether the opinions of the experts. As we have already noted, such is not the accepted rule, and to so instruct the jury was highly prejudicial to the rights of the appellants. * * * We therefore are of the opinion that the rule of law set forth in the above instruction which the court refused to give was applicable to the issues in this case, and it was therefore error on the part of the court, prejudicial to the rights of the defendants, to give the instruction which it did and whereby it instructed the jury that the opinions of the doctors were merely advisory, and that the jury were not bound to accept them, but might disregard them altogether, if from all the facts and the circumstances in the case they believed them unreasonable.

"Judgment is reversed."

The case of Pearson v. Crabtree, supra, has been uniformly followed in this and other jurisdictions where the common law prevails and is recognized as the settled law of this state.

There is little doubt, in my opinion, that if the case at bar were a civil action in which a judgment had been recovered by a plaintiff upon the same factual situation as that disclosed by the record in this case, and such an instruction had been given as the one quoted in the majority opinion in this case, this court would have no hesitancy in reversing such a judgment upon the authority of the case of Pearson v. Crabtree, supra, and Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, upon the ground that such instruction was prejudicially erroneous and probably resulted in a miscarriage of justice.

To hold that the giving of such an instruction as the one given in the case at bar is prejudicial in a civil case and not in a criminal case, is to my mind a holding in effect that life and liberty are of less concern to human beings than property. I am opposed to any such concept and I firmly believe that the application of the law should be more rigid and more strictly construed in the protection of the lives and liberties of our people than in the protection of their property rights.

There can be no escape from the conclusion that the jury in the case at bar were plainly told by the trial judge not only that they could regard the testimony of an expert as merely *advisory*, but that they *may disregard altogether the testimony of such expert*, and form their own conclusions from all the evidence submitted to them. To say that such an instruction did not deprive the defendant of the benefit of the expert testimony submitted by both the prosecution and the defense is stating an obvious contradiction. If such an instruction can be cured by the application of section 4½ of article VI of the Constitution, then in my opinion it must necessarily follow that a defendant in a criminal case is not entitled as a matter of legal right to have the jury instructed on the law applicable to the facts of the case presented to the trial court during the trial of his case and that this section of the Constitution can be resorted to for the purpose of depriving a person of the equal protection of the law guaranteed by the 14th Amendment to the Constitution of the United States.

In my opinion, the effect of the giving of the above-mentioned instruction was to deprive the defendant of the fair and impartial trial guaranteed by the Constitution and laws of this state and that the judgment and order denying him a new trial should be reversed.

In re AMPHLETT'S ESTATE.

Civ. 11386.

District Court of Appeal, First District, Division 1, California.

June 19, 1940.

Hearing Denied Aug. 15, 1940.

1. Wills 🔑488

Trust provision in will providing for monthly payments to widow from trust income and for payments from remaining income to other beneficiaries was ambiguous as to whether widow's preference was cumulative in case income was insufficient to meet the monthly payments, and trial court therefore should have allowed admission of any relevant extrinsic evidence of surrounding circumstances to assist in construing the provision. Probate Code, § 1120 et seq.

2. Trusts 🔑274(1)

Where all beneficiaries of testamentary trust sought construction of trust provision and appealed from trial court's decree, District Court of Appeal could make the costs on appeal a charge on the income or corpus of the trust estate, but, in view of the conceded unequal interest of the beneficiaries in the trust income, court would not do so.

◆

Appeal from Superior Court, San Mateo County; James L. Atteridge, Judge.

Proceeding in the matter of the estate of Horace W. Amphlett, deceased, between Eleanor Amphlett, Janet E. Amphlett and others, and Alfred A. Johnson and others, trustees acting under and pursuant to the last will and testament of Horace W. Amphlett, deceased, for construction of a trust provision of a will. From portions of the decree, Eleanor Amphlett appeals, and from the entire decree, Janet E. Amphlett and others appeal.

Decree reversed.

Morrison, Hohfeld, Foerster, Shuman & Clark, J. Hart Clinton and Noel A. Troy, all of San Francisco, for appellants and respondents Janet E. Amphlett, Kathleen M. Amphlett, Helen Amphlett Clinton, and Richard M. Amphlett.

Joseph E. Derham and Andrew F. Burke, both of San Francisco, for appellant Eleanor Amphlett (widow of decedent).

Bradford M. Melvin and Faulkner & O'Connor, all of San Francisco, for respondents.

PETERS, Presiding Justice.

By his will Horace W. Amphlett created a trust for the benefit of his wife, his father and his three sisters. The decree of distribution distributed the trust property to the trustees named in the will to hold upon the trusts declared therein, without attempting to construe the provision of the trust now in controversy. The present proceeding was instituted by the widow to obtain a construction of the trust provision. Sec. 1120 et seq. of the Probate Code; Estate of Smith, 4 Cal.App.2d 548, 41 P.2d 565. The other beneficiaries also requested a construction of the provision in dispute. All parties, being dissatisfied with the construction given to the provision by the trial court, have appealed on a single bill of exceptions, the widow appealing from certain portions of the decree, and the other appellants from the entire decree. The widow contends that she has greater rights than the court's decree allows her, while the father and three sisters contend that she is entitled to less.

The trust provision which is the subject of dispute is as follows:

"My said trustees during the life of this trust shall pay the net income from this trust monthly, if practicable, but in any event at intervals of not to exceed three (3) months as follows:

"The first Three Hundred Fifty Dollars ($350.00) per month to my wife, Eleanor Amphlett. Then to my sisters, Janet E. Amphlett, Kathleen M. Amphlett and Helen Amphlett Clinton, and my father, Richard M. Amphlett, share and share alike, the amount then remaining until each of them shall have received Three Hundred Fifty Dollars ($350.00) per month, and the balance then remaining, share and share alike, to my wife, Eleanor Amphlett, my said sisters and my father, Richard M. Amphlett, or the survivors of them."

There is no dispute but that, under the trust provision, the widow receives a preferential right to $350 per month from the income of the trust, if the income is sufficient. It is conceded that deficiencies in income cannot be made up from the corpus. The question presented is as to the extent of the preference granted the widow. The basic problem presented is whether, if income from the trust is less than $350 in any one month, the deficiency must be paid to her from income exceeding that amount received by the trustees in later months.

The trust property consists of all of the issued and outstanding stock of the Amphlett Printing Company, appraised at $105,252, and the residue of the estate. Included within the residue, and distributed to the trustees as part of the trust, were five promissory notes of the printing company representing debts owed the estate, totaling $19,000. The balance of the estate was either specifically bequeathed, was consumed in paying the debts of the decedent, in paying the expenses of administration, in paying the widow a family allowance, or was set aside to the widow as exempt property. The will was executed about three months before the testator's death, which occurred on November 29, 1933, and, by its terms, the trust is to terminate ten years from the date of death. Upon termination of the trust the corpus is to be divided equally among the five beneficiaries.

The will declares "that substantially all the property now owned by me and standing in my name is my separate property". The stock of the printing company stood in the name of the testator. The provision in the will in favor of the wife was in lieu of community property rights, and the widow, in due course, filed her written election to take under the will. The will designated three trustees to manage the trust. These three trustees were also the three persons constituting the board of directors of the printing company. In April of 1936 the board of directors was increased to five, one of the new members being one of the attorneys for the widow, the other being one of the attorneys for the father and three sisters.

The sole income of the trust is derived from dividends declared by the printing company, the five notes of that company constituting the balance of the trust estate being interest free until November 29, 1943, the date of the termination of the trust.

The trust estate was distributed to the named trustees by a decree of partial distribution dated October 8, 1934. No dividends at all were declared by the board of directors of the printing company between the date of death, November 29, 1933, and October 8, 1934, and none were declared thereafter until July of 1936, when a dividend of $5,012 was declared. On December 29, 1936, another dividend of $5,012 was received by the trustees. The total net income since the decree of distribution has averaged less than $350 per month. None of the appellants attacks a finding that dividends were paid at the earliest dates at which they could reasonably be declared and paid in the normal operation of the business of the company. It is also conceded that income of the printing company is not income of the trust estate until dividends are declared by the board of directors and received by the trustees.

The appellant wife contends that under the above-quoted provision she is entitled to have deficiencies in income made up from surplus income, if any, in subsequent months. To apply her theory to the particular facts here involved, it is her contention that the dividends totaling $10,024 received by the trustees must be applied by them to pay her at the rate of $350 a month for each month since the date of distribution. It is the theory of this appellant that the preferential right granted her is a cumulative right, and that the extent of that right is that she is entitled to an average payment of $350 per month before the other appellants are entitled to anything. This appellant concedes that the provision in question does not create a technical bequest for maintenance, and that it does not create a strict annuity within the meaning of section 161, subdivision 3, of the Probate Code.

The sisters and father of the deceased, also appellants, contend that under the above-quoted clause, properly interpreted, each month's income as received by the trustees constitutes a separate and distinct fund; that from that fund the widow is to be paid the first $350; that her right to such preference vests upon the receipt of income each month by the trustees regardless of the time when payment thereof occurs; that if the trustees fail to receive $350 each and every month, no deficiency arises for those months in which nothing or in which less than $350 is received by the trustees; that no cumulative right is granted to the widow at all. Applying this construction to the facts involved herein, these appellants contend that the dividend of $5,012 received by the trustees in July of 1936, after deducting expenses, should be distributed as follows: The first $350 to Eleanor Amphlett; then $350 to the testator's father and to each of his three sisters, and the balance, share and share alike, to all five of the beneficiaries. The dividend received by the trustees in December, 1936, according to these appellants, should also be distributed in the same fashion.

The trial court, in construing the trust provision, adopted a middle course between the claims of the widow and the claims of the other beneficiaries. By its decree, from which the present appeals are taken, it first held that the widow has a preferential right to receive the first $350 distributed in any month by the trustees from the income of the trust estate. This interpretation is in accord with the contentions of all appellants. In the second place, the trial court held that the preferential right thus granted is also a limited cumulative right, that is, that when a dividend is received by the trustees the widow is entitled to the first $350 of said dividend for the month in which it is received, and if no dividend at all has been paid for the two preceding months she is entitled to $350 for each of the two preceding months before the father or sisters receive anything. In other words, the maximum cumulative right accorded the widow is for three months. The decree also provided, however, that if a distribution of any amount (less than $350) occurs in a given month, the widow's cumulative right ends with such distribution so far as that month is concerned. Thus if $100 was distributed in January to the widow, nothing was received in February, and the trustees received $2,100 in March, the widow would be entitled to $350 for March, $350 for February, and no further payment for January. The remaining $1,400 would be divided among the other four beneficiaries, each receiving $350.

At the trial the opposing counsel contended that the clause in question was free from all ambiguity and that therefore evidence of the circumstances surrounding the execution of the will was not admissible. This view was shared by the trial court. On this appeal counsel for the sisters and father of the deceased continue to contend that the clause is free from ambiguity, but counsel for the widow urges that error was committed in excluding certain proffered evidence concerning the surrounding circumstances. In spite of the view taken by the trial court that the clause was free from ambiguity and, therefore, evidence of the surrounding circumstances was not admissible, some, but not all, of the evidence offered by the parties on this point was admitted. Thus, the trial court permitted the father and sisters of the deceased to offer into evidence, over the widow's objection, a summary of certain documents. In their brief the father and sisters rely heavily on some of the facts there disclosed as demonstrating that their interpretation is correct. On the other hand, the widow was permitted to testify, over the father's and sisters' objections, that, although the deceased and the widow were separated for some years prior to the death of the testator, their relations were friendly, and that he had in fact been contributing to her support prior to his death. In fact in its decree the trial court finds that at the time of the testator's death, and for many years prior thereto, the wife was dependent upon the decedent for support, and that for several years prior to his death the decedent was contributing not less than $350 per month to her support. It is true that this evidence was offered and admitted on the issue of whether the trust was a trust for maintenance, and that the widow now concedes that the trust is not technically one for maintenance; but the important fact is that all of the appellants, as well as the trial court, rely on this evidence in support of their opposing constructions of the clause in question.

The position finally taken by the trial court is shown by the following: Counsel for the widow offered evidence that in fact the stock of the printing company was community property. This evidence was important because this appellant contends that any bequest to a widow made in lieu of her community property rights must be construed most favorably in her favor. The trial court excluded this testimony. The basis of the trial court's ruling was that until the court had determined that an ambiguity existed such evidence was inadmissible. After considerable argument between counsel, and between counsel and the court, the court stated: "I do not want you to anticipate that contingency, Mr. Burke, because in the event the court finds there is an ambiguity it will afford you the fullest opportunity to rebut these contentions and bring those matters in, and until that point is reached I do not think there is any necessity for it." Counsel for the widow then replied that such ruling was correct if it was understood that if the court should find there was an ambiguity they would be given the opportunity of offering extrinsic evidence. After some discussion Mr. Burke, counsel for appellant widow, stated that as he understood the court's position, either the court would rule the clause was unambiguous, in which event extrinsic evidence was not admissible, or the court would find the clause ambiguous, in which event "you will afford us an opportunity to make an offer of proof and then your Honor will rule upon the admissibility of the particular evidence we offer."

The trial court thereupon took the matter under submission, and apparently found the clause unambiguous and rendered its decree accordingly.

[1] A mere reading of the clause in question demonstrates that it is ambiguous. There are at least three possible constructions of the disputed provision. Counsel on each side have filed exhaustive briefs in which cogent arguments are advanced to support their particular construction of the trust. There are arguments not advanced by any of the appellants to sustain the construction adopted by the trial court. Under such circumstances it is clear that extrinsic evidence should have been admitted to assist the court in interpreting the clause. The trial court should have permitted counsel to introduce any relevant evidence of the surrounding circumstances. Evidence as to whether the stock was in fact community property; whether the testator and his wife had ever disputed this point; whether the father and sisters of the decedent were in fact dependent on him; whether the decedent had contributed to their support prior to his death; the past dividend policy of the printing company; the past earning capacity of that company—these and other matters obviously will shed some light on the proper interpretation of the clause in question, and will assist the trial court and the appellate court in properly interpreting the same.

It also should be stated that the father and sisters of decedent attack a finding contained in the decree that the decedent for several years prior to his death had contributed at least $350 per month to the support of the wife. It is at least doubtful if the evidence contained in the bill of exceptions supports that finding. Without now passing on the question as a matter of law, the attention of the parties should be directed to this point so that it may be clarified on the new trial.

[2] On behalf of the widow of the decedent it is contended that costs of all the parties on these appeals should be made a charge upon and paid out of the income of the trust estate. This is challenged by the other appellants on the ground that inasmuch as it is conceded by all that the widow has a preferential right to income, any such ruling would adversely affect the father and sisters who have secondary rights in the income. Conceding that the court in a proper case has the power to make the costs a charge on the income or corpus of the trust estate (Estate of Gartenlaub, 185 Cal. 648, 655, 198 P. 209, 16 A.L.R. 520; In re Gabler's Will, 235 App. Div. 807, 257 N.Y.S. 311), because of the unequal interests of the beneficiaries, and, in the exercise of our discretion, we do not think this is a proper case to exercise that power.

From what has been said, it is obvious that the appeals are meritorious and that the decree must be reversed.

The decree is reversed, each of the parties to bear his or her own costs on these appeals.

We concur: KNIGHT, J.; WARD, J.

WALLING et ux. v. KIMBALL et al.*

Civ. 2297.

District Court of Appeal, Fourth District, California.

June 25, 1940.

Hearing Granted Aug. 22, 1940.

1. Trial 🔑140(1)

The credibility of a witness is for the jury.

2. Trial 🔑121(1)

In action for injuries sustained in automobile accident, against driver and owners who allegedly consented to use of automobile by driver, statements by plaintiffs' attorney that owners were acting in collusion with driver, and that hence owners were not entitled to attack driver's testimony as to permissive use of automobile, which testimony was weak and unsatisfactory, were improper, where statements were made at time when cross-examination of driver was about to be read to jury.

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* Subsequent opinion 110 P.2d 58.

3. Automobiles ⟹249

An automobile owner's imputed liability for negligent operation of automobile driven with consent of owner, by one who was not owner's agent, cannot be increased beyond statutory limit of $5,000, with respect to the injury to one person in one accident, by increasing number of claimants even though one be the husband of the injured party who has furnished the care made necessary by such injury. Vehicle Code, § 402(a, b), St. 1935, p. 153.

4. Appeal and error ⟹1064(1)

In action by husband and wife to recover damages for personal injuries, and hospital and medical expenses, against automobile driver and owner charged with liability on ground of permissive use of automobile by one who was not owner's agent, an instruction that if jury found in favor of husband, it could allow as damages amount he had expended for treatment of his wife resulted in a "miscarriage of justice" as permitting jury to assess damages against owner in excess of statutory limit of $5,000 which can be awarded for injuries to one person in one accident where verdicts for $5,000 were awarded in favor of husband and wife and against owner. Vehicle Code, § 402(a, b), St.1935, p. 153.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

5. Appeal and error ⟹1178(6)

In action by husband and wife to recover damages sustained in automobile accident, against driver and owner charged with liability on ground of permissive use of automobile by driver who at time of accident was not owner's agent, on reversal of judgments for husband and wife because of an erroneous instruction as to measure of husband's damages, a retrial would be ordered on all issues where evidence of permissive use of automobile was unsatisfactory.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Jones D. Walling and Grace D. Walling, his wife, against David K. Kimball and the Kimball Motor Car Company and another to recover damages sustained in an automobile accident. From adverse judgments, named defendants appeal.

Reversed and remanded.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

Ira J. McDonald, of Los Angeles, and J. K. Lilly, of Bakersfield (Harvey D. Taylor, of Los Angeles, of counsel), for respondents.

BARNARD, Presiding Judge.

This is an action for damages sustained by the plaintiffs in a collision which occurred on November 24, 1935, between an automobile in which they were riding and a Cadillac car owned by the defendants Kimball and driven by the defendant Hastings. David K. Kimball is the sole owner of Kimball Motor Car Company and under that name operates an automobile business in Huntington Park. The plaintiff Jones D. Walling prayed for judgment for medical and hospital expenses, incurred for himself in the sum of $500.52; for damages to his automobile in the sum of $600.20; for medical and hospital expenses incurred in connection with his wife's injuries in the sum of $3,260.55; and for general damages in the sum of $10,000. The plaintiff Grace Walling prayed for judgment in the sum of $50,000.

On a first trial of the action the jury disagreed. On the second trial the jury returned verdicts in favor of Jones D. Walling for $5,000 as against all defendants, and in favor of Grace Walling for $20,000 as against defendant Hastings, and for $5,000 as against David K. Kimball and Kimball Motor Car Company. Judgments were entered accordingly and David K. Kimball and Kimball Motor Car Company have appealed.

Hastings was represented at both trials by his own counsel, a Mr. Bradley, although this counsel was paid by the appellants. While he was on the witness stand during the first trial Hastings promised to cooperate with his own counsel and also promised the court he would leave hotel rooms which were paid for and also occupied by an investigator for the respondents. During his cross-examination by the appellants an adjournment was taken, the court ordering him to appear on the next court day. During the adjournment Hastings disappeared and has not been seen since.

From the evidence it appears that Hastings went to work for the appellants on November 18, 1935, his principal duties being to wash cars, do janitor work and run errands. Since his duties required him to open the place in the morning, he was given a key to the garage. On Saturday, November 23, 1935, he was told to take a Dodge car and go to Long Beach on a specific errand. He had not returned when the garage was closed at 9 o'clock that night. He did return about 11 o'clock that night when no one was at the garage, and, leaving the Dodge, he took the Cadillac and started for Bakersfield to see his sister. The accident happened before he arrived there. The next morning the Cadillac was missed and the matter was reported to the police. That afternoon the appellants received a wire from Hastings advising them of the wreck. It was conceded by respondents that Hastings was not acting within the scope of his employment at the time of the accident, and liability is sought to be imposed upon the appellants under subdivisions (a) and (b) of section 402 of the Vehicle Code, St.1935, p. 153.

The evidence relied upon as showing that Hastings had permission to drive the Cadillac car consists of a portion of the deposition of Hastings, taken by the respondents under section 2055 of the Code of Civil Procedure, and the testimony of Jones D. Walling and his investigator to the effect that some months after the accident Hastings told them that he had had such permission. With reference to this matter Hastings' testimony was that he had worked for the appellants for seven or eight months before the accident happened; that during that time he had used appellants' cars for his personal purposes some forty or forty-five times; that David K. Kimball and his brother had told him about a week after he went to work there, to take a car whenever he needed it; and that the day he went to work there the brother told him he could take a car whenever he wanted it for his own personal use.

This evidence was contradicted by the testimony for the appellants, and by a part of the testimony of Hastings himself. It conclusively appears that the business operated by the appellants was not opened until September 10, 1935, a little more than two months before the accident; that Hastings did not go to work for them until November 18, 1935; that he worked for and was paid by a firm in Long Beach up to November 15, 1935; and that he later paid the appellant for the damage to the Cadillac. There was testimony on behalf of the appellants that no general permission to take cars was given, and that Hastings had been allowed to use a car for his own use only once, which was on November 16, 1935, when he was allowed to take a car to go to Long Beach to get some of his belongings before going to work for them. When his deposition was taken Hastings was shown a statement which he had signed on November 26, 1935, two days after the accident. In this he said: "I had no permission to use the Cadillac and no one at the Kimball Motor Company knew I had the Cadillac until I reported the accident Sunday afternoon," and also: "I was acquainted previously with Mr. Vaus, and I presumed that I could use a car without asking for permission." In his deposition Hastings testified that these statements were true.

The appellants' first contention is that, in view of the unsatisfactory nature of this evidence as to permission, certain statements made by the respondents' counsel during the reading of Hastings' deposition constituted prejudicial misconduct which prevented them from having a fair trial. In the incident thus referred to, after he had finished reading the direct examination of Hastings, counsel for the respondents objected to the reading of his cross-examination on the ground "that Mr. Dana in this case as a matter of fact is the representative of Mr. Hastings, and that he is attempting to indulge in this cross-examination to confuse the issues, and that he and Mr. Bradley are representing these parties jointly, and that Mr. Dana, * * * employed Mr. Bradley in this case, and that due to that relationship they are certainly not entitled to put Mr. Hastings on the 'pan' and have their cake and eat it." When this objection was overruled, counsel said: "I will later then have to call both Mr. Bradley and Mr. Dana to the stand and find out the true facts of this matter." Counsel for the appellants assigned these remarks as misconduct and asked the court to strike them from the record, which was not done. In connection with a motion for a mistrial, which was denied, counsel for respondents withdrew the charges thus made, but this was not communicated to the jury. Three days later, in its general instructions, the court told the jury not to consider as evidence any statement made by counsel.

The appellants contend that the statements so made injected a false quantity into the case; that in effect they accused the attorney for the appellants of conniving with the attorney for Hastings for the purpose of misleading the jury; and that, coming as they did, during the most important part of the evidence relating to whether or not Hastings had permission to use the automobile in question, they constituted misconduct which was sufficiently prejudicial to justify a reversal under the rules laid down in Merralls v. Southern Pacific Co. 182 Cal. 19, 186 P. 778; Keena v. United Railroads, 197 Cal. 148, 239 P. 1061; Gackstetter v. Market Street R. Co., 130 Cal.App. 316, 20 P.2d 93; Gee v. Fong Poy, 88 Cal.App. 627, 264 P. 564.

The question as to whether Hastings had been given permission to drive the Cadillac was the most important issue in the trial of this case. There is no evidence that Hastings had or ever claimed to have had specific permission. At all times he said that no one was there when he took the car. The entire case, with respect to permission, rests upon his claim that he had been given permission to take a car at any time. While he said he had been given such general permission, he also stated that he had had "no permission to use the Cadillac" and that he "presumed" he could use a car, and there is no evidence of his personal use of a car during the six days he worked for the appellants. Moreover, Jones D. Walling testified that when he and his investigattor asked Hastings whether or not he had had permission to use the car, Hastings "stated that he didn't have particular permission to use that car, but he had been given permission that same afternoon to use a Dodge car, and the only reason he wasn't using the Dodge car on this trip was because there was no one there to ask at the time".

In view of Hastings' claim that he had been given permission to take a car any time he desired, his statement that "there was no one there to ask at the time" is most significant. His claim of general permission should also be considered with his further statements in connection therewith, that he had worked for the appellants for seven or eight months during which time he had used their cars on forty or forty-five occasions. These statements were obviously untrue, and clearly impossible. It should also be remembered that on the first trial, when he was about to be cross-examined on the unusual and conflicting statements made by him, Hastings disappeared.

[1,2] While the matter of his credibility was for the jury, and a part of his statements would support a finding that his use of this car was with the permission of the appellants, any such evidence was "manifestly very weak and unsatisfactory". It was under such circumstances, and at the very moment when the cross-examination of Hastings was about to be read to the jury, that the statements here complained of were injected into the case by counsel for respondents. Not only were these statements unjustified and improper, but coming at the time they did, just as the falseness of a large part of Hastings' testimony was being brought out, the charge that the appellants were acting in collusion with Hastings, with the claim that for this reason they were not entitled to attack Hastings' very questionable testimony, may well have had a very considerable, if not a controlling, effect upon the jury in weighing appellants' evidence on the question as to whether permission to drive the car had been granted.

Under a somewhat similar situation, with the exception that the misconduct was there oftener repeated, the court in Keena v. United Railroads [197 Cal. 148, 239 P. 1064], supra, said: "The evidence bearing upon the question of the legal responsibility of the defendant for the death of the infant son of the plaintiff was manifestly very weak and unsatisfactory. The verdict of the jury might well have been in favor of the defendant. Nevertheless, in itself and in the absence of prejudicial error 'the record reveals evidence sufficiently substantial to support the verdict.' What the verdict would have been without the suggestions of counsel for plaintiff is, of course, impossible of infallible ascertainment, but in view of the fact that the decision by the jury, resting, as it did, primarily upon indifferent evidence, may have been and in all probability was largely influenced and possibly absolutely controlled by the innuendoes speaking to the wrongdoing of the defendant in concealing facts which should have been placed by it within the knowledge of the jury, it is clearly unfair and unjust to the defendant that it be mulcted in damages where the misconduct by counsel for the plaintiff was presumably so large a factor in the verdict."

Whether or not the misconduct here in question was, in itself, sufficiently prejudicial to justify a reversal, it constitutes an additional reason, along with the unsatisfactory nature of the evidence, why, if a retrial of the action is to be ordered, it should be upon all issues.

The appellants further contend that the court erroneously instructed the jury that damages in excess of $5,000 could be imposed on the appellants, as arising from the injuries to one person.

The court read to the jury subdivisions (a) and (b) of section 402 of the Vehicle Code. Subdivision (b) limits the liability of the owner in such a case as this to $5,000 "for the death of or injury to one person in any one accident", and subject to this limit, to $10,000 "with respect to the death of or injury to more than one person in any one accident". The court then instructed the jurors that they must respect these limits, as against these appellants, even though they should award a greater sum as against Hastings. This was followed by eight instructions of a general nature after which the court, at the request of respondents, gave a long instruction, taking up three pages in the reporter's transcript, most of which relates to the elements of general damage which might be considered in connection with each of the respondents. The last paragraph of this instruction reads as follows: "It has been stipulated that plaintiff, Jones D. Walling, incurred as special damages, for hospital, medical, X-rays and incidental expense for treatment of his own injuries, to-wit, the sum of $500.52, and expense of treatment of the injuries of his wife, Grace Walling, to-wit, the sum of $3,260.55, and as damage to his Chevrolet automobile, to-wit, the sum of $600.20, and that said items of expense were reasonable. If you find the plaintiff, Jones D. Walling, is entitled to recover you may assess said items as his special damage."

While the appellants denied liability therefor, it was stipulated that Jones D. Walling had expended $3,260.55 for medical treatment, hospitalization and other care required by his wife as a result of her injuries in the accident in question. While that amount was paid by the husband, it arose out of the injuries to the wife. While the jury was told in the earlier instructions to which we have referred, that the liability of such an owner was limited to $5,000 on account of an injury to one person in an accident, the last-mentioned instruction told the jury that it could allow for certain elements of general damage, as to each respondent, and further, that if it found in favor of Jones D. Walling it could allow certain items, including the amount he had expended for the treatment and care of his wife, as his special damage. The effect of all these instructions is that the jury could consider this $3,260.55 as a part of the husband's damage, provided the entire amount awarded to him should not exceed $5,000. The inevitable result was to permit the jury, as against the appellants, to award the wife $5,000 on account of the injuries sustained by her in this accident, and also to award to the husband the further sum of $3,260.55 for damage which also resulted from the same injuries.

If the damage caused by the injuries to the wife in this case exceeded $5,000, the respondents should not be allowed, in face of the plain provision of the statute, to collect that amount through a judgment in favor of the wife and then collect a further sum of $3,260.55, for the injuries, merely because the husband happened also to have a cause of action arising from the same accident. Bradford v. Brock, 140 Cal.App. 47, 34 P.2d 1048. If this action had been by the husband and wife to recover solely for the injuries suffered by the wife in this accident, it would clearly appear that the instructions given permitted a recovery as against the appellants of an amount not permitted by the statutes. The result here is the same, and the error in thus instructing the jury is just as apparent. The jury should have been plainly told that if it allowed the wife the full amount of $5,000 it could make no further allowance to the husband for damages resulting from the injuries received by the wife.

While the pertinent part of subdivision (b) of section 402 of the Vehicle Code has not been considered, in respect to the situation here in question, in any case in this state to which our attention has been called, the language used is clear and seems to compel the interpretation we have placed upon it. In Ravenswood Hospital v. Maryland Cas. Co., 1917, 280 Ill. 103, 117 N.E. 485, 487, the court had under consideration an insurance policy containing language quite similar to that used in our statute, to-wit: "The company's liability for such damages on account of injuries to or the death of one person is limited to $5,000, and, subject to the same limits for each person, the company's total liability for such damages on account of injuries to or the death of any number of persons is limited to $10,000."

In commenting upon this provision the court said: "This language is too plain and clear to leave any doubt as to its meaning. It specifically limits appellant's liability to $5,000 for injury or death to one person, irrespective of the number of persons who may make claim to damages on account of the injury to such person. In this case but one person was injured—Mrs. Appel—and under the conditions of the policy the appellant's liability was limited to $5,000 on account of such injury."

In Chattanooga Dayton Bus Line et al. v. Burney, 1929, 160 Tenn. 294, 23 S.W. 2d 669, 672, in speaking of a similar situation, the court said: "The limitation of liability to a fixed amount 'for one injury' in an insurance contract of this kind imposes the limitation upon all claims for damage, by whomsoever made, arising out of personal injuries to a single person."

[3] The reasoning and holdings in those cases is applicable here. An owner's imputed liability in such a case as this cannot be increased beyond the statutory limit of $5,000, with respect to the injury to one person in one accident, by increasing the number of claimants even though one be the husband of the injured party who has furnished the care made necessary by such injury.

[4] The respondents contend that this error in the instructions was not prejudicial. It is argued that the portion of the instruction complained of was proper as to the defendant Hastings; that the evidence of other damage would sustain a verdict of $5,000 in favor of the husband, if the $3,260.55 be eliminated; and that it must be assumed that the jury did not disregard the court's instruction that the liability of the appellants was limited to $5,000. If this be assumed, it should also be assumed that the jury did not disregard the other instruction, to assess the $3,260.55 as a part of his damages in the event of a verdict in the husband's favor. If we assume that neither part of the instructions was disregarded, the result is that the $5,000 allowed the husband was within the limit of appellants' liability, and that it included the $3,260.55 which the court also told the jury it might allow the husband. That this is what occurred is strongly indicated by the fact that the jury's verdict as against Hastings was for the same amount, $5,000, although the jury had been repeatedly told that a larger verdict might be returned as against that defendant. If we assume that the jury followed these instructions it follows that it found that $5,000 covered all of the damage suffered by Jones D. Walling, including the amount he expended in the care of his wife. Under any other assumption we are left entirely to speculation as to what the jury intended.

The instructions were confusing, at best. That the jury was confused appears from the fact that it returned into court and the foreman asked the court whether the amount that Mr. Walling "had to pay the doctor bills, so forth" was "assessable in addition to the $5,000.00". The court replied in the negative. The court had told the jury this amount was assessable in favor of the husband, who had paid it. The foreman's inquiry seems to have related to the contemplated verdict in favor of Mr. Walling. Neither then nor when the original instruction concerning that item was given, did the court advise the jury that such an item could be allowed the husband only in the event it, taken with the amount allowed the wife, did not exceed $5,000, as against these appellants. The inquiry thus made by the jury shows it had in mind this item which the court had specifically told it to allow the husband, and indicates that this amount was considered and included in the amount finally awarded the husband. Clearly the jury wanted to follow the court's instruction and allow the husband for those expenses. If they had not found that $5,000 covered all of the husband's damage, including the item of his expenditures for his wife, they would have followed the court's other instructions and have added the latter amount to the husband's verdict against Hastings.

[5] Under these circumstances it can neither be held that the error and confusion in the instructions were not prejudicial, nor that a miscarriage of justice has not occurred. Apparently, the jury has awarded more than $5,000 on account of the wife's injury. While the verdict in favor of the respondent wife is not directly affected by the instruction com-

plained of, that part of the judgment is directly affected by the misconduct in question and by the unsatisfactory nature of the evidence relating to permissive use. The appellants were entitled to a fair trial upon all issues, and under correct and complete instructions. The matters in issue were not segregated at the trial, and the familiar rule permitting, upon a reversal, the ordering of a retrial on a part of the issues only, when the interests of justice will be thereby served, should not be here applied. Any retrial should be upon all issues and as to both respondents.

The judgments are reversed and the action is remanded for a new trial.

I concur: MARKS, J.

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39 Cal.App.2d 574

JACKSON v. DE BENEDETTI et al.

Civ. 11354.

District Court of Appeal, First District, Division 2, California.

June 20, 1940.

Hearing Denied Aug. 19, 1940.

1. Appeal and error 🔑948
Dismissal and nonsuit 🔑60(1)

Defendants' motion to dismiss action for want of diligence in prosecution rested in sound discretion of trial court, and plaintiff, on appeal from order granting the motion, was required to show manifest abuse of that discretion. Code Civ.Proc. § 583.

2. Appeal and error 🔑948
Dismissal and nonsuit 🔑81(6)

Plaintiff's motion for relief under statute from order granting motion to dismiss for want of diligence in prosecution, on ground that delay in prosecution was caused by plaintiff's physical condition, rested in trial court's discretion and, on appeal from order denying relief, plaintiff was required to show manifest abuse of that discretion. Code Civ.Proc. §§ 473, 583.

3. Dismissal and nonsuit 🔑50, 60(1)

Statutory authority to dismiss action for want of prosecution where for two years after action is filed plaintiff has failed to bring the action to trial is not limited, and defendant's right to a dismissal is not "waived", by the filing of a demurrer or answer. Code Civ.Proc. §§ 581a, 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

4. Dismissal and nonsuit 🔑60(1)

The only limitation upon court's exercise of discretionary power to dismiss action for want of prosecution is that the power must not be abused. Code Civ.Proc. §§ 581a, 583.

5. Dismissal and nonsuit 🔑60(2)

Where summons was not served until nearly two years after action was filed and plaintiff did not file counter affidavits or appear at hearing in opposition to defendants' motion for dismissal for want of prosecution and offered no excuse for the unreasonable delay in service of summons, granting of motion to dismiss was not an abuse of trial court's discretion. Code Civ.Proc. §§ 581a, 583.

6. Dismissal and nonsuit 🔑81(6)

Where plaintiff did not file counter affidavit or appear at hearing in opposition to defendants' motion to dismiss action for want of prosecution and offered no excuse for delay in service of summons nearly two years after complaint was filed, except that he was ill for short periods during that time, denial of motion for relief under statute from order granting motion to dismiss was not an abuse of discretion. Code Civ.Proc. §§ 473, 581a, 583.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Donald B. Jackson against Frank De Benedetti and others, and Frank De Benedetti, as copartners doing business under the firm name and style of Donovan Buffet, and others, for injuries arising out of an alleged assault. From an order granting defendants' motion to dismiss the action for want of diligence in prosecution and from an order denying plaintiff relief under Code Civ.Proc. § 473, plaintiff appeals.

Orders affirmed.

Edward E. Craig, of Berkeley, for appellant.

Brown & Rosson and Joseph A. Murphy, all of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff appeals from an order granting defendants' motion to dismiss his action for want of diligence in prosecution and from another order denying him relief under section 473 of the Code of Civil Procedure from the order first appealed from.

The action is one seeking damages for personal injuries arising out of an alleged assault on May 19, 1936. The complaint was filed on May 19, 1937, and summons was served on May 12, 1939. On June 29, 1939, defendants' motion to dismiss for want of diligence in prosecution was heard upon affidavits filed by them, no counter affidavits having been filed by the plaintiff. Following the argument upon that motion the trial court granted plaintiff until August 1, 1939, to file affidavits in opposition to the motion. The order then entered read in part: "Should counsel fail to file and serve his affidavits before said August 1, 1939, then said counsel is forbidden to file any affidavits in opposition to the motion to dismiss, and said matter is continued to August 1, 1939, at 10:30 A. M. Upon failure of filing affidavit, then said matters are ordered continued to August 15, 1939, at 10:30 A. M. for decision before Honorable T. W. Harris." On August 1, 1939, the date to which said matter was continued for hearing, counsel for plaintiff failed to appear and the cause was regularly continued to August 14, 1939. On the latter date counsel for plaintiff again failing to appear the motion to dismiss was granted without further hearing or argument. On August 5, 1939, plaintiff filed his own affidavit alleging that the delay in the prosecution of the case was caused by his physical condition, and stating specifically that from May, 1936 to June, 1936, he required hospitalization, and again from April 15, 1937, to April 28, 1937, and from July, 1938, until September, 1938.

On September 14, 1939, plaintiff filed his motion for relief under section 473 of the Code of Civil Procedure. This was accompanied by the affidavits of two physicians, one stating that he had given the plaintiff professional treatment on July 26, 1938. The other that he had treated him for eight days in May, 1936, twelve days in April, 1937, and four days in May, 1938. Aside from the first treatment which was for a condition probably acquired from the injuries received in the alleged assault, the other treatments were for peptic or gastric ulcers.

[1, 2] Plaintiff's difficulties are these: On the motion to dismiss, having failed to appear when the matter was set for hearing, having failed to make any showing whatever in excuse for his unreasonable delay in service of summons and in bringing the cause to issue, he is in no position now to claim error in the order appealed from. As to the motion for relief under section 473, the extent of his showing is that he was ill for short periods of time in the years 1936, 1937 and 1938. There was no attempt to make any excuse whatever for the delay in the service of the summons of approximately two years from the date when the complaint was filed. Both of these motions rest in the sound discretion of the trial court, and when the losing party attacks either it is incumbent upon him to show manifest abuse of that discretion. It is not sufficient to say to us that the excuse is good or that we should in our discretion weigh the evidence and extend leniency to the losing party.

The principles of law involved in both appeals are not complicated. Section 583 of the Code of Civil Procedure reads in part: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial." In 9 Cal. Jur., page 526, it is said: "It is the duty of a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination. And it is clearly settled by numerous decisions that if he fails in the performance of that duty, the superior court may, in the exercise of its inherent discretionary powers, dismiss the action." In Gray v. Times-Mirror Co., 11 Cal.App. 155, 164, 104 P. 481, 484, the court said: "The law will presume injury from unreasonable delay. It is the policy of the law to favor and encourage a prompt disposition of litigation, and this policy is the outgrowth of sound and substantial reasons. The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rest upon the same reasons or principle. A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights of the plaintiff; and, if he who starts the law in motion does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default. It is no answer to say that the respondent did not, during the period of the delay, utter a word of protest against such delay. As we have said, it was the duty of the plaintiff to act and to act with reasonable promptness and diligence. It was not the duty of the respondent to make any move except such as the law requires it to make in response to the movements of plaintiff at the various stages of the litigation." A clear and succinct statement of the principles controlling in a case of this character is found in Lieb v. Lager, 9 Cal.App.2d 324, 326, 49 P.2d 886, 887, where the court said: "As has frequently been said, the duty rests upon a plaintiff at every stage of the proceedings to use diligence to expedite his case to a final determination that there may be an end to litigation. The question of diligent prosecution is one largely committed to the discretion of the lower court. Ferris v. Wood, 144 Cal. 426, 77 P. 1037. The only limitation upon the exercise of the discretionary power of the court to dismiss a cause for delay in the service of summons is that it must not be abused. Kreiss v. Hotaling, 99 Cal. 383, 33 P. 1125. Here the motion was heard upon conflicting affidavits and it must be assumed that the court below found the facts to be as asserted by the moving and prevailing party. Witter v. Phelps, 163 Cal. 655, 126 P. 593. * * * Even if it be assumed that the delay here involved did not injure the defendants, it is no excuse in itself for the tardy service, and this fact in no manner controlled the action of the court in the exercise of its discretion. Anderson v. Nawa, 25 Cal.App. 151, 143 P. 555. To say that the court is so limited is to deny its exercise of discretionary power in all cases. As we have seen, the only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. Clavey v. Lord, 87 Cal. 413, 419, 25 P. 493."

[3, 4] In his closing brief the appellant for the first time suggests the point that respondents' demurrer was a waiver of their right to a dismissal and stopped the running of the statute. He cites section 581a of the Code of Civil Procedure and Johnston v. Baker, 167 Cal. 260, 139 P. 86. Neither the code section nor the case cited is helpful. The case was decided in 1914 when section 583 contained the expression "two years after answer filed", but in the later amendment to this section this expression was changed to read "two years after action is filed". There is no inconsistency between section 581a and section 583. The latter starts the time running from the filing of the action and is not limited by the filing of a demurrer or answer. The first clause of section 583 stands by itself as conferring discretionary power to dismiss under the circumstances therein stated. This power is not controlled by the succeeding mandatory provisions of that section, nor by the provisions of 581a which would permit the court to retain jurisdiction after defendant's appearance, if no objection were made. It is limited only by the rule that this judicial power shall not be abused.

[5, 6] In the case at hand, the motion for relief under section 473 was heard upon conflicting affidavits, and it must be assumed that the trial court "found the facts to be as asserted by the moving and prevailing party". In the motion to dismiss the appellant failed to avail himself of the opportunity granted him to make a countershowing, and it must be assumed here likewise that the trial court found the facts tendered by the moving and prevailing party to be true. Upon this record we can not state that the trial court abused its discretion upon either motion.

The orders are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

CLENDANIEL v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 11346.

District Court of Appeal, First District, Division 1, California.

June 25, 1940.

Rehearing Denied July 25, 1940.

See 104 P.2d 555.

1. Workmen's compensation ⚷1795

Evidence is not "cumulative evidence" which would warrant denial of petition to reopen compensation proceeding merely because it tends to establish the same ultimate or principally controverted fact. Code Civ.Proc. § 1838.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative Evidence".

2. Workmen's compensation ⚷1795

Where controverted issue in compensation proceeding was whether employee injured thumb during course of employment, and witnesses produced at hearing tended to establish the general issue by showing that at certain time after the injury occurred, employee showed witnesses thumb and made statements to them as to how it was injured, refusal to reopen the case to permit eyewitness who was not present on original hearing to testify as to how employee injured thumb on ground that such evidence was "cumulative evidence" was error. Code Civ. Proc. § 1838; St.1937, pp. 301, 302, 304, §§ 5803–5805, 5810, 5952.

3. Workmen's compensation ⚷1910

The determination of the Industrial Accident Commission as to what constitutes "good cause" for rescinding, altering or amending its order, decisions or awards is entitled to great weight but such determination is not conclusive and weight to which it is entitled depends upon the circumstances. St.1937, pp. 301, 302, 304, §§ 5803–5805, 5810, 5952.

4. Workmen's compensation ⚷1936

The Industrial Accident Commission is vested with sound discretion to regulate proceeding before it and its decisions will not be disturbed on certiorari for mere errors of procedure but such authority does not justify an arbitrary denial of the right of litigant to procure competent evidence when the application therefor is seasonably made and presented with due diligence according to established rules of procedure. St.1937, pp. 301, 302, 304, §§ 5803–5805, 5810, 5952.

5. Workmen's compensation ⚷1939

There must be a real and substantial conflict in the evidence to render Industrial Accident Commission's order immune to inquiry by reviewing court. St.1937, pp. 301, 302, 304, §§ 5803–5805, 5810, 5952.

6. Workmen's compensation ⚷1939

The Industrial Accident Commission is the exclusive judge as to the credibility of the witnesses and the weight to be given to the evidence before it and no finding of fact will be disturbed on review if there is any substantial evidence to support it. St.1937, pp. 301, 302, 304, §§ 5803–5805, 5810, 5952.

7. Workmen's compensation ⚷11, 1409

The workmen's compensation law has as its objective the protection of a workman against economic insecurity and the law favors the payment of compensation and mere conjecture of Industrial Accident Commission that injury may not be compensable should not militate against employee's receiving benefits.

8. Workmen's compensation ⚷1410

Mere discrepancies in employee's testimony as to exact place where alleged injury was sustained are not sufficient to destroy the credibility of the employee as a witness or to destroy force of facts proved by other witnesses or justify denial of compensation where the fact of injury is indisputable and no positive evidence is presented that injury was sustained elsewhere than in course of employment and there is no evidence from which a reasonable inference to that effect can be drawn.

9. Workmen's compensation ⚷1936

Where a party has failed to seek a writ of review of original award in compensation proceeding and later petitions commission to reopen the case on the ground of newly discovered evidence, if the evidence is merely cumulative, or could have been produced at original hearing with reasonable diligence and petition is denied, reviewing court has no right to order the case reopened. St. 1937, pp. 301, 302, 304, §§ 5803–5805, 5810, 5952.

◆

Petition by Fred Clendaniel, employee, for a writ of review to annul orders of the Industrial Accident Commission refusing to reopen a decision in favor of the Horseshoe Tavern, employer, and the California Firemen's Fund Indemnity Company, insurer.

Orders annulled.

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* Subsequent opinion 111 P.2d 314.

George B. Harris, of San Francisco, for petitioner.

Keith & Creede, of San Francisco, for respondent Fireman's Fund Indemnity Co.

Everett A. Corten, of San Francisco, for other respondents.

KNIGHT, Justice.

The petitioner, Fred Clendaniel, applied for a writ of review to have annulled an order made by the Industrial Accident Commission refusing to reopen a decision denying him compensation for an injury he claimed to have sustained during the course of his employment as a waiter at the Horseshoe Tavern. The original injury consisted of a slight puncture or laceration of the thumb, which developed into a critical case of blood poisoning and confined him in a hospital for approximately six weeks, during eight or nine days of which time he remained in an unconscious condition. He claimed to have sustained the injury on the night of March 31, 1937, by striking his thumb on the end of a protruding nail while cleaning a cabinet in the tavern. Working nearby at the time was a Chinese cook who saw the injured thumb immediately after the accident happened and suggested certain first aid for its treatment. On May 10, 1937, the cook went to China, and on May 20, 1937, shortly after Clendaniel was discharged from the hospital, the employer's insurance carrier instituted the proceedings before the commission for an adjustment of the claim for compensation. Part of the testimony was taken before one referee, and part before another, and on the report of the latter the commission on November 18, 1937, denied Clendaniel any compensation upon the ground that he failed to establish that his injury arose out of and in the course of his employment. On March 1, 1938, the cook returned from China, and shortly thereafter Clendaniel applied to the commission for a reopening of the case so that he might avail himself of the benefit of the cook's testimony as to the happening of the accident. The motion to reopen was partially heard before a third referee, and was concluded before Miss McGuire, the referee on whose recommendation the adverse decision was based; and on her recommendation also the commission on September 8, 1939, denied the application to reopen the case.

One of the main grounds of opposition to the annulment of the order refusing to reopen the case is that the evidence is conflicting upon the issue as to whether Clendaniel injured his thumb during the performance of his duties at the restaurant, and that the testimony to be adduced from the Chinese cook is cumulative. The consideration and determination of that question necessarily requires a review of the testimony given on the merits. In this regard the record discloses the following: Clendaniel had been working at the tavern about three years. On the evening of Wednesday, March 31, 1937, he went to work at the usual time, 5 o'clock. After having served thirty dinners, and about 8:30, he started his weekly job of cleaning the cabinet which stood between the kitchen and the dining room, facing and three feet away from the open doorway of the kitchen. It was eight feet long, six feet nine inches high, and eighteen inches deep, with a solid wooden back made of thin paneling, and on the side facing the kitchen were three shelves. The lowest shelf was about waist high, and was used as a workboard or cutting shelf for cutting pies, cakes and breads, and mixing salads. About two feet above this workboard was a pie shelf, and about a foot below the top of the cabinet, five feet seven inches from the floor, was a "top" shelf, which was used to hold salt, pepper, vinegar, oil and other condiments. On the dining room side of the cabinet was a shelf which had been added about a year prior to the injury, on which were placed glasses, and the nail upon which petitioner claims to have injured his thumb was one which he claims was placed there when that shelf was installed, having been driven into the bracing of the shelf on the left-hand side thereof, and protruding through to the kitchen side about three-eighths of an inch. The point was bent down and to the right, being about two and a quarter inches from the surface of the top shelf. Petitioner testified that he had taken everything off the top shelf, and was washing it with a rag and soap and water, when he stuck his thumb on the nail; that it bled a little, but not much, and he did not pay much attention to it; that almost immediately he showed it to the Chinese cook who was washing dishes in the kitchen, and who told him to put lemon juice on it; that about an hour later he showed his thumb to a Mrs. Geimann, a regular customer of the tavern, who warned him to take care of the injury, that she had a friend who stuck his finger and almost lost his arm. Continuing he testified that about 1:30 he mixed some salad dressing, and noticed at that time that his thumb had begun to burn; that afterwards he told the bartender that he could not help him dry the glasses that night, as he generally did, because his thumb was sore; that Mrs. Geimann came back about 1 o'clock, and again told petitioner to take care of his thumb; that about 2:15 he left for home, which was only a block away; that his thumb was sore, and was beginning to turn black, so he put some mercurochrome on it. The testimony further shows that on Thursday morning, the day following the happening of the alleged injury, Clendaniel reported to the manager of the tavern that he would not be able to work, but did not explain why; that he then went to his doctor's office, Drs. Rhodes and Butler, and the doctor whom he saw there instructed him to soak the thumb in epsom salts and to go home and remain in bed; that he followed the advice so given, and on Friday and Saturday again visited the doctor, staying in bed the rest of those days. Sunday morning the pain from the thumb had extended up to the armpit; the thumb was badly swollen, and he noticed red streaks up his arm. About 12:30 that night he went to the emergency hospital, and the next morning was taken to St. Mary's Hospital, where he remained about six weeks. Clendaniel gave the name of the insurance carrier to his doctor, who sent in a report of the case dated April 1, 1937, which was purported to have been mailed on Saturday, April 3d, and was received at the office of the insurance carrier on Tuesday, April 6th.

The testimony so given by Clendaniel was taken on June 15, 1937, before the first referee, and the hearing was resumed on July 28, 1937, before Miss McGuire, at which time the witnesses above referred to by Clendaniel were produced. Mrs. Geimann testified that between 10 and 11 o'clock that night petitioner told her he had scratched his thumb on the work bench, and showed it to her, and that she saw that it was a fresh scratch, and advised him to be careful of it and put something on it; that she returned to the tavern about 1 o'clock and again cautioned him to be sure and take care of it. Stone, the bartender, testified that petitioner complained to him about 10 o'clock that his finger was sore, telling him at this time "that he stuck it on something back there, and I thought he said a fork or a nail"; that later, just before 2 o'clock, Clendaniel told him he could not help him wipe the glasses because his finger was so sore; that he looked at Clendaniel's thumb, and saw a punch hole; that before Clendaniel left he asked for some whiskey to put his thumb in. Further testimony was given by Dunn, the proprietor of the tavern, to the effect that a day or two after March 31st he met Clendaniel on the street and noticed that his hand was bandaged; that Clendaniel told him he had hurt his hand "the other night" but did not say how; that Dunn told him to go back to the tavern and find a list of doctors who would take care of him. Monroe, another waiter at the tavern, also testified that he saw Clendaniel in the hospital, and that Clendaniel told him he had stabbed his thumb "on a nail out there on the work board" (referring to the whole cabinet); that he understood that "when he was wiping off this upper shelf" he "stabbed [it] on the upper nail". In addition to the foregoing testimony Clendaniel produced as a witness an engineer who had made an inspection of the cabinet on June 8, 1937. After explaining in detail the construction of the cabinet, he testified that he found a nail driven through above the upper shelf which protruded through about three-eighths of an inch and had been bent down. Petitioner testified again at the second hearing, before Miss McGuire, but he was not called upon to relate again the circumstances under which he claimed to have injured his thumb. His testimony was limited to incidental matters thereto.

Part of the evidence adduced at the first hearing consisted also of a written statement taken by an adjuster for the insurance carrier on April 22, 1937, at the hospital while Clendaniel was still in a greatly weakened condition. The adjuster was an acquaintance of Clendaniel's, and took the statement in the course of a general conversation. Afterwards he wrote it out, and read it to Clendaniel, who signed it with his left hand. The circumstances related therein as to the happening of the accident were substantially the same as those testified to by Clendaniel, except that it is stated therein that Clendaniel was scrubbing "the top of the salad counter" where he struck his thumb on the nail. The insurance adjuster also was a witness at the second hearing. At that time he testified that he had made three inspections of the cabinet in the course of his investigation of the case; that the first inspection was made the same day he had called on Clendaniel at the hospital, and that because of the way Clendaniel had explained the accident to him, he had assumed that the nail was on or about the salad counter; and that he was unable to find anything on the top of the salad board on which anyone might have cut his finger. About three weeks later, during the evening while he was eating dinner at the tavern, the manager called his attention to a row of rusty nail heads above the top shelf about even with his head; and the adjuster testified that he looked over the back of the cabinet and ran his fingers over the nail heads, but did not find anything that would cause an abrasion. His third inspection was made during the daytime on June 14, 1937, the day before the first hearing. Clendaniel was present at the tavern, and pointed out to the adjuster the nail upon which he claimed to have injured his thumb. The adjuster's description of the nail was identical with the descriptions given by the other witnesses; that is, he said it was one which had been driven into the side of the support for the shelf on the dining room side of the cabinet, and protruded through to the kitchen side some three-quarters of an inch and had been bent down. However, not having found this particular nail on his previous inspection of the upper shelf, the adjuster testified that at that time it was not there.

At the conclusion of the second hearing the referee visited the premises; and on November 18, 1937, the findings and award were filed, denying petitioner compensation on the ground that "the evidence does not establish that the defendant suffered an injury arising out of and in the course of his employment". It is stated in the petition filed in the present proceeding, and not denied by the commission, that "The referee advised that she had been impressed particularly by two points in the case, which had led to her decision:—(a) That an injury of the kind described sustained at 8:00 or 9:00 P. M. could not bring about such a blackening of the thumb due to infection as early as 10:00 A. M. of the following morning [when he visited his doctor]. (b) That the top shelf was so dusty and dirty on July 28, 1937, when the referee viewed it that petitioner must have been falsifying when he said he washed it on March 31, 1937 (nearly four months before)"; and evidently it was mainly on those grounds that the referee recommended denial of compensation. In this connection it may be here stated, however, that as to the first ground, no medical testimony was introduced before the referee at the hearing on the merits; consequently the conclusion drawn by her as to the possibility of infection finds no support in the record; and as to the second, all the testimony on the subject shows, without contradiction, that the upper shelf had been washed on numerous occasions.

Following the rendition of the commission's decision a petition for rehearing was filed by petitioner, and it was denied by an order made ex parte; and no further proceedings were had until April 7, 1938. On that date petitioner filed a petition pursuant to the authority granted by sections 5803–5805 of the Labor Code, St.1937, p. 301 (formerly section 20 (d) of the Workmen's Compensation Act, St.1917, p. 850) to reopen the case so that the testimony of the Chinese cook, who had just returned from China, could be produced and considered on a hearing on the merits; and two hearings on the petition to reopen were had. The last one took place before Miss McGuire, at which time, in support of the petition to reopen, the Chinese cook was produced and through an interpreter he related the facts petitioner sought to have considered on the merits along with the other facts. In this regard the cook stated in substance that on the night in question he was standing about four feet away from Clendaniel, and saw him washing off the upper shelf of the cabinet; that there was a nail on the shelf that had been driven through and bent over, on which Clendaniel caught his thumb; that Clendaniel told him he hurt his thumb on the nail; that he showed him his thumb, and it was bleeding; that it was not a cut but a puncture, and that he put lemon juice on it and "kind of" wrapped it up for Clendaniel; that when Clendaniel was making the salad dressing at 1:30 that night he told the cook again that his thumb was hurting, and when Clendaniel left at 2 o'clock the cook again saw the thumb; that it was not bleeding at that time, but "there was a little black dot on the puncture" and a little swelling "on the black spot". There was also introduced in evidence at the same hearing a report from the doctor who first treated Clendaniel, wherein he stated that the examination, which took place about twelve hours after the alleged injury, disclosed a puncture wound of the right thumb; that the thumb was red, swollen, inflamed and tender; that the appearance was characteristic of an acute fulminating streptococcic infection in an early stage, and that "the picture was typical of an early cellulitis due to the described wound and could easily have been created in this twelve-hour period".

Furthermore, in his petition to reopen, petitioner stated that he had located and would produce at a retrial the carpenter who installed the outside shelf, who would testify that the protruding nail was one he had driven into the outside shelf through the back wall of the cabinet at the time the shelf was installed. Other testimony was produced at these hearings to reopen, but it does not call for special attention as it added nothing substantial to what has already been set out.

[1, 2] We are of the opinion that in the foregoing state of the record the commission exceeded its powers in refusing to reopen the case upon the ground that the testimony sought to be introduced on the merits on retrial was cumulative. As defined by section 1838 of the Code of Civil Procedure, "Cumulative evidence is additional evidence of the same character, to the same point"; and "Evidence is not cumulative merely because it tends to establish the same ultimate or principally controverted fact" (Black's Law Dictionary.) Here the ultimate controverted issue to be determined was whether petitioner injured his thumb during the course of his employment; and while the testimony of the witnesses produced by petitioner at the hearing on the merits tended to establish petitioner's case on the general issue, the testimony of the cook, which petitioner sought to have the commission consider on a retrial related to matters of fact entirely different in point of time and in substance from those covered by the testimony of the other witnesses. That is to say, the testimony given by Mrs. Geimann and the bartender was to the effect that an hour or so after petitioner claimed he had hurt his thumb he showed it to them and made certain statements to them as to how it was injured, but neither of them saw him cleaning the cabinet where he claimed he hurt his thumb; whereas, according to the cook, he actually saw petitioner washing the upper shelf of the cabinet at the time he was injured; the nail was there on which he stuck his thumb, and immediately upon being hurt petitioner showed his thumb to him and it was bleeding. Moreover, on a retrial petitioner would have had the benefit of the doctor's testimony that the injury was of such a nature as would produce an acute fulminating streptococcic infection within twelve hours after it was inflicted; also of the carpenter's testimony that he had placed the nail there prior to the time of the injury.

The power of the court to review the commission's order on petition to reopen under sections 5803–5805 of the Labor Code is the same as that to review an original award of the commission. Section 5810 of said code provides: "The orders, findings, decisions, or awards of the commission made and entered under this division may be reviewed by the courts specified in sections 5950 to 5956 within the time and in the manner therein specified and not otherwise"; and section 5952 provides: "The review by the court shall not be extended further than to determine whether: (a) The commission acted without or in excess of its powers. (b) The order, decision, or award was procured by fraud. (c) The order, decision, or award was unreasonable. (d) If findings of fact are made, such findings of fact support the order, decision, or award under review." It is well settled, of course, that the determination of the commission as to what constitutes "good cause" for rescinding, altering or amending its orders, decisions or awards is entitled to great weight; but such determination is not conclusive. It depends largely upon the circumstances of each case. Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195. And we are convinced that under the circumstances here present the commission's refusal to reopen the case to allow petitioner to introduce the new evidence on the merits was not only unreasonable, but amounted to a denial to an injured employee of a substantial right to which he was entitled under the provisions of the Labor Code, namely, the right to lay before the commission on a hearing on the merits all available facts to establish his claim to compensation. In other words, the commission is vested with a sound discretion to regulate and control the proceedings before it, and its decisions will not be disturbed on certiorari for mere errors of procedure. But that authority will not justify an arbitrary or unreasonable denial of the right of a litigant to procure and produce competent evidence when the application therefore is seasonably made and presented with due diligence according to the established rules of procedure. (Walker Mining Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 95 P.2d 188); and after a complete examination of the facts here presented it is our conclusion that this is such a case. Admittedly petitioner suffered a most severe case of blood poisoning as the direct result of the injury to his thumb; and there was not a single affirmative fact or circumstance developed at any stage of the case tending to show that he received the injury to his thumb at any other time or place than as claimed by him. In this situation, to preclude him from presenting the new evidence, now available to him, to substantiate his claim for compensation, would, in our opinion, amount to a denial of substantial justice.

[5-8] Respondents call attention to certain discrepancies in the evidence, and contend that they constitute conflicts sufficient to justify the commission in finding that petitioner's injury did not occur in the course of his employment, and that therefore its order refusing to reopen the case is conclusive. In this regard it is pointed out that appellant in conversations with others about his injury referred to the place where he hurt his thumb as the salad counter and the work bench; and that the doctor's report referred to it as a table; also that petitioner testified that when he showed his thumb to the cook the latter told him to put lemon juice on it, but that he did not do so, whereas, according to the cook's testimony, petitioner did apply the lemon juice. Attention is also called to the adjuster's testimony that on his second inspection of the cabinet he was unable to find the nail on which petitioner claimed to have injured his thumb; and also to the fact that petitioner did not complain to the manager or proprietor that he had sustained an industrial injury, nor so report it to the doctor. Under well-settled rules, however, there must be a real and substantial conflict in the evidence to render the commission's order immune to inquiry by a reviewing court (Gamberg v. Industrial Acc. Comm., 138 Cal.App. 424, 32 P.2d 413; Thoreau v. Industrial Acc. Comm., 120 Cal.App. 67 7 P.2d 767); and we are of the opinion that the claimed conflicts here relied upon amount to no more than minor discrepancies which do not bring the case within the foregoing rule of immunity. There is, of course, no dispute as to the elementary proposition that the commission is the exclusive judge as to the credibility of the witnesses and the weight to be given to the evidence before it, and that no finding of fact will be disturbed if there is any substantial evidence to support it. Market Street R. Co. v. Industrial Acc. Comm., 193 Cal. 178, 224 P. 95. However, as said in Moquin v. Industrial Acc. Comm., 33 Cal.App.2d 511, 92 P.2d 413, the law under which the respondent commission functions in cases like this is founded on sound public policy, and with the objective of protecting, in a proper case, a workman against economic insecurity. This law favors the payment of compensation, and mere conjecture on the part of the commission that the injury may not be a compensable one should not militate against the employee's receiving this benefit. And the court went on to say in substance that mere discrepancies in the testimony would seem to be insufficient to destroy the credibility of the employee as a witness, and certainly insufficient to destroy the force of the facts proved by other witnesses, or to justify the denial of an award for compensation, where the fact of the injury is indisputable, and no positive evidence is presented that he sustained the injury elsewhere than in the course of his employment, nor even any evidence from which a reasonable inference to that effect could be drawn. See, also, Bussey v. Industrial Acc. Comm., 26 Cal.App.2d 211, 79 P.2d 169, to the same effect.

[9] Respondents contend that where, as here, a party has failed to seek a writ of review of the original award, and later petitions the commission to reopen the case on the ground of newly discovered evidence, and the commission finds such evidence merely cumulative and denies the petition, the appellate court has no right to order the case reopened. This is doubtless the law, if the evidence relied upon as newly discovered was in fact merely cumulative, or could with reasonable diligence have been produced at the original hearing. But such is not the case here. As we have pointed out, the evidence of the Chinese cook was not cumulative, and could not have been presented at the prior hearings because he was in China and it was uncertain when he would return; and it will be remembered that the proceedings before the commission were not instituted by the petitioner, but by the insurance carrier, and that it was heard and determined during the absence of the cook in China.

In support of their contention respondents rely on the cases of Fidelity & Casualty Co. v. Industrial Acc. Comm., 67 Cal.App. 648, 228 P. 348; Silva v. Industrial Acc. Comm., 68 Cal.App. 510, 229 P. 870; Mantyla v. Industrial Acc. Comm., 130 Cal.App. 139, 19 P.2d 799; Mustain v. Industrial Acc. Comm., 130 Cal. App. 447, 19 P.2d 1031; Ingram v. Department of Industrial Relations, 208 Cal. 633, 284 P. 212; Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., 6 Cal.2d 314, 57 P.2d 501, 502. In our opinion the above cases are not here controlling. The decisions in the Fidelity and Silva cases were rendered prior to the decision in Bartlett Hayward Co. v. Industrial Acc. Comm., supra; and as said in Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., supra, "The leading case defining the power of the Industrial Accident Commission under this section [20 (d)] is the case of Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195. Prior to the decision in this case it was held * * * that the power of the commission was limited to alter or amend its awards to the situation where the disability of the person in whose favor such award was made had either increased, diminished, or terminated. The case of Bartlett Hayward Co. v. Industrial Acc. Comm. held that the Legislature, in enacting section 20 (d) of the Workmen's Compensation Act in 1917, intended thereby to broaden the power of the commission and to enlarge and expand the continuing jurisdiction of the commission beyond the power theretofore possessed by it merely to review, grant or regrant, diminish, increase, or terminate any compensation awarded upon the ground that the disability had recurred, increased, diminished, or terminated, and to embrace the power to rescind, alter, or amend its orders, decisions, and awards within the period of 245 weeks 'upon good cause appearing therefor.' Since the decision in the Bartlett Hayward Company Case, the appellate courts have consistently held that the continuing jurisdiction of the commission under section 20 (d) of said act is only limited by the expiration of the period of time therein prescribed and by the requirement that 'good cause appear' for rescinding, altering, or amending the former decision of the commission." In the Mustain case no claim was made that the petition for review should have been filed at the time of the original award, and the order refusing to reopen the case was affirmed on the ground that no new and further disability was alleged. In the Mantyla case it was held that "ordinarily" the commission's refusal to reopen the case should be upheld where the ground specified is one which might have been considered on a review of the original award, but it was further held, as in the Mustain case, that the evidence there supported the commission's findings. It was also held that the testimony sought to be introduced in the Mantyla case was merely cumulative, and there was no showing that such evidence could not with due diligence have been produced at the original hearing. Nor do we find anything inconsistent with the decision herein in either the Ingram or Merritt-Chapman & Scott cases. The Ingram case simply held that the power of the commission to reopen should be exercised with great caution, and in cases where fraud, inadvertence, mistake or excusable neglect are clearly shown; and the Merritt-Chapman & Scott case held that the petitioner therein, after having applied some five different times for a reopening of the case after the original award, was not entitled to have the case reopened, one of the grounds thereof being that "the various petitions presented do not contain any allegation nor give any good reason why such evidence was not produced at an earlier hearing", which is not, of course, the case here. However, in that case the court goes on to say: "It is self-evident, we think, that, if the words, 'good cause appearing' are to have any place or purpose in said statutory provision, the power of the commission to change its former orders or awards may not be predicated upon a mere change of opinion by the commission as to the correctness of its original decision, but there must exist some good ground, not within the knowledge of the commission at the time of making the former award or orders, which renders said original award or orders inequitable. * * * In other words, the existence of some fact or circumstance which warrants the conclusion that the challenged award is inequitable is a necessary element to the exercise of the continuing jurisdiction of the commission under the authority of section 20 (d)." The above language would seem to be particularly applicable to the present case, for it is apparent that the unavailability of the cook's testimony at the time of the original hearing presents good cause for reopening the case, and warrants the conclusion that the award, made without said testimony having been presented on the merits, is inequitable.

The orders denying the petition to reopen, and denying the rehearing on the petition to reopen, are annulled, and the cause is remanded to the commission for further proceedings not inconsistent with the views herein expressed.

We concur: PETERS, P. J.; WARD, J.

39 Cal.App.2d 602

KIDROSKI et al. v. ANDERSON.

Civ. 11920.

District Court of Appeal, Second District, Division 1, California.

June 22, 1940.

1. Appeal and error 🔑994(3), 1011(1)

In action for injuries sustained by pedestrians when struck by an automobile while crossing street intersection, weight to be given conflicting evidence and credibility of witnesses was for the trial court sitting without a jury.

2. Appeal and error 🔑842(7), 987(1)

Reviewing courts are not authorized to review evidence except where on its face it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact but purely one of law.

3. Appeal and error 🔑1012(1)

Before a reviewing court can reject the positive testimony of a witness who is believed by the trial court sitting without a jury, testimony must be inherently improbable and it is not sufficient that testimony may disclose circumstances which are unusual.

4. Appeal and error 🔑1032(1)

Where attack is made on trial court's judgment on ground that the evidence is insufficient to sustain judgment, it is necessary for appellant to show that the testimony which reviewing court is asked to reject is inherently improbable or that it was incompetent, or for some other reason not legal evidence upon which the trial court could rely.

5. Automobiles 🔑244(6)

Evidence authorized recovery by pedestrians for injuries sustained when struck by an automobile while crossing a street intersection.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Mathias J. Kidroski and others against Paul S. Anderson for injuries sustained by Louise Ross and Mildred Kidroski when struck by defendant's automobile while walking across an intersection. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

Chase, Barnes & Chase and Thomas R. Suttner, all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs commenced this action to recover damages from defendants for personal injuries sustained as the result of an automobile accident. At the beginning of the trial it was announced that plaintiffs Edward J. Kidroski and Louise Kidroski had changed their names to Edward J. Ross and Louise Ross, and the pleadings were amended accordingly; also that the claim for damages in behalf of Edward J. Ross was waived. As to all defendants sued under fictitious names the complaint was dismissed. The remaining defendant, Paul S. Anderson, by his answer denied negligence upon his part and asserted that plaintiffs were guilty of contributory negligence which proximately caused their injuries. Following a trial before the court sitting without a jury, judgment was rendered in favor of plaintiffs. From such judgment this appeal is prosecuted.

Briefly, the facts are that about eight o'clock on the evening of July 15, 1935, plaintiffs Louise Ross and Mildred Kidroski were walking north on the west sidewalk of Broadway toward the intersection of Broadway and Fifty-first street in the city of Los Angeles. When they reached the southwest corner of the intersection they started to cross Broadway, and as they proceeded across such thoroughfare they were struck by an automobile traveling south.

[1] Appellant attacks the judgment of the trial court upon the single ground that it is unsupported by the evidence.

The evidence being in conflict, we shall here set forth an epitome of the testimony which we conclude was of sufficient substantiality to justify the trial court in the conclusions arrived at. We find in the record testimony that when plaintiffs reached the intersection of Fifty-first and Broadway they stopped and waited for the traffic signal to authorize the movement of east and west traffic. When they first arrived at the corner the traffic signal was against them. They watched the northeast corner signal, and when it turned green they started to cross Broadway. They looked "both ways" as they stepped off the curb. The automobile which struck them was in the middle of the car tracks which bisect Broadway. There is in the record testimony that plaintiffs were struck by an automobile operated by defendant Paul S. Anderson; that such automobile was driven south against and through the traffic signals, which indicated "stop" for southbound traffic, and that the speed at which the automobile was traveling as it went through the intersection was between thirty and thirty-five miles per hour. It is true that there was evidence in conflict with the foregoing, but to the trial court exclusively belongs the right to evaluate evidence, gauge its weight, and determine the credibility of witnesses.

The testimony which we have herein narrated is more or less corroborated by the testimony of defendant's wife, who was riding with him. Answering a question as to her knowledge of the accident, she testified, "Well, just after we crossed the intersection we were a little ways down, I don't know how many feet, when I saw a glimpse of a tan coat and felt a slight impact. Still I was not positive whether we had hit anything or what, so I turned around. After we passed I told my husband there were two women down on the ground." In addition to this, the trial court had before it testimony that after the accident defendant found his left front headlight damaged, as well as his admissions contained in the following testimony:

"Q. You did see these ladies in a flash and you put on your brakes? A. I wasn't positive what it was, really.

"Q. You saw something in front of your car? A. Not in front of my car, on the left-hand side.

"Q. Did you feel any momentum when you started? A. Very slightly.

"Q. The impact, you felt it very slightly? A. Yes."

[2-5] It is not here necessary to set forth the testimony from which appellant contends it can be inferred that another automobile traveling at a high rate of speed struck the plaintiffs and knocked them against defendant's car, because no rule is more firmly grounded in our law than that which provides that appellate courts are not authorized to review evidence except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Before an appellate court can reject the positive testimony of a witness who is believed by the trial court the testimony must be inherently improbable. It is not sufficient that the testimony may disclose circumstances which are unusual. Let us reiterate that the appellate court does not sit as a jury to determine the issues of fact upon the credibility of the testimony of witnesses, and when the attack upon the judgment is made upon the ground that the evidence is insufficient to sustain such judgment, it becomes necessary for the appellant to show that the testimony which we are asked to reject is inherently improbable or that it was incompetent, or for some other reason not legal evidence upon which the court or jury could rely. In the instant case we are not directed to nor do we find anything in the record to justify this court in concluding from all the facts and circumstances here present that there was not sufficient legal evidence upon which the trial court could rely in determining that the negligence of defendant was the proximate cause of plaintiffs' injuries and that the latter were free from contributory negligence.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

39 Cal.App.2d 580

VADEN v. HOLMES et al.

Civ. 11236.

District Court of Appeal, First District, Division 2, California.

June 20, 1940.

1. Automobiles ⟹244(28)

Uncontradicted testimony of corporation's agent that after business hours he took corporation's automobile to go to his aunt's house to have dinner, that he had no business of corporation to transact, and that he did not attempt to transact any business for corporation on trip, warranted finding that at time and place of collision with automobile in which plaintiff was riding agent was operating corporation's automobile on his own personal concerns, and not as corporation's agent, servant, or employee in corporation's business.

2. Damages ⟹185(1)

Plaintiff's testimony that after collision between automobile in which she was riding and defendants' automobile she had pains in her abdominal cavity and that operation disclosed that she was suffering from an acute venereal disease, showed that defendants were in no manner liable in damages for those pains.

3. Damages ⟹185(1)

In action for injuries sustained by automobile passenger in collision between two automobiles, cause of any pains in passenger's head presented a question for the testimony of medical men and not of laymen.

4. Trial ⟹29(1)

In automobile passenger's personal injury action, trial court's statement that he was trying to fix on an amount which he thought would cover damages to passenger's knee more or less arbitrarily, was not ipso facto an arbitrary decision but was merely a statement that there was no standard for estimating the amount in dollars and cents which would compensate for knee injury.

5. Damages ⟹20

Hospital bill, medical expense, and loss of employment necessitated by disease not caused by automobile collision could not be considered in estimating damage caused by bruise on plaintiff's right knee resulting from collision.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Gladys Constance Vaden against Perry Holmes and another for personal injuries. From the judgment, plaintiff appeals.

Affirmed.

Joseph F. O'Malley, of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

STURTEVANT, Justice.

On the evening of September 23, 1938, Curtis Farrell was driving a Packard sedan automobile northerly along San Leandro way in San Francisco. The plaintiff, as his guest, sat by his side. On her right Miss Walker, another guest, was seated. At a point where San Leandro way intersects Portola drive the Packard car collided with a Ford coupe. The latter car was owned by the Holmes Express, a corporation, and was being driven by Perry Holmes, an agent of said corporation. The plaintiff commenced an action against Perry Holmes and the corporation to recover damages for her alleged injuries. The action was tried before the trial court sitting without a jury. The defendants admitted that Perry Holmes was negligent in driving the Ford coupe. The other issues made by the pleadings were tried. The court made findings in favor of Holmes Express but against Perry Holmes and in favor of the plaintiff. In those findings the court fixed the damages of the plaintiff in the sum of $150. From the judgment the plaintiff has appealed.

[1] In her first point the plaintiff contends that the trial court erred in making a finding in favor of Holmes Express, a corporation. That finding was as follows: "At the time and place of said collision the defendant Perry Holmes was operating a Ford automobile on his own personal concerns and not as agent, servant, or employee of the defendants, Holmes Express, a corporation, and not in the business of said corporation." The only evidence on the subject contained in said finding was the testimony of Perry Holmes who was called as a witness by the plaintiff under the provisions of section 2055 of the Code of Civil Procedure. The uncontradicted evidence given by that witness

was that after 6 o'clock and after the defendants' business had been done, he took the car and started to go to his aunt's to have dinner. He further testified that he had no business of the corporation to transact on his trip and that he did not on said trip attempt to transact any business whatever for the corporation. Under these circumstances it is apparent that the trial court's finding was in direct response to the evidence. In this connection the plaintiff asks this court to hold that Holmes Express was but the corporate double of Perry Holmes. It is sufficient to state that in the record there were no facts whatever that would justify the application of that doctrine.

[2, 3] In her next point the plaintiff contends that on the issue of the amount of damages the judgment is against the evidence and against law. She attacks a finding which is as follows: "In said collision, and the result thereof, the plaintiff did not sustain any injury, save and except a slight laceration or abrasion of the skin of her right knee and she was slightly shaken up." She contends her evidence showed (1) injuries to her right knee; (2) injuries to her head; and (3) injuries to her abdominal cavity. Before proceeding it should be noted the only witness called by the plaintiff to testify regarding her injuries was the plaintiff. The defendants called no witnesses. The plaintiff testified the accident happened about 6:20 p. m. on September 23, 1938, that is, on a Friday afternoon. Immediately thereafter she was taken to Alemany Emergency Hospital and was there examined by Dr. O'Hara. He found no surface injury on any part of her body except her knee. He applied some alcoholic wash to the spot, placed some gauze over it, and fastened the gauze with tapes. Later he directed the plaintiff to lie down on a bed. At about the same time Dr. Jones was summoned. He came to the hospital and there treated Miss Walker in particular, and also examined the plaintiff. Thereafter Miss Walker was taken to her hotel and the plaintiff went with her, under the directions of Dr. Jones, to wait on and attend her during the night. No other treatment of any kind was ever administered to the knee. There was no external injury to the plaintiff's head and no treatment of any kind was ever administered to her head. She testified that after the accident she had pains in her head. Those pains subsided and she testified she then had pains in her abdominal cavity. Later she became nauseated. On Saturday pains in her abdominal cavity continued. On Sunday she was taken to St. Luke's Hospital. Dr. McKee took the history of the case. Later in the day Dr. Jones and Dr. Stevens arrived. After an examination they concluded it was best to operate on her abdominal cavity. They did so Sunday evening. The plaintiff testified that after she was taken to her room Dr. Jones stated to her that when the doctors opened the cavity they found what was wrong. They found she was suffering from an acute venereal disease. They therefore at once sewed up the incision they had made. From this evidence it is clear the defendants were in no manner liable for the pains which the plaintiff claimed she suffered in her abdominal cavity. It is also clear that the cause of any pains in her head presented a question for the testimony of medical men and not for the testimony of laymen. Assurance Corp. v. Industrial Acc. Comm., 106 Cal.App. 39, 42, 288 P. 692. However, the record is entirely silent regarding any medical opinion as to the cause of the pains complained of in the plaintiff's head.

[4, 5] In speaking to counsel on the subject of the claims made by the plaintiff, the trial court used this sentence: "Now, I am trying to fix on an amount which I think would cover the damages to the knee more or less arbitrarily." The plaintiff stresses that language and contends the trial court ipso facto rendered an arbitrary decision. That contention is quite unfair to the trial court. It is perfectly clear the trial court was but stating that there was no standard for estimating the amount in dollars and cents which would compensate for the injury to the knee, and as so understood we see no objection to the words used. The plaintiff continues by discussing the hospital bill, medical expense, and loss of employment, and makes the general claim that those things should have been considered in estimating the damage caused by the bruise on plaintiff's right knee. But, considering the facts hereinabove discussed, it is patent the contention now made is wholly without merit.

In her notice of intention to move for a new trial the plaintiff pleaded subdivisions 6 and 7 of section 657 of the Code of Civil Procedure. From what has been said above we think it is clear the trial court very properly denied her motion for a new trial.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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39 Cal.App.2d 559

RED ARROW BONDED MESSENGER CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 11424.

District Court of Appeal, First District, Division 2, California.

June 20, 1940.

1. Workmen's compensation 🔑666

Where an employee on a special errand for employer deviates from regular and direct route for purposes of his own and is injured, such injury does not "arise out of the employment", and is not compensable unless caused by an instrumentality of the employment, or by a circumstance incidental to its use and not by reason of the deviation.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of the Employment".

2. Workmen's compensation 🔑666

Where messenger boy, after delivering message, deviated from direct route to employer's office by going 16 blocks south of direct route towards his home in order to get some food, and, after eating, started back to office and was struck by an automobile while at a point approximately 12 blocks south of direct line of travel from place of errand's end to office, messenger boy's injury did not "arise out of the employment", so as to entitle him to compensation.

◆

Original proceeding on application to review an award of the Industrial Accident Commission, by the Red Arrow Bonded Messenger Corporation, a corporation, and the Liberty Mutual Insurance Company, a corporation, against the Industrial Accident Commission of the State of California, and Thomas O'Brien, a minor, by William O'Brien, his guardian ad litem.

Award annulled.

Theodore Hale, Charles B. Morris, and Carroll B. Crawford, all of San Francisco, for petitioners.

Everett A. Corten, and Dan Murphy, Jr., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

In this application to review an award of compensation the basis for the several grounds of attack upon the award is that the employee was not injured during the course of his employment. The respondent commission in its answer concedes that petitioner's statement of facts is correct, and the following résumé is taken from the petition.

Thomas O'Brien, a fifteen year old schoolboy, was employed by the Red Arrow Bonded Messenger Corporation as a bicycle delivery messenger for four hours a day after school. His pay was on a commission basis, with a minimum guarantee of 25 cents an hour, or $1 for a four-hour day. On this part-time basis he was allowed no time off for meals, and he punched a time card at the beginning and end of each errand. At the close of each day he had instructions to turn in the uniform and bicycle supplied to him by the employer at the main office located at 309 Mason street between Geary and O'Farrell streets in San Francisco. On the fourth day of his employment O'Brien was instructed to deliver a package to Sea Cliff and one to 43rd avenue between Balboa and Cabrillo streets, and return "as soon as possible". After delivering the last package to the latter address the direct and the shortest way back to the office would have been down Geary street to Mason street; O'Brien went down Fulton street, and when he got to Masonic avenue he branched south of the direct route towards his home in order to get some food. He was then sixteen blocks south of the direct route of Geary street which would have led him back to the place of employment. After eating at home, he started back to the office and collided with an automobile at Market and Brady streets. He received a brain concussion, a fracture of the cervical vertebra and body bruises. The Industrial Accident Commission first dismissed the matter for lack of jurisdiction, but on a rehearing found that O'Brien had sustained injury in the course of and arising out of his employment; he was granted $4.17 a week until the termination of his disability in addition to the medical expenses incurred.

[1, 2] The question presented for review is whether the messenger's injuries arose out of and in the course of his employment or whether he was at the time on a detour for purposes personal to himself. The respondent commission seeks to sustain the award upon the ground that, since the messenger was on his way to the employer's office to return the badge and bicycle pursuant to instructions, he must be deemed to have been in his employer's service when the injuries occurred. The petitioner contends that the deviation to procure a meal having been unauthorized and contrary to instructions, it can not be held to have been within the scope of his employment, and that the injuries did not arise out of or in the course of his employment. We are in accord with the position taken by the petitioner. The argument of respondent resolves itself to this: that, conceding the deviation from the course of employment when the messenger went sixteen blocks out of his way to get a meal, that deviation ended and the employment relation was renewed immediately upon his turning from his wayward course and facing his progress in the direction of his place of employment. This they say is so because he was carrying the uniform and using the bicycle which he was required to leave at the office at the close of each day's service. We are not impressed with the argument. It could as well be applied to cover the time when the employee was progressing away from his direct course, because it could then be said that he intended to obey the instructions to return these articles as soon as he had eaten his dinner. The doctrine of deviation does not hang on the intention of the employee alone. The injury occurred at a point approximately twelve blocks south of the direct line of travel from the place of his errand's end to the place of his employment. These facts—all admitted by the parties—bring the case within the rule stated in I Campbell on Workmen's Compensation, section 190, as follows: "Where an employe on a special errand for his employer deviates from the regular and direct route for purposes of his own and is injured, such injury does not arise out of the employment. It is not compensable unless caused by an instrumentality of the employment, or by a circumstance incidental to its use and not by reason of the deviation. The deviation must be the proximate cause of the injury."

Mountain v. Industrial Accident Comm., 92 Cal.App. 176, 267 P. 913, is cited in support of the text. It is directly in line with the case presented in this record. Numerous authorities to the same point are cited in the Mountain case and further citation at this time is not necessary.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

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39 Cal.App.2d 671

PEOPLE v. GIBBONS.

Cr. 3338.

District Court of Appeal, Second District, Division 2, California.

June 26, 1940.

1. Gaming ⚷98(5)

Evidence was sufficient to sustain conviction for keeping and occupying a room with paraphernalia for the purpose of recording and registering wagers on horse races. Pen.Code § 337a, subd. 2.

2. Gaming ⚷97(1)

Where evidence was sufficient to establish that premises in question were occupied for the purpose of registering wagers on horse races in violation of statute, the trial court did not err in admitting testimony concerning conversations between defendant and police officer who went to premises. Pen.Code, § 337a, subd. 2.

3. Criminal law ⚷535(2)

In prosecution for keeping premises for the purpose of recording and registering wagers on horse races, it was not necessary for the prosecution to prove the corpus delicti beyond a reasonable doubt before receiving evidence of admissions or confessions, but a prima facie showing only was necessary. Pen.Code, § 337a, subd. 2.

4. Criminal law ⚿1023(9)

Where defendant was placed on probation without the rendition of a judgment, a purported appeal from a judgment was required to be dismissed.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

John A. Gibbons was convicted of violating subdivision 2 of section 337a of the Penal Code in that he kept and occupied a room with paraphernalia for the purpose of recording and registering wagers on horse races, and he appeals from the judgment and from an order denying his motion for a new trial.

Appeal from judgment dismissed and order affirmed.

Donald MacKay, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of violating subdivision 2 of section 337a of the Penal Code in that he kept and occupied a room with paraphernalia for the purpose of recording and registering wagers on horse races. At the trial before the court without a jury he was found guilty and now prosecutes this appeal from the order denying his motion for a new trial.

[1] Defendant contends that the evidence is insufficient to sustain the conviction. Police Officer Newton testified that he went to the building at 716 West Third street in Los Angeles in the front part of which was a cigar store, the rear part being a large vacant room. Defendant was seen by the officer with his back toward him at a counter with a telephone receiver in his hand. Defendant was telephoning and the officer heard him say, "Two dollars win, High End, seventh race at Rockingham", whereupon he referred to a sheet described by the officer as a sheet used for overnight entries, a sheet which gives the numbers assigned to horses in the races for the day. The officer then heard the defendant say, "No. 141, Two dollars win, Abbot's Hour, same race". Defendant checked the sheet and said, "Horse 138". As defendant referred to these numbers he wrote the number 141; after he repeated, "High End" he wrote the number 2. The officer saw him write 138 and 2 and overheard him say, "Two dollars, win, on Rythehley". He referred to the sheet and wrote 137 and 2. The officer examined the sheet and found the numbers 141, 138 and 137 upon it with the names above mentioned. Officer Newton then reached over and took the receiver from the hand of defendant and heard a voice on the telephone say, "Golden Mesh, fifth at Hawthorne, to win and Busse Trumpet, fifth at Hawthorne to win". The party at the other end of the receiver then said, "O. K. Jack" and hung up. The officer testified that he checked the names and numbers of the horses and found that Golden Mesh was the name of a horse in the fifth race at Hawthorne, Illinois, and that Busse Trumpet was the name of a horse running in the same race at the same place. In defendant's trousers pocket Officer Newton found A. B. C. markers which, according to his testimony, are used to record the names of race horses and data concerning wagers made on races. The name "Jack" appeared at the top of the markers. A pad used in recording wagers and a run-down sheet were found on the counter.

Upon his arrest defendant was searched and a key was found in his possession which turned the lock of the front door of the premises. Concerning a conversation with defendant, Officer Newton testified: "I asked him whose place it was and he said it was his, but he didn't work there—the fellow that was running the place went out to eat lunch. And I said, 'Well, you are Jack, aren't you?' he said, 'Yes.' And I said, 'Well, that is what this fellow said over the telephone.' And about that time the telephone rang and asked for 'Jack.' * * * So after I had the telephone conversation, he started saying to give him a break—that he was on probation now and he would have to go back to jail if we took him in; that he would close the place up and leave Third street and never be seen again."

We are satisfied that the evidence is sufficient to sustain the conviction.

[2, 3] Defendant claims that the corpus delicti was not established and that the trial court erred in admitting testimony concerning the conversation between Officer Newton and defendant. There is no merit in this contention. The evidence is sufficient to establish that the premises in question were occupied for the purpose of registering wagers on horse races. Moreover, it

was not necessary for the prosecution to prove the corpus delicti beyond a reasonable doubt before receiving evidence of admissions or confessions. A prima facie showing only was necessary. People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571; People v. Black, 111 Cal.App. 90, 295 P. 87.

[4] A purported appeal from the "judgment" appears in the record. Since defendant was placed on probation without the rendition of a judgment such appeal must be dismissed and it is so ordered. The order denying the motion for a new trial is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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39 Cal.App.2d 527

WILSON v. NICHOLS et al.

Civ. 11286.

District Court of Appeal, First District, Division 1, California.

June 19, 1940.

Rehearing Denied July 19, 1940.

1. Quieting title 🔑44(1, 2, 4)

In suit to quiet title, defendants could properly introduce into evidence, under statute, deed on which they relied, and deed, which was recorded before deed under which plaintiff claimed title was executed, established a prima facie case, but when plaintiff produced unequivocal testimony that deed was a forgery, burden of going forward with evidence returned to the defendants. Code Civ.Proc. § 1951.

2. Appeal and error 🔑837(1)

In determining whether a certain deed under which defendants claimed record title in suit to quiet title was a forgery, the reviewing court could properly consider obvious erasures on back of deed and facts that words had been typed with two different sizes of type and that other words had been written over.

3. Deeds 🔑207

Evidence showed that deed relied on by defendants in support of their claim of record title in one defendant was a forgery.

4. Vendor and purchaser 🔑233

A certain deed could not be relied on by defendants in support of their claim of record title in one defendant where deed was not recorded, and grantor subsequently admittedly conveyed to plaintiff's predecessor in interest who did record his deed.

5. Taxation 🔑816

A tax deed which at most established in one grantee but a one-half interest in realty could not sustain decree quieting entire title in grantee's sole heir.

6. Adverse possession 🔑13

Payment of taxes is only one element in proving title by "adverse possession" and another and fundamental requisite is that the claimant must have been in possession of the property and that the possession was by actual, open, and notorious occupation.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

7. Adverse possession 🔑114(1)

In suit to quiet title, evidence was insufficient to sustain title in one defendant by adverse possession.

8. Estoppel 🔑37

An agreement which amounted to a release or quitclaim of whatever rights plaintiff had in a particular lot in 1932 could not be interpreted as intending to pass an after-acquired independent title to property and did not "estop" plaintiff from claiming any interest in lot where lot was not conveyed to plaintiff's predecessor in interest until March, 1935, and predecessor conveyed to plaintiff in August, 1935.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Suit to quiet title by Jerrie Wilson against W. F. Nichols, Catherine A. McKenna, and others. From a decree quieting the title of defendant Catherine A. McKenna, plaintiff appeals.

Reversed.

Harmel L. Pratt, of Los Angeles, for appellant.

Catherine A. McKenna, in pro. per., of Los Angeles, for respondents.

PETERS, Presiding Judge.

Plaintiff appeals from a decree quieting the title of defendant Catherine A. McKenna to a tract of land in the city of Los Angeles.

The task of this court in considering this appeal has been rendered most difficult because of the failure of counsel, and particularly because of the failure of respondents, to prepare proper briefs. Nowhere in respondents' several briefs is there a straightforward statement of their position or claims. Their main brief lacks cohesion and coordination. Both counsel frequently make reference to factual matters without transcript references. The headings and subheadings in respondents' brief do not comply with the spirit or purpose of rule VIII, section 2. Such practices are not to be condoned.

The tracing of the title here involved has been made difficult by reason of the fact that various people involved on both sides of this controversy used several different names, and because there are many deeds running to these parties, many of them completely outside the chain of title. Each of the litigants charges the other with fraud and trickery. There is reason to question the tactics of both litigants. The trial court attempted to keep counsel within reasonable limits in their proof, but the record is full of deeds and judgment rolls in various actions whose connection with the title to this property is not apparent, and which neither counsel attempts to explain.

Plaintiff sought to establish record title in himself. He traced the title from the original Spanish patent down to 1887, at which time title was in William Paterson. On September 13, 1902, Paterson and his wife conveyed the property to the Beach Land Company. In 1911 Edward G. Geldmacher, in an action in which the Beach Land Company defaulted, quieted title to the property in himself. The circumstances surrounding the securing of that decree were, to say the least, suspicious. On March 27, 1935, Edward G. Geldmacher and Edward E. Geldmacher, his son, conveyed the property to E. M. Shannon, who in turn conveyed to plaintiff on August 23, 1935. Whether the Geldmacher who was the plaintiff in the Beach Land Company case was the same Geldmacher who conveyed to Shannon does not clearly appear.

As already indicated, the trial court quieted title in defendant Catherine A. McKenna. Defendants W. F. Nichols, W. P. Nichols and Winifred P. McKenna are all the same person, she being a daughter of Catherine A. McKenna. Defendant J. Irving McKenna is the husband of Catherine A. McKenna, and defendant W. J. Williams is a lessee of Catherine A. McKenna.

Defendants not only pleaded a record title in Catherine A. McKenna, but also pleaded title based on adverse possession, and that the plaintiff was estopped from claiming title by reason of a certain agreement entered into between the parties March 22, 1932. The trial court found in favor of Catherine A. McKenna on all the grounds urged.

Defendants, in support of their claim of record title in Catherine A. McKenna, rely on several different deeds. The first of these is a deed, the original of which Catherine A. McKenna testified she had lost. What purports to be a photostat of this deed was introduced into evidence. It is dated November 27, 1912. It names L. J. Zabolio, Edward G. Geldmacher, also known as Edward C. Goldmacher and Edward E. Goldmacher, and J. H. Smith as grantors. This deed purported to convey two lots in San Diego, and the lot in Los Angeles here in question, to Henry B. Hunt as grantee. It was not recorded until January 22, 1935, and was then recorded at the request of Catherine A. McKenna. In as much as Geldmacher did not convey to Shannon, through whom plaintiff claims, until March of 1935, this deed to Hunt recorded in January of 1935 takes priority over the Shannon deed. Hunt conveyed to W. P. Nichols, and she conveyed to Catherine A. McKenna. Plaintiff claims that the deed is a forgery. In support of this contention he called as his witness Hedley Beesley, the notary public whose name appears on the deed as having taken the acknowledgment of the three grantors. He testified that he had been a notary public in 1912, and that he kept a book of all of his notarial acknowledgments; that his records showed that on November 27, 1912, he had taken the acknowledgment of L. J. Zabolio to a deed in which Nate O. Sessions (not Hunt) was named as grantee; that the deed described two lots in San Diego and did not describe the property here in question; that that was the only acknowledgment taken by him on that day; that he did not know Geldmacher or Smith at that time, nor did he take their acknowledgments on that date; that he knew Zabolio well; that the signature on the acknowledgment was his; that the various words written on the acknowledgment were also written by him; that he was sure that he had not acknowledged a second deed on the date in question; that he could clearly remember the occasion, and that on that date Zabolio alone came to his office.

Edward G. Geldmacher, one of the grantees in the deed and the person through whom plaintiff derives title, was also called by plaintiff. On direct examination he stated that he did not know Henry B. Hunt, and that he had never sold property to Hunt. When shown the deed, he stated he had never owned any property in San Diego, and positively stated that he had not executed the deed in question. On cross-examination when asked to look at the signature on the deed he stated: "That resembles mine a great deal." He was then asked: "You would not say it was not your signature? A. It resembles mine * * *. I would not say. I know I never signed anything like that in my life." It was the theory of plaintiff that Geldmacher's signature had been traced on the deed.

[1-3] Defendants did not call Hunt as a witness or explain their failure to do so. They offered no evidence at all of the due execution of the deed other than by the mere production of the document. Of course, under section 1951 of the Code of Civil Procedure, defendants properly could introduce the deed into evidence. That established a prima facie case. But when the plaintiff produced unequivocal testimony that the deed was a forgery, the burden of going forward with the evidence returned to the defendants. This burden they have failed to sustain. According to the uncontradicted evidence the deed is a forgery. Moreover, physical examination of the deed itself discloses some very suspicious circumstances. On the back of the deed there have been obvious erasures, words have been typed with two different sizes of type and other words have been written over. This court may properly consider these matters. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220. Obviously, therefore there is no evidence to sustain record title in Catherine A. McKenna based on this deed.

[4] Defendants also place some reliance on a deed dated November 23, 1912, purporting to be signed by Edward G. Geldmacher and naming John E. Phillips as grantee. John E. Phillips was one of the assumed names of J. H. Smith. Geldmacher denied signing this deed. This deed does not support defendants because it was not recorded, and later Geldmacher admittedly conveyed to plaintiff's predecessor in interest, who did record his deed.

[5] Defendants also claim through a tax deed to the premises running to Edward E. Geldmacher and J. H. Smith, dated June 17, 1910, and recorded by Mrs. McKenna January 22, 1935. Attached to this deed is an unacknowledged deed from Smith to Geldmacher. Mrs. McKenna is now the sole heir of Smith. Plaintiff contends that as heir of Smith Mrs. McKenna in some collateral litigation disclaimed any interest in the matter. However that may be, it is clear that at most the tax deed establishes in Smith but a one-half interest in the property. Obviously, therefore, it cannot sustain the decree quieting the entire title in Mrs. McKenna. It should also be mentioned that Geldmacher testified, and was uncontradicted on this point, that he advanced the money for Smith to purchase the tax title.

Defendants also make some mention in their briefs of several other deeds through which they claim. Apparently these deeds were not recorded, and for that reason are immaterial.

[6, 7] The testimony is also far from sufficient to sustain title by adverse possession. This claim was predicated on the contention that either Smith or Mrs. McKenna had paid all taxes assessed against the property from 1910 to date. It may be assumed for the purposes of this appeal that the evidence is sufficient to show that fact, although the evidence is not as clear as might be desired. But payment of taxes is only one element in proving title by adverse possession. Another and fundamental requisite is that the claimant must have been in possession of the property, and that such possession must be by actual occupation, which is open and notorious. 1 Cal.Jur. p. 522, sec. 22; sec. 322, Code Civ. Proc. The only evidence referred to by defendants to sustain the finding of possession is that of Mrs. McKenna. She testified that she had been familiar with the lot for many years; that in 1910 the

lot was a great part of the time under water; it was then a duck pond; that in 1915 or 1916, by reason of certain flood control projects, the lot was partially drained; that in 1918 new streets were put through near the lot; shortly thereafter J. H. Smith leased the lot to Varney for a signboard and Smith was paid about $10 per year; about 1925 Varney leased the sign to Foster & Kleiser, and thereafter the sign was removed. There was also evidence that in 1934 Mrs. McKenna leased the lot to Williams, and that in 1935 (the cause was tried in March, 1936) Williams installed an oil pipeline in the lot. Defendants do not cite a single case to support their contention that this evidence is sufficient to support the finding that Mrs. McKenna and her predecessors have been in exclusive possession of the land for over five years. It is true that she testified that in 1918 Smith "leased" the lot to Varney and received $10 a year. She testified the sign was still up in 1925, but there is no testimony that Varney continued to pay the $10 per year to Smith, or that from 1918 to 1925 Varney continued to hold under Smith. Moreover, it is very doubtful whether the mere construction of a signboard on one corner of a lot is sufficient possession to satisfy the requirements of the code. Huling v. Seccombe, 88 Cal. App. 238, 263 P. 362; Secret Valley Land Co. v. Perry, 187 Cal. 420, 202 P. 449; Madson v. Cohn, 122 Cal.App. 704, 10 P. 2d 531.

There is one other factor concerning the alleged title by adverse possession that should be mentioned. According to the uncontradicted testimony of Geldmacher, Smith agreed with Geldmacher to pay the taxes on the lot and to handle it for Geldmacher, presumably for a one-half interest therein. Any payment of taxes by Smith, therefore, was at least partially for the benefit of Geldmacher, and any possession of Smith was with the consent and for the benefit of Geldmacher, at least as to one-half the lot. These matters probably will be clarified on the retrial.

[8] The trial court also found that plaintiff made, executed and delivered to Mrs. McKenna on March 22, 1932, a certain agreement, and that the lot herein involved is one of the parcels of land mentioned in that agreement. The agreement in question was entered into between J. Truitt Bustamente and Jerrie Wilson on the one side, and Catherine A. McKenna on the other. The agreement recites that a full settlement and release has been made between the parties in reference to certain lands (which we may assume included the lot here in question), and that all of such lands in dispute have been conveyed to W. P. Nichols, with exceptions not here important, and then declares that in consideration of the sum of $500 paid to Jerrie Wilson by Catherine A. McKenna "the said parties hereto, and each of them, for themselves, their heirs or assigns, hereby agree and warrant that there are no outstanding deeds made by either of them, except those that appear of record, conveying said lands, and that they or either of them will not assert directly or indirectly, any adverse claim in or to any of the said lands, in their own name or in the name of any other person, and that they and each of them agree, that they or either of them will execute or cause to be executed, any and all further instruments, releases or disclaimers necessary to carry this agreement into effect". The trial court evidently believed that this agreement estopped plaintiff from claiming any interest in the lot. So far as the lot here concerned is involved, the agreement amounted to a release or quitclaim of whatever rights Jerrie Wilson had in the lot in 1932. At that time, according to plaintiff's present proof, he had no interest in the lot. Geldmacher did not convey to Shannon until March 27, 1935, and Shannon conveyed to plaintiff in August of that year. The agreement cannot be interpreted as intending to pass an after-acquired independent title to the property. See 58 A.L.R. 360; Rosenthal v. Silveira, 42 Cal.App. 637, 184 P. 58. No evidence was offered by respondents that this was the intent of the parties, and certainly the agreement shows no such intent on its face.

The tactics employed by the parties to this appeal and their predecessors in seeking to acquire title to this lot are not to be commended. It is to be hoped that on the new trial both sides will make a straightforward declaration of their position and introduce evidence to sustain their respective contentions.

The decree appealed from is reversed.

We concur: KNIGHT, J.; WARD, J.

39 Cal.App.2d 572

BENNETT v. JOHANSEN et al.

Civ. 11361.

District Court of Appeal, First District, Division 2, California.
June 20, 1940.

1. Appeal and error 🔑935(3)

Where order allowing execution to issue five years after judgment was entered recited that motion came on regularly for "further testimony" and that the court having heard the testimony made order granting the motion, and testimony was not brought up on appeal, recitals in order would be presumed to be true, and reviewing court would presume that evidence taken was sufficient to support order. Code Civ. Proc. §§ 685, 953a.

2. Execution 🔑73

A defect in the form or in the substance of an affidavit required by statute to accompany a motion to issue execution after five years from entry of judgment does not affect the jurisdiction of the court to hear the motion, but it is sufficient ground for denial of the motion unless it is cured by evidence taken at the trial. Code Civ.Proc. § 685.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action on a note by O. M. Bennett against Odin Johansen and another. From an order granting plaintiff's motion that execution issue five years after judgment was entered, named defendant appeals.

Affirmed.

Austin Lewis, of San Francisco, for appellant.

Edgar R. Peixotto, of San Francisco (Robert E. Hatch, of San Francisco, of Counsel), for respondent.

NOURSE, Presiding Justice.

The defendant Odin Johansen in a suit upon a promissory note appeals from an order made after judgment granting plaintiff's motion that execution issue after five years. The question raised by appellant is whether the affidavit filed with the notice of motion "sets forth reasons for granting said motion sufficient in the due discretion of the court making the order appealed from".

For the reasons hereinafter stated we cannot agree with appellant that this question is here for decision. The appeal is taken under section 953a, Code of Civil Procedure. The transcript contains the judgment roll in the main case, the notice of motion for execution, the affidavit of plaintiff in support of the motion, and the order granting the motion. This was all that the appellant asked the clerk to make up, and the transcript complies with the request in every detail. But, it appears from the order appealed from that the motion noticed for October 10, 1939, was granted on November 8, 1939, when it came on "regularly this day for further testimony"; and that "the court having heard the testimony" made the order granting the motion. None of this testimony has been brought up and none was requested by appellant either by notice to the clerk or by a proposed bill of exceptions.

[1] The recitals made by the trial court in its order will be presumed to be true. We will also presume that the evidence taken upon the hearing was sufficient to support the order. We may not conclude upon the bare statement of counsel that the trial court abused its discretion in granting the motion.

[2] The applicable statute is section 685 of the Code of Civil Procedure which provides that the supporting affidavit shall set "forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion." A defect in the form or in the substance of the affidavit does not affect the jurisdiction of the court to hear the motion and the appellant does not make any such claim here. It is a sufficient ground for a denial of the motion unless it is cured by evidence taken at the hearing. This is the rule of McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225, where numerous authorities are cited upon the general propositions advanced by the appellant. But particularly pertinent to the narrower question here involved is the ruling of that case that the defects in the supporting affidavit, may be cured by other affidavits used at the hearing, and that it was an abuse of discretion to deny the motion because of the defects in the original affidavit.

Here we are asked to reverse the order upon the ground that the trial court abused its discretion in refusing to do what in that case was held to be an abuse of discretion. Reverting to the earlier statement of the presumptions available, we must here presume that the evidence taken at the hearing, like the affidavits used in the McClelland case, cured all the asserted defects in the original affidavit. We must also presume, in the absence of a contrary showing, that this evidence was all taken without objection.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

39 Cal.App.2d 606

BLACK v. BROWNE et al.

Civ. 11995.

District Court of Appeal, Second District, Division 1, California.

June 22, 1940.

As Amended Aug. 5, 1940.

1. Appeal and error 🔑672

When a complaint states a cause of action, the face of the record shows an abuse of discretion in sustaining a demurrer without leave to amend.

2. Pleading 🔑225(1)

It is error to sustain a general demurrer without leave to amend unless it appears that the complaint is incapable of amendment in a radical particular.

3. Pleading 🔑225(1)

Where pleading denominated a "third amended complaint" was plaintiff's first effort to set up a cause of action against the particular defendants, exclusively, for damages alleged to have resulted from loss of wages based on theory that defendants had conspired to "blacklist" plaintiff and deprive him of employment, plaintiff was entitled to an opportunity to amend after the sustaining of a demurrer.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Francis Harrison Black against George E. Browne and others for damages alleged to have resulted from a loss of wages. From a judgment based on an order sustaining a demurrer to the complaint without leave to amend, plaintiff appeals.

Judgment based on the order sustaining demurrer affirmed, but portion of judgment based on the order denying leave to amend reversed, with directions.

Lee Stanton, of Los Angeles, for appellant.

Bodkin, Breslin & Luddy, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment based upon an order sustaining a demurrer to the plaintiff's complaint without leave to amend.

The original complaint asked for declaratory relief and damages against the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Hollywood and Culver City Studio Local No. 37 thereof, and certain officials of said unions, both as officers and individuals, as defendants in said action. A demurrer to said complaint was sustained with leave to amend. A first amended complaint followed, to which a demurrer was sustained with leave to amend. In a second amended complaint setting up two causes of action, a demurrer was sustained with leave to amend as to the second count only. A third amended complaint was then filed which was limited to one cause of action for damages alleged to have resulted from a loss of wages. Briefly, it was alleged that defendants in their individual capacity, conspired to "black list" plaintiff and deprive him of employment. The third amended complaint was essentially different, notably in the fact that the unions named as defendants in the former complaints were eliminated as parties defendant, and the alleged cause of action was directed against certain individuals only.

It is from the judgment based upon an order sustaining defendants' demurrer to this last-mentioned third amended complaint, without leave to amend, that plaintiff appeals.

Upon submission for decision, of the issues raised by defendants' demurrer, plaintiff specifically requested leave to amend in the event the demurrer was sustained.

It is urged on appeal that the judgment based upon an order sustaining the demurrer, in the circumstances above recited, was an abuse of discretion.

Respondents submit that the questions presented are, First: "whether third parties are liable to an employee for preventing his employment by a particular employer, in the absence of a contract of employment (other than an employment at will) where the third parties did not use unlawful means such as force, fear or intimidation"; and second: whether "the appellant so stated his case as to sufficiently show facts giving rise to a cause of action".

The questions sought to be raised by respondents and to be settled in connection with the within appeal are beside the issue. The sole valid question presented by the appeal is, whether the judgment based upon an order from which plaintiff appeals was an abuse of discretion.

[1,2] It is well settled that when the complaint states a cause of action the "face of the record would show an abuse of discretion" in sustaining a demurrer without leave to amend. Schaake v. Eagle, etc., Can Co., 135 Cal. 472, 480, 63 P. 1025, 67 P. 759. It is equally well settled that it is error to sustain a general demurrer without leave to amend unless it appears that the complaint is incapable of amendment in a radical particular. 21 Cal.Jur., p. 121, and cases there cited.

[3] The demurrer was general, notwithstanding nine specifications set out in particular wherein it was alleged that the complaint was uncertain, ambiguous and unintelligible. Plaintiff was denied the opportunity to correct any of these alleged defects. It should be noted that although denominated the "third amended complaint", nevertheless it was apparently plaintiff's first effort to set up a cause of action against these particular defendants exclusively. Whether plaintiff's complaint in its present form and substance states a cause of action need not be determined. It is sufficient to note that plaintiff was entitled to the opportunity to amend as requested, for it cannot be determined from the present state of the record that plaintiff was seeking the legally impossible. As was declared in Adkins v. San Francisco, 8 Cal. App. 2d 620, 47 P.2d 751, "From a reading of the complaint in question, it appears that plaintiff was attempting in good faith to state a cause of action. It is not at all clear that plaintiff could not have amended and obviated the objections raised by the demurrer. While defendants may be correct in their contention that plaintiff could not have amended so as to state a cause of action as to certain defendants, it cannot be said that plaintiff could not have amended so as to state a cause of action as to one or more of said defendants."

For the foregoing reasons the judgment based upon an order sustaining the demurrer to plaintiff's complaint is affirmed, but that portion of the judgment based upon an order denying leave to amend is reversed, with direction that such judgment based upon an order be modified to enable plaintiff to amend.

I concur: YORK, P. J.

WHITE, J., deeming himself disqualified, did not participate.

Order Amending Remittitur, Aug. 5, 1940.

It is further ordered that the remittitur in the above entitled cause shall not be transmitted to the clerk of the Superior Court until the expiration of sixty days from the date hereof.

39 Cal.App.2d 634

CONNECTICUT MUT. LIFE INS. CO. v. MOST et al.

Civ. 6393.

District Court of Appeal, Third District, California.

June 24, 1940.

1. Judges 🔑21

The statutory and constitutional provisions prohibiting judge of court of record from practicing law do not affect the standing of an attorney as such, and their purpose is directed solely toward judges of courts of record. Code Civ.Proc. §§ 171, 172; Const. art. 6, § 18.

2. Judges 🔑21

A violation of constitutional and statutory provisions prohibiting judge of court of record from practicing law is not an offense against the profession of the law, but rather against the judicial office. Code Civ. Proc. §§ 171, 172; Const. art. 6, § 18.

3. Judges 🔑21

The fact that one of the attorneys representing mortgagee in mortgage foreclosure action was judge of police court who had been assigned by the judicial council of the state to sit as judge of superior court did not invalidate judgment rendered by an-

other judge of the same superior court, since violation, if any, of constitutional and statutory provisions prohibiting judge of court of record from practicing law was as a judicial officer rather than as a lawyer. Code Civ.Proc. §§ 171, 172; Const. art. 6, § 18.

4. Mortgages ⚷459(1)
Witnesses ⚷16

Where complaint in mortgage foreclosure action alleged that principal sum of note was wholly due and payable, that no part thereof had been paid, and that $343.75 was paid in January, 1936, on an installment of interest of $625 that fell due in December, 1935, answer denying every allegation in complaint except admitting that $343.75 was paid in January, 1936, as partial payment of interest due in December, 1935, was insufficient to raise issue of payment, and justified denial of subpœna duces tecum requiring production of books sought for purpose of showing payment of amount due.

5. Mortgages ⚷306

Where closing of transaction whereby borrowers were to secure renewal of loan was held up and then defeated by failure of borrowers to pay escrow expenses and counsel fees in accordance with terms of escrow and loan application and pending the negotiations, mortgagee, in accordance with its established custom of collecting interest at new rate pending completion of transaction, collected interest at higher rate, mortgagee's acceptance of interest at new higher rate did not operate as an "extension" of the existing mortgage.

See Words and Phrases, Permanent Edition, for all other definitions of "Extension".

6. Equity ⚷66

Equity demands that those who seek relief at its hands shall have done or offered to do what is fair and equitable before being entitled to relief.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Connecticut Mutual Life Insurance Company against I. Most, Sophie Most and others to foreclose a mortgage. From an adverse judgment, the named defendants appeal.

Affirmed.

Louis Most, of Los Angeles, and Louis T. Fletcher, of South Pasadena, for appellants.

Morin, Newell, Brown & Hamill, of Pasadena, for respondent.

Mr. Justice pro tem. GEARY delivered the opinion of the court.

On May 28, 1936, the plaintiff and hereinafter designated respondent, a Connecticut corporation, filed an action against appellant and numerous codefendants to foreclose its mortgage upon certain real property in Los Angeles county. The complaint alleged that on or about June 18, 1928, the defendants I. Most and Sophie Most, his wife, and B. Chazan and Pearl Chazan, husband and wife, executed and delivered to plaintiff their promissory note for $25,000, payable five years after date, interest at 5 per cent, payable semi-annually, and at the same time, and as security therefor, executed a mortgage upon the real property owned by defendants and described therein; that the principal sum of $25,000 became due and payable on June 18, 1933; that no part thereof was paid; that interest was fully paid to June 18, 1935, and that a portion of the instalment of interest due December 18, 1935, was paid on January 28, 1936, leaving a balance of $281.25 of interest due and unpaid; that the plaintiff had to pay general and special taxes upon the mortgaged property for the fiscal year 1935–1936, in the total sum including penalties of $444.98. It was further alleged that certain named defendants claimed to have liens or other interests in the property; that the same were subject to the mortgage of respondent, and it thereupon prayed judgment against defendants for the sum of $25,000 with interest and other sums alleged due according to the terms of the mortgage, plus $1,000 attorney's fees and costs. To the complaint, appellant I. Most filed his answer wherein he admitted his execution of the note for $25,000 on June 18, 1928, together with the mortgage securing same; alleged that on that date, and for a year prior thereto he had no interest in the mortgaged property, having conveyed his interest therein to the defendant and appellant Sophie Most, his wife, and that he executed the note in question at the request of defendant Ben Chazan, merely as an accommodation maker. He thereupon prayed that he be relieved of any enforceable contribution to his co-makers. A motion for summary judgment was thereafter granted against defendant I. Most.

Appellant, by answer to the complaint, generally and specifically denied each and every allegation of the complaint, except to admit that the sum of $343.75 was paid to respondent on January 28, 1936, as a partial payment of the interest due on December 18, 1935; alleged that she had paid, and therefore denied that any sum was due for a foreclosure search of title, and denied that $1,000 was a reasonable attorney's fee. As a separate defense she alleged the note sued upon was not in default for the reason that on June 10, 1933, a new note in the sum of $25,000, secured by deed of trust, was "entered into" between the plaintiff and the signers of the original note; that the new note provided for payment of interest at the rate of 5½ per cent in lieu of 5 per cent as in the former note; and that plaintiff had thereafter accepted interest at that rate, and that the deed of trust had thereafter been "looked upon by the parties hereto" as a first lien upon the mortgaged property. That the new note and deed of trust, although not recorded, obligated the defendants to pay interest at 5½ per cent semiannually, at which rate they had paid interest from June 10, 1933, to December 18, 1935; and that the same was a first and an equitable lien on the real property by reason of respondent's accepting the interest due in accordance with the terms of the new note. Appellant thereupon prayed that foreclosure be denied; that the trust deed executed to secure the new note be adjudged a lien on the property; that in the event the court should hold that the original mortgage was a valid first lien, that it should adjudge there is a valid and existing agreement extending the note and mortgage for five years.

The defendants Chazans and the Standard Furniture Company sued as Four Doe Company, by answer admitted each and all of the allegations of the complaint; and other subsequent lienholders either admitted priority of respondent's lien or defaulted, and their defaults were duly entered.

The court found generally in accordance with the allegations of the complaint; that in September, 1933, defendants Most and Chazan applied for a new loan, and that thereafter, on or about April 25, 1934, they executed a new note dated June 19, 1933, for $25,000, with interest at 5½ per cent, together with a deed of trust to secure payment thereof, and delivered both to the Security Title Insurance and Guaranty Company, of Los Angeles, as escrowholder. The court further found that the note and deed of trust dated June 18, 1933, were never delivered to the respondent herein, and were never recorded, and the deed of trust never became a first lien upon the property covered by the mortgage; that defendants had paid interest on $25,000 at 5½ per cent from June 18, 1933, to June 18, 1935, in lieu of interest at 5 per cent as provided in the original mortgage note, and that they are entitled to a credit therefor on account of the interest paid at 5½ per cent instead of 5 per cent, in the sum of $250. The court decreed foreclosure of the original mortgage and the payment of $27,660.82 principal and interest, $1,000 attorney's fees and costs. Judgment in accordance with the findings was thereafter filed and entered. From the judgment appellant presents several grounds as the basis for her appeal. These will be considered and determined in the order in which they appear in the briefs.

In the instant action respondent is and was represented by the law firm of Morin, Newell, Brown & Hamill, appearing by Kenneth C. Newell of Pasadena, California. Newell, at the time of the trial, was a duly qualified and acting police judge of Pasadena. As such, pursuant to the request of Superior Judge Frank C. Collier, the judge presiding herein, Newell was assigned by the judicial council, on December 30, 1936, to sit as a judge pro tempore of the superior court in Los Angeles county, from January 2, 1937, to December 31, 1937, in such matters as might be assigned him from time to time by the presiding judge of department Pasadena "A" of said court. Thereafter, between January 18 and June 15, 1937, Judge Newell sat for twenty-three days as a judge pro tempore of the said superior court. In addition, it further appears that on July 21, 1937, at 10 a. m., when the instant matter was called for trial, he was sitting in a probate proceeding, and the trial of the instant action was continued for that reason until 2 p. m. of the same date. Affidavits of bias and prejudice were filed herein against Judge Frank C. Collier, the trial judge, on the ground that appellant could not obtain a fair trial by reason of the bias and prejudice resulting from Judge Collier's "interest in and relationship to said Honorable Kenneth C. Newell". This issue was properly determined adversely to appellant. Indeed, appellant's counsel so admitted. The question of the bias and prejudice of the trial judge is not presented herein. Adopting the language of appellant's reply brief, the first and "main" question presented is: May a judge of a police court, who, in addition to sitting as such police judge, is allowed to practice law, and who is assigned by the judicial council of this state to sit as a judge of the superior court, continue to practice law in the superior court after such assignment?

The authority or legality of the judicial council to assign a police judge to sit as a judge of the superior court by virtue of such assignment is not questioned. The appellant does contend, however, that it is contrary to the provisions of our Constitution and sections 171 and 172 of the Code of Civil Procedure, and against public policy for a police judge acting as judge of the superior court by assignment to practice before the same department of the superior court in which he sits as judge from time to time. In other words, that in view of the constitutional and statutory provisions that a judge of a court of record shall not practice law, the assignment of Judge Newell to the superior court rendered him ineligible to represent the respondent herein. Hence, that this action in which Judge Newell appeared as attorney for the respondent was instituted and prosecuted without authority, and in violation of law, and the judgment rendered is void. Article VI, section 18 of the California Constitution provides in part: "* * * No justice or judge of a court of record shall practice law in or out of court during his continuance in office; * * *."

The Code of Civil Procedure, section 171, provides: "* * * No justice, or judge of a court of record, or county clerk, shall practice law in any court of this state, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings, before any department of the state or general government, or courts of the United States, during his continuance in office."

And section 172, supra, provides: "No justice, judge, or other elective judicial officer, or court commissioner, shall have a partner acting as attorney or counsel in any court of this state."

[1, 2] The provisions of these sections, however, have not the sweeping effect appellant claims for them. They do not in any way affect the standing of an attorney as such; their clear purpose is directed solely toward judges of courts of record. A violation of these provisions is not an offense against the profession of the law, but rather against the judicial office. As was stated in the case of State Bar of California v. Superior Court, 207 Cal. 323, 337, 278 P. 432, 438: "It amounts, if proven, to such misconduct in office as would subject him to impeachment or to such other procedure to accomplish his removal from office as the laws provide, but it does not, and should not, put him in peril of proceedings which would destroy his eligibility to practice his profession or remove him from his membership therein, for the obvious reason that so to do would be to permit the accomplishment by indirection of his disqualification to hold, and hence necessarily his removal from his office, for which the Constitution, in sections 17 and 18 of article 4 thereof has provided a direct, if not an exclusive, mode of procedure."

[3] The violation of the Constitution and statutes complained of herein, if any there be, was as a judicial officer rather than as a lawyer, and the professional standing of Judge Newell as a lawyer is not affected. In re Silkman, 88 App.Div. 102, 84 N.Y.S. 1025, 1027; In re Strahl, 201 App.Div. 729, 195 N.Y.S. 385. It follows that the right of respondent to be represented by Judge Newell as an attorney was not in any way affected by the constitutional and statutory provisions relied upon by appellant.

[4] Appellant contends, upon appeal as throughout the trial, that her tenants in common, the Chazans, or through them, the Standard Furniture Company, sued herein as Fourth Doe, has paid respondent all sums due on the note sued upon. Hence, that appellant was not in default. In support of this contention appellant caused "blanket" subpoenas duces tecum to be served upon respondent and the Standard Furniture Company requiring the production of all books and records of the respondent and of the copartnership Furniture Company from December 1, 1936, to June 23, 1937. During the trial conversations were had between counsel in an effort to determine exactly what books should be produced. In open court counsel for appellant advised of his desire for "an opportunity to examine them in order to ascertain whether or not the Standard Furniture Company or Mr. Chazan or Mr. Passman made any interest payments". Objection that the evidence sought to be elicited was immaterial was sustained by the court.

The ruling was proper. Paragraph IV of the complaint alleged that the principal sum of the note was "wholly" due and payable, and no part thereof had been paid; that interest was paid to June 18, 1935, and that $343.75 was paid January 28, 1936, on an instalment of interest in the amount of $625, that fell due on December 18, 1935, leaving a balance of $281.25 due on that particular interest instalment. By answer thereto appellant alleged: "Denies each and every allegation contained in paragraph VI of plaintiff's complaint on file herein, except to admit that the sum of Three Hundred Forty-three and 75/100 ($343.75) dollars was paid to plaintiff on January 28, 1936, as partial payment of the installment of interest due on the 18th day of December, 1935." This, in effect, amounted to nothing more than a denial that the sum mentioned in paragraph VI of the complaint was "wholly" due and payable. Under proper rules of pleading the allegations might be construed as an admission that all but a single dollar of the amount claimed due was actually due and payable. The allegation of the answer, containing as it does a negative pregnant, was evasive and wholly insufficient to raise the issue of payment. Blankman et al. v. Vallejo, 15 Cal. 638, 639, 645; Marsters v. Lash, 61 Cal. 622, 624; Westbay v. Gray, 116 Cal. 660, 663, 48 P. 800; Provident Gold Mining Co. v. Haynes, 173 Cal. 44, 48, 159 P. 155; Janeway & Carpender v. Long Beach Co., 190 Cal. 150, 153, 211 P. 6; Motor Investment Co. v. Breslauer, 64 Cal.App. 230, 240, 221 P. 700. Under the pleadings there was no issue presented to support the issuance of the subpoena duces tecum in the first instance, nor thereafter render any evidence sought to be secured thereby material herein.

In September, 1933, appellant Most and Chazan applied to respondent in writing for a new loan of $25,000, at the rate of 5½ per cent (instead of 5 per cent as provided in the existing note of 1928), "said note to be secured by a first lien". This application was subsequently approved by respondent, subject to the securing of waivers by junior lienholders in order that respondent's new loan might also be secured by a first lien on the property. To that end, on January 20, 1934, Security Title Insurance and Guaranty Company of Los Angeles was designated by respondent as the escrow holder, and requested as such to complete the necessary details to close the loan. On April 13, 1934, H. A. Goldman, counsel for the holder of the junior liens, by letter to the escrow holder, agreed to cooperate by accepting a new note and deed of trust which would be subordinate to the deed of trust to be given the respondent herein. For that purpose reconveyances, a new note and deed of trust and other documents were forwarded by Goldman to the escrow holder. As a condition, however, it was expressly provided therein that the escrow holder should secure from appellant and her cotenants payment of the sum of $75 as Goldman's fee in connection with the matter. The letter further provided: "This escrow is to be concluded within fifteen days from this date, and if not concluded within that time, then you may take such additional time as may be necessary to conclude that escrow, unless I notify you in writing to the contrary, in which event all papers are to be returned to me." About two years later, on May 1, 1936, the attorney's fee not having been paid, Goldman, in writing, demanded the return of all documents from the escrow holder. Thereupon, the above-mentioned documents were returned pursuant to such request, thereby terminating the ability of the escrow holder to secure compliance with respondent's demand that the deed of trust securing the new loan should be a first lien upon the premises in question.

On or about April 25, 1934, appellant Most and the Chazans had executed and delivered to the Security Title and Guaranty Company a new note for $25,000, and a deed of trust securing same, together with appellant's check for $37.50 as a deposit to be applied upon the escrow expenses. Thereafter, they paid interest upon the new note at the rate of 5½ per cent per annum as provided therein. Appellant contends that payment of the interest and respondent's acceptance of the same according to the terms of the new note and the deed of trust securing same, constituted an existing first lien and encumbrance on the property; or, that in any event, payment and acceptance of the interest in accordance with the terms of the new note and deed of trust, amounted to an extension of the existing mortgage.

[5, 6] These contentions are wholly without merit. Respondent offered evidence showing that in all cases where new loans are being negotiated at a different interest rate, whether the new rate be higher or lower, interest is collected at the new rate pending completion of the transaction. In the instant action the closing of the transaction, whereby appellant and her cotenants were to secure a renewal of this

loan, was held up and then defeated by the very failure of the borrowers themselves to comply with the express terms of the escrow and their own loan application. As a result of their own continued refusal or failure to pay the escrow expenses and counsel fees mentioned, they absolutely prevented completion of the escrow and respondent's renewal of their loan. Equity still demands that those who seek relief at its hands and in its name have first complied with its inexorable rule that they shall themselves have done or offered to do what is fair and equitable before being entitled to enjoy relief at its hands. In view of all the evidence herein, no citation of authority is required to convince that appellant's exhortation for equity herein lacks the first prerequisite of a proper plea therefor.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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39 Cal.App.2d 615

BROWN v. NEWBY et al.

Civ. 11937.

District Court of Appeal, Second District, Division 1, California.

June 22, 1940.

1. Execution 🔑73

The propriety of granting a writ of execution after a lapse of more than five years from date of entry of judgment must be decided upon facts in each case.

2. Appeal and error 🔑983(3)

On appeal from an order granting a motion for issuance of a writ of execution more than five years from date of entry of judgment, reviewing court is not warranted in substituting its judgment for the judgment of the trial judge, where the facts merely afford an opportunity for a difference of opinion, and it does not clearly appear that trial court abused its discretion.

3. Execution 🔑73

Where, at time of entry of judgment, judgment debtors were duly examined concerning their property and thereafter excused by referee and in subsequent proceeding were excused for failure of plaintiff's counsel to appear, and more than five years after entry of judgment plaintiff filed a motion for issuance of writ of execution alleging that debtors were attempting to collect moneys from a party which should be paid on judgment, and that plaintiff through her attorneys had made diligent search for property of judgment debtor out of which the judgment could be satisfied, but were unable to locate any such property, trial court did not abuse its discretion in issuing a writ of execution.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action on a note by Bernice Brown against Nathan Newby, Jr., and another, wherein judgment was entered for the plaintiff. From an order granting a motion of plaintiff for the issuance of a writ of execution after a lapse of more than five years from date of entry of judgment, defendants appeal.

Affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellants.

E. Walter Guthrie and Allan H. McCurdy, both of Los Angeles, for respondent.

DORAN, Justice.

Defendants appeal from an order of the superior court made and entered on February 3, 1938, granting the motion of plaintiff, respondent herein, for the issuance of a writ of execution after a lapse of more than five years from the date of the entry of judgment, in an action upon a promissory note. Plaintiff, an employee of the real party in interest, was an assignee for the purpose of collection of the note.

The complaint which was filed on September 15, 1930, alleged in substance that the defendants made, executed and delivered their promissory note in the amount of $11,250 in favor of the Citizens National Trust and Savings Bank of Los Angeles, due sixty days from and after July 1, 1930. The complaint further alleged the assignment and transfer of said note without recourse by the bank to the plaintiff, and the demand and nonpayment of the amount allegedly due.

After a trial on the issues presented by the pleadings, judgment was entered on

May 27, 1932, in favor of plaintiff and against the defendants, for $11,250 principal, together with interest, attorneys' fees and costs. Defendants appealed from the judgment, and on June 29, 1935, the judgment of the trial court was affirmed on condition that within twenty-five days after the filing of the decision plaintiff waive all of said judgment in excess of $5,000 against each defendant. This the plaintiff did, on July 17, 1935, and the judgment was then affirmed. See Brown v. Newby, 8 Cal.App.2d 203, 47 P.2d 1076.

After the entry of the judgment of the trial court, to wit, on or about June 28, 1933, the judgment debtors were duly examined concerning their property, and were thereafter excused by the referee.

On November 9, 1937, the defendants again appeared before the referee for examination concerning their property, pursuant to an order of the court. When it appeared that counsel who had initiated the proceedings were not attorneys of record in the case, the matter was allowed to go off calendar.

On December 3, 1937, after plaintiff had obtained another order for the appearance of the judgment debtors, the defendants were excused by the referee upon the failure of plaintiff's counsel to appear. An affidavit subsequently filed by one of plaintiff's attorneys recites the fact that while the order read that the hearing was to be had before the referee at 9 o'clock a. m. on December 3, 1937, through inadvertence and a mistake which was made on his office calendar, he appeared before the referee at 9:20 a. m., and that the defendants were already excused.

Thereafter plaintiff gave notice of a motion for execution after five years, supported by an affidavit which recited the existence of the judgment and that it was unsatisfied; that plaintiff, through her attorneys, had made diligent search for property of the judgment debtors out of which the judgment could be satisfied, but had been unable to locate any such property; and that plaintiff is informed and believes that the defendants have property out of which the judgment could be satisfied. The motion was noticed for hearing on December 30, 1937. Plaintiff thereafter obtained an order shortening time for hearing, which order was made upon the affidavit of one of the attorneys, wherein it was alleged that defendants were attempting to collect certain moneys due from a third party which should be paid on said judgment. This allegation was denied by the counter-affidavit of one of the defendants, and in opposition to the motion it was alleged that plaintiff's attorneys were causing repeated and unjustified orders and notices of motions to be made, for the purpose of harassing and embarrassing said defendant. The hearing on plaintiff's motion was continued to December 30, 1937. Thereafter, on February 3, 1938, an order was entered granting plaintiff's motion for a writ of execution, from which order, as heretofore noted, this appeal is taken.

The sole question on appeal is, whether the trial court abused its discretion in granting plaintiff's motion for the issuance of a writ of execution after five years from the date of the entry of the judgment.

[1-3] The law with regard to the only issue involved is well settled; therefore, to cite from the many authorities on the subject would serve no purpose. Appellants concede that "a majority of the cases have resulted in granting the motion for the issuance of the writ" and that "Each case must be decided upon its own peculiar facts". It should be emphasized in that connection that the showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice; without indulging in further detail, the record reveals appellants' showing to be insufficient in this regard. See 2 Cal. Jur. p. 896 et seq.

For the foregoing reasons the order granting plaintiff's motion for the issuance of a writ of execution, is affirmed.

We concur: YORK, P. J.; WHITE, J.

39 Cal.App.2d 587

PEOPLE v. BAUMAN.

Cr. 2117.

District Court of Appeal, First District,
Division 1, California.
June 21, 1940.

1. Homicide 🔑18(1)

The felonious intent to commit larceny by the use of felonious means, in the perpetration of which the victim is slain, would constitute "murder in the second degree," since under such circumstances malice is implied. Pen.Code, §§ 188, 189, 211, 971.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in the Second Degree".

2. Homicide 🔑23(2)

To sustain a conviction of "murder in the second degree" it should appear as a reasonable certainty that immediately preceding the killing, defendant had not formed a deliberate intent to take the life of the deceased or that such act was not the result of pre-existing reflection or deliberate premeditation. Pen.Code, §§ 189, 211, 971.

3. Homicide 🔑171(1)

The entire conduct of a defendant at time of his alleged commission of crime of murder in the second degree and his subsequent statements were admissible to determine defendant's connection with the crime.

4. Homicide 🔑29

In prosecution for murder in the second degree, defendant's flight after defendant's companion had struck deceased with his fist, and had searched deceased and defendant's return for purpose of a further search were circumstances showing guilty knowledge and participation.

5. Homicide 🔑254

Extrajudicial statements, declarations and admissions of a defendant charged with murder in the second degree, would be sufficient to sustain a conviction for murder in the second degree.

6. Criminal law 🔑274

Trial court did not abuse its discretion in denying defendant's motion to withdraw his plea of guilty to offense of murder in the second degree where no showing was made of reasonable excuse for delay in presenting motion, or that plea of guilty was induced through ignorance, inadvertence or without deliberation or that it was made through hope, fear, coercion, or cajolery, or that evidence whereon trial court fixed the degree of crime was untrue. Pen.Code, § 1018.

7. Criminal law 🔑274

A defendant, charged with criminal offense, may not delay an unreasonable time in entering a plea of guilty, and, when he discovers that punishment is to be inflicted, attempt to change his plea.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Joseph Bauman was convicted of murder in the second degree, and he appeals.

Affirmed.

A. J. Hennessy, of San Francisco, for appellant.

Earl Warren, Atty. Gen., Wm. F. Cleary, and Dennis Hession, Deputies Atty. Gen., for respondent.

WARD, Justice.

An appeal by defendant from a judgment of conviction of the crime of felony, to-wit, murder in the second degree, following his plea of guilty to the offense as charged in an information. Defendant subsequently moved to withdraw his plea of guilty, and the question is, whether the court abused its discretion in denying such motion.

Penal Code, section 1018, provides: "A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment or information against a corporation, in which case it may be put in by counsel. The court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted."

Appellant and Joseph Patrick were charged with the murder of William Stewart. More than a month after the arraignment, appellant entered a plea of guilty. For the purpose of determining the degree of the offense, an inspector of the police department was sworn as a witness and, through him, statements made by Patrick and appellant were introduced in evidence. No objection was made thereto.

The statements in brief showed that on the night of the murder, the two defendants, soldiers attached to the Presidio at

San Francisco, were with Stewart at a resort referred to in the statements as a saloon, where Stewart changed a ten or a twenty dollar bill. Later, during the same evening, Stewart accompanied Patrick and appellant into a nearby alley, where, according to the statement of Patrick, he struck the civilian Stewart on the mouth or chin, rendering him unconscious. From his person, Patrick took a billfold and he and the appellant filed in different directions. Nothing of value was found in the billfold and it, with its contents, was thrown away. Subsequently Patrick and appellant met and returned to the alley, where Patrick again searched Stewart, but could find no money. As they left the alley they were observed by a civilian who reported the matter to the police. Appellant, taken to the morgue, identified Stewart as the man who had been drinking with Patrick and himself earlier in the evening. Later, referring to the statement made by Patrick, appellant said that the man in the morgue was the person described in Patrick's statement. Appellant denied that he had searched decedent, but admitted that "two searches of the civilian's body" had been made, and, on hearing the Patrick statement read, he adopted the same saying: "Well, see I was there, but there is nothing to be added or subtracted."

Appellant was arraigned October 25, 1939. The plea was entered November 28, 1939, and at that time, pursuant to an agreement between the district attorney and appellant, a charge of robbery which had also been made against appellant was dismissed; whereupon a motion for probation was interposed. Without passing upon the propriety of such a motion after a plea on a charge of murder (Pen.Code, sec. 1203), it should be noted that the hearing upon the motion for probation was continued until December 6, 1939, at which time it was denied. Immediately thereafter, an attorney substituted for the assistant public defender, referring to appellant, said: "I think he desired to withdraw his plea of guilty in that case." His motion to withdraw the guilty plea was denied.

No showing was made of reasonable excuse for delay in presenting the motion, or that the plea was induced through ignorance, inadvertence or without proper deliberation, or that it was made through hope, fear, coercion or cajolery. Appellant did not appear as a witness; he did not submit affidavits of others to show that he was unfairly persuaded to enter his guilty plea, nor did he attempt to show that the evidence whereon the court fixed the degree of crime was untrue.

It may be admitted that appellant could have been convicted of murder of the first degree, without recommendation, or of a lesser degree of crime, or possibly a lesser offense, or even acquitted. The question is not whether there is sufficient evidence to sustain a jury's verdict of guilty, but whether under the circumstances shown the court abused its discretion in denying appellant's motion to set aside the plea of guilty.

The judgment might be affirmed without further consideration. We will, however, proceed a step further. On appeal, appellant contends that he was not in fact an accomplice in the commission of the offense and that there was no evidence indicating that he knew a felony was to be committed. Patrick's statement sets forth the circumstances attending the entry into the alley of the three men:

"Q. When you stated that you took the civilian up the alley to get what money off of him, you means that you intended to strongarm him? A. I meant to hit him on the chin, or talk to him and get it how I could." After Patrick's statement had been read in its entirety to appellant, the following conversation took place between the officer reading the same and appellant:

"Q. But the statement that has just been read to you that was made by Joseph Patrick would be the same as your own statement if you made one, would it not? A. Yes.

"Q. Were there any corrections that you would make in that statement? A. Well, see I was there, but there is nothing to be added or subtracted.

"Q. And the man that was shown over at the morgue, is the man that is described in that statement? A. Yes."

Finally, appellant's plea of guilty following consultation with his attorney, and after due deliberation, is sufficient to indicate an intent to commit an offense against the laws of this state. (Pen.Code, sec. 189.) It is not necessary to show that he intended to slay the victim; it is sufficient to show that he intended to aid or abet in the felonious taking, by means of force or fear, of property from the person of Stewart, against the latter's will. (Pen.Code, secs. 189, 211, 971.)

[1] Assuming that there could be a reasonable doubt on the part of a jury as to the intent of appellant to commit robbery, or that the act was not the result of previous planning or deliberate determination, and assuming that the crime was one of "drunk rolling", with an intent to commit larceny rather than robbery, nevertheless the felonious intent to commit larceny by the use of felonious means, in the perpetration of which the victim was slain, would constitute murder of the second degree. Under such circumstances malice is implied. Pen.Code, sec. 188; People v. Garnett, 9 Cal.App. 194, 98 P. 247. A felonious purpose, accomplished by felonious means, is sufficient to constitute murder in the second degree.

[2] The facts presented indicate murder in the first degree. Appellant should not complain that the court rendered a judgment of conviction of murder in the second degree. In connection with this appeal he has offered nothing except the statement of his present attorney that the offense was not murder in the first degree. In People v. Wells, 10 Cal.2d 610, 619, 76 P.2d 493, 499, the court said: "Likewise, in order that a conclusion that the offense constituted a murder of the second degree might be sustainable, it should appear with reasonable certainty that immediately preceding the execution of his fatal act the killer had not formed a deliberate intent to take the life of the person whom he thereafter killed, or that such act was not the result of 'pre-existing reflection' or 'deliberate premeditation.'"

[3-5] The entire conduct of appellant at the time of the crime, and his subsequent statements, may be the subject of inquiry in determining his connection with the commission of the crime. His flight (People v. Armstrong, 114 Cal. 570, 46 P. 611) after the first search, and his return to the scene for the purpose of a further search, are circumstances showing guilty knowledge and participation. People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951. Had appellant submitted his case to a jury, and a verdict of guilty been returned, the extrajudicial statements, declarations and admissions would have been sufficient to sustain the judgment upon appeal. People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611.

[6, 7] As stated, immediately upon the entry of the plea of guilty, and the request for probation, the robbery charged, based upon the same facts, was dismissed. A defendant, charged with criminal offenses, may not delay an unreasonable time in entering a plea of guilty, and, when he discovers that punishment is to be inflicted, attempt to change his plea.

Under all the circumstances presented, we cannot hold that the court abused its discretion in refusing to set aside the plea. The order and judgment are affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

39 Cal.App.2d 569

LIVERMORE SANITARIUM v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

Civ. 11451.

District Court of Appeal, First District, Division 2, California.

June 20, 1940.

1. Mandamus 🔑164(3)

The allegations of petition for mandamus would be treated as true where respondent failed to respond to order to show cause.

2. Officers 🔑110

When officers of the law, judicial or administrative, fail or neglect to perform a duty imposed upon them by law, the individual should not be made to suffer by their dereliction when he is not at fault.

3. Mandamus 🔑57(1)

Where judgment of justice of the peace sustaining a demurrer without leave to amend and dismissing an action was appealed from, on ground that the day set for trial of demurrer was not entered on docket pursuant to statute, and appellant mailed to justice by registered mail a notice of appeal, undertaking on appeal and the statement of the case on appeal, and through fault of either the justice or the postal authorities, statement on appeal was not filed with su-

perior court, mandamus would issue to compel superior court to determine appeal on its merits notwithstanding absence of statement of the case, in view of lack of negligence on part of appellant. Code Civ.Proc. § 594.

◆

Proceeding by the Livermore Sanitarium, a corporation, for a writ of mandate commanding the Superior Court of the state of California in and for the County of Contra Costa and Hon. Thomas D. Johnston, judge of department 1 thereof, to determine on the merits an appeal which petitioner had taken from a justice court.

Peremptory writ issued.

R. Clarence Ogden, of San Francisco, for petitioner.

No appearance on behalf of respondents.

NOURSE, Presiding Judge.

[1] The petitioner seeks a writ of mandate. The respondent has failed to respond to the order to show cause, and we will therefore treat the allegations of the petition as true.

Petitioner filed a complaint in the justice's court on June 19, 1939, against J. Augustine for recovery of money upon a written contract; on August 14, 1939, it filed an amended complaint. On September 15, 1939, Augustine demurred to this amended complaint, and the demurrer was sustained without leave to amend on October, 11, 1939. Prior to October 11, the justice of the peace had failed to fix the day for trial of this issue of law, or to enter the day set in his docket, and had neglected to give notice in writing of the day so fixed to the plaintiff. On October 20, 1939, the justice mailed to petitioner's attorney a notice of the rendition of the judgment sustaining the demurrer without leave to amend and dismissing the action. On October 27, 1939, petitioner mailed to the justice by registered mail a notice of appeal, undertaking on appeal and a statement of the case on appeal; the justice received these documents on October 30, 1939. On November 3, 1939, petitioner paid to the justice the fees for filing the record on appeal; the justice filed with the county clerk a notice of appeal, undertaking on appeal, amended complaint, demurrer, copy of the justice's docket and paid all the filing fees. At the hearing of the appeal Augustine moved for dismissal on the ground that a statement of the case was not on file. The appellant offered proof that the statement was filed with the justice and by him placed in the mail for transmission to the superior court. On April 11, 1940, the superior court dismissed the appeal. Petitioner prays for an alternative writ commanding the superior court to determine the appeal on its merits.

Section 594 of the Code of Civil Procedure reads in part: "the justice must fix the day for trial, whether the issue be one of law or fact, and the day so fixed for such trial shall be entered on the docket. Notice of the day so fixed for trial shall be given, as herein provided, to the parties to the action who have appeared. Such notice shall be in writing, signed by the justice * * *."

The case on appeal was dismissed under the rule of Butler v. Superior Court, 3 Cal. App.2d 508, 39 P.2d 860, as no statement on appeal had been sent up by the justice. In the Butler case no statement was settled or filed by the appellant with the justice, or in the superior court. Here the appellant did all it could do by filing the statement on appeal with the justice; the justice may have been at fault in not sending it up to the superior court; or the postal authorities may have been at fault. But in any event, the petitioner did all that the law required of it.

The appeal was taken on the ground that the day set for trial of the demurrer was not entered on the docket pursuant to the Code of Civil Procedure, section 594 (2); the docket which the superior court had before it showed this on its face. 15 California Jurisprudence, page 537, states: "It was formerly held that such a statement was indispensable to every appeal on questions of law. (People v. El Dorado County Court, 10 Cal. 19) but the rule is now settled that if the alleged errors appear in the copy of the justice's docket or in the papers sent up by him, a statement is not necessary." See to that effect: Southern Pac. Ry. Co. v. Superior Court, 59 Cal. 471; Maxson v. Superior Court, 124 Cal. 468, 57 P. 379; 6 Cal.Jur.Supp. p. 670.

[2, 3] If there is any principle of law involved in this proceeding it is that, when the officers of the law, judicial or administrative, fail or neglect to perform a duty imposed upon them by law, the individual should not be made to suffer by their dereliction when he is not at fault. Here the petitioner complied with all the requirements of the law to have its case heard and determined. It has shown that

it brought to the respondent court a meritorious appeal which it was entitled to have heard on its merits.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

30 Cal.App.2d 584

PEOPLE v. TAGAWA.

Cr. 1720.

District Court of Appeal, Third District California.

June 20, 1940.

Hearing Denied July 18, 1940.

1. Homicide 🔑268

In murder prosecution, accused's contention that from the place where alleged eyewitness claimed he was standing, witness could not have seen victim as victim fell after being shot, was a matter of defense to be submitted to jury.

2. Criminal law 🔑741(1), 742(1)

The credibility of witnesses and the weight to be given their testimony is exclusively for jury, and not for court on appeal.

3. Criminal law 🔑434

In murder prosecution, hotel account book containing items which were original entries made by witness in the regular course of business from his personal knowledge and from reports regularly made to him by hotel proprietor was admissible.

4. Criminal law 🔑785(16)

In murder prosecution, instruction that if a witness deliberately and willfully testified falsely in one material matter, the jury might treat all of his testimony with distrust, and if they saw fit could reject all thereof unless they were convinced from the evidence that he had in other particulars told the truth, was not objectionable.

5. Homicide 🔑253(1)

Evidence, including testimony of two eyewitnesses, sustained conviction for murder in the first degree.

Appeal from Superior Court, City and County of Sacramento; Dal M. Lemmon, Judge.

M. Tagawa was convicted of murder in the first degree, and he appeals.

Affirmed.

Albert E. Coger, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Judge PULLEN delivered the opinion of the court.

In an opinion affirming an order granting a new trial (People v. Tagawa, 35 Cal.App.2d 14, 94 P.2d 354) the facts in this case are fully set forth, and it is not necessary to repeat them again.

The matter is now before us on an appeal from a judgment of conviction of murder in the first degree with punishment fixed at life imprisonment.

The principal grounds for reversal as urged by appellant seem to be the insufficiency of the evidence to support the judgment, that the court erred in admitting in evidence a certain account book, and also erred in an instruction to the jury.

[1] Two witnesses testified they saw appellant shoot the deceased. I. Takada testified he stood in the cage of the lookout, or watchman, and from there he saw what happened in the yard below. Appellant claims that due to the angle of vision, a person standing where Takada said he was, could not see the deceased as he fell. That, of course, we do not know. No witnesses were called to establish that fact, nor were the jury asked to view the premises. That was a matter of defense to be submitted to the jury.

[2] Appellant also claims the testimony of the other eye witness, Tomita, is highly improbable. It is argued that if, as he testified, the deceased and his killers followed Tomita as closely as they apparently did, he would have seen or heard them on the stairs immediately behind him. That is also a matter for the jury. Certain discrepancies are also pointed out in their testimony as given at the first trial and as given at the second trial. As has often been said, the credibility of the witnesses and the weight to be given their testimony is exclusively for the jury. We cannot go into that matter here.

Appellant claimed he was in Los Angeles at the time of the murder and that he is the victim of a plot. That is a proper matter of defense and was presented to the trial court and jury and evidently not believed. We have read the entire record and are convinced as were the jury in the first trial and the jury in the present trial, that appellant was the man who shot the deceased.

[3] It is next claimed the court erred in admitting an account book of a hotel where appellant lived just prior to the murder. It is claimed the witness Kubo has no personal knowledge of the transaction of which he testified.

The following is found in the record:

"The Court: You kept the book yourself, did you? A. Well, yes.

"The Court: You made the entries in the book? A. Yes.

"Mr. Coger: Q. Did Mr. Nagahisa sometimes make entries in the book, too? A. No, he did not.

"Q. Mr. Kubo, do you know in whose handwriting that page, page 59 of the book is in? A. My handwriting.

"Q. All that book is yours? A. Yes sir."

The account book here was that of a hotel; the items were the original entries made in the usual course of business, and were made by the witness in the regular course of business from his knowledge and from reports regularly made to him by the proprietor of the hotel. The witness knew appellant and knew he was a roomer in the hotel. A person making such entry may have personal knowledge of the transaction or have obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it is to make such reports in the regular course of business. Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657; Montgomery, etc., Co. v. Ocean Park Scenic R. Co., 32 Cal.App. 32, 161 P. 1171.

[4] The instruction complained of is to the effect that if a witness deliberately and wilfully testified falsely in one material matter, the jury might treat all of his testimony with distrust, and if they saw fit could reject all thereof, unless they were convinced from the evidence that he had in other particulars told the truth.

Appellant finds an implication therein that if the witness has in "other particulars" told the truth, the rule as to rejection or distrust is then not to be applied to the witness' testimony. This instruction was substantially the same as affirmed in People v. Dobbins, 138 Cal. 694, 72 P. 339, and we do not believe the criticism of appellant is well founded.

[5] Appellant points out many instances of what he claims falsehoods, discrepancies and contradictions in the evidence, but these were matters going to the credibility of the witnesses. A study of the entire record of this case leaves this court convinced, as it did the jury, that the accused was guilty of the crime of which he was convicted.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

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39 Cal.App.2d 665

MEYERS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11455.

District Court of Appeal, First District, Division 2, California.

June 25, 1940.

Hearing Denied Aug. 22, 1940.

1. Workmen's compensation 🔑1626

Evidence that employee was a common laborer, and that injury to leg left him practically one-legged, sustained finding that work of the type which employee could perform had not been available to him, in absence of evidence regarding vacant jobs for such employees.

2. Workmen's compensation 🔑1935

Temporary partial disability does not necessarily carry with it legal inference that employee is able to compete in an open labor market, but each case must rest upon its own facts, and an employer who relies on the inference should present a record in support thereof.

3. Workmen's compensation 🔑1377

Where an injured employee is only fitted to do odd jobs or special work, not generally available, burden is on employer to show that such special work is available.

4. Workmen's compensation ⚷1377

Where injury to leg of employee engaged in common labor caused temporary partial disability, employer had burden of showing that odd lots of employment were available to employee, and in absence of evidence that it was possible for one so crippled to obtain employment of any kind, or that after injury employee was employed in any capacity, award of further disability indemnity was proper.

◆

Proceeding under the Workmen's Compensation Act by James D. Titsworth, claimant, opposed by J. C. Meyers, employer, and the United States Fidelity & Guaranty Company, insurance carrier. To secure amendment of an award by the Industrial Accident Commission in favor of claimant, the employer and insurance carrier apply for writ of review.

Award affirmed.

Hearing denied; Edmonds and Houser, JJ., dissenting.

Horace W. B. Smith, of San Francisco, for petitioners.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

R. P. Wisecarver, of San Francisco, amici curiae for petitioners.

STURTEVANT, Justice.

Petitioners have applied for a writ of review seeking to have an award heretofore made by the respondent commission amended. The findings and the award involved are as follows:

"Findings of Fact.

"1. James D. Titsworth, aged 27, while employed as a laborer on July 21, 1939, at Westley, California, by J. C. Meyers, sustained injury occurring in the course of and arising out of his employment, consisting of an injury to his left foot and ankle. At said time said employer's insurance carrier was U. S. Fidelity & Guaranty Company, and both the employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of the State of California.

"2. Said injury caused temporary total disability, continuing from July 21, 1939, to and including November 17, 1939, entitling the employee to $15.44 a week during said time, exclusive of the waiting period of seven days. The foregoing weekly benefit is based on wages of $25.00 a week. Said injury caused temporary partial disability beginning November 18, 1939, and continuing indefinitely, during which time work of a type which the employee could perform has not been available to him, and therefore said employee is entitled to further disability indemnity at the rate of $15.44 a week beginning November 18, 1939, and continuing indefinitely. The carrier is entitled to a credit in the sum of $26.46 on account of compensation heretofore paid.

"3. The employee is entitled to his reasonable medical expenses obtained subsequent to August 29, 1939, which will be fixed by this Commission subsequently upon request and the filing of itemized bills in the event the parties are unable to adjust the same out of court.

"4. Applicant's attorneys are entitled to a lien against unpaid compensation for the reasonable value of their services in the sum of $35.00.

"Award.

"Award is hereby made in favor of James D. Titsworth against U. S. Fidelity & Guaranty Company of the sum of $15.44 a week beginning July 29, 1939, until the termination of disability or further order of this Commission less the sum of $26.46 heretofore paid on account of compensation, and less $35.00 payable to Cleary and Zeff, as attorneys' fees."

James D. Titsworth while employed as a laborer in doing some carpenter work was injured. The injury occurred when he and others employed at the work were attempting to put the side of a cabin in place. The structure slipped and injured his left foot and ankle. Both at the time of the accident and prior thereto he had been engaged as a laborer doing any kind of labor in which he could find employment. The injury was such as to cause him to remain off of the foot at times, at other times to walk with crutches, and at still other times to walk with difficulty. There was evidence introduced that the disability was fifty per cent. No evidence was introduced that it was possible for a person so crippled to obtain any kind of employment nor was there any evidence that after the injury Titsworth was employed in any capacity whatsoever.

The petitioners contend that as a matter of law temporary partial disability carries with it legal inference that the employee is able to compete in an open labor market. They further contend that the finding of the commission infers that said employee is physically able to work and there is no finding or inference that work is not available to him of the type he can perform because of his injury. Finally the petitioners contend that the compensation law insures only against incapacity for work and not against lack of opportunity to work. That final contention is the gravamen of this application.

The respondents reply by stating that with the final contention of the petitioners they fully agree. Continuing they assert that the findings and award are not subject to the other attacks made by the petitioners and when read as a whole are unobjectionable.

We think the foregoing reply is entirely sufficient. The foregoing record does not show on its face that the petitioners have been held as on a contract tantamount to a policy of unemployment insurance.

[1] There is a direct finding that "* * * work of a type which the employee could perform has not been available to him * * *." Bearing in mind that he is a common laborer, that under the facts he is practically one legged, that there is no evidence regarding vacant jobs for such employees, it may not be said that said finding is not sustained by the evidence. It further follows that it may not properly be said that there "* * * is no finding or inference that work is not available to him of the type he can perform because of his injury."

[2-4] As recited above the petitioners contend that as a matter of law temporary partial disability carries with it legal inference that the employee is able to compete in an open labor market. That contention is too broad. As presented there is no such inference. Each case must rest upon its own facts. He who would rely on the inference as claimed should present a record supporting the inference. The record in the present case does not do so. As to what inference will arise depends on many factors including the specific injury, the extent thereof, and the tendency to heal or otherwise. For instance one can readily state a supposititious case in which a person suffers temporary partial disability which would not prevent him from doing his ordinary work. Again in another case temporary partial disability may be of such a nature as to render one a nondescript. Such, as we read the findings, the respondent commission found in the instant case. The general rule we believe was stated and followed in White v. Tennessee Consolidated Coal Co., 162 Tenn. 380, 36 S.W.2d 902. Commencing on page 904, of 36 S.W. 2d the supreme court of Tennessee stated and quoted as follows: "The authorities draw a distinction between cases in which it appears that the injured employee can do light work of a general nature and where he is only fitted to do 'odd' jobs, or special work, not generally available. In the former, the burden is on the petitioner; the presumption being that his inability to obtain employment is due to the fluctuations in the labor market and not to the consequences of the accident. In the latter, the burden is on the employer to show that such special work is available to the petitioner. The rule is admirably stated by Judge Moulton in Cardiff Corp. v. Hall, (1911) 1 K.B. 1009, as follows: 'But, on the other hand, I am also of opinion that there are cases in which the onus of showing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labor market—if, in other words, the capacities for work left to him fit him only for special uses, and do not, so to speak, make his powers of labor a merchantable article in some of the well-known lines of the labor market,—I think it is incumbent on the employer to show that such special employment can, in fact, be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labor in the position of an "odd lot" in the labor market, the employer must show that a customer can be found who will take it.'" So in the instant case. If there were any "odd lots" of employment available to Titsworth the employer should have shown the facts.

In the briefs the petitioners cite and rely on sections 4654 and 4657 of the Labor Code. After having carefully read the record we find no place in which the defendant commission failed to carefully follow the procedure delineated in those sections.

The award under attack is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

39 Cal.App.2d 670

PEOPLE v. LANE.

Cr. 1734.

District Court of Appeal, Third District, California.

June 25, 1940.

Criminal law 🔑1182

Where transcript on appeal was filed in the District Court of Appeal, and cause was regularly placed on calendar for oral argument, but no brief was filed in behalf of defendant and no appearance was made for defendant at time case was called for hearing, conviction was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Raymond Bradley Lane was convicted of burglary, and he appeals.

Affirmed.

Oliver J. Carter, of Redding, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the superior court of Shasta county of the crime of burglary, a felony.

The transcript on appeal was filed in this court June 3, 1940. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 25, 1940. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment is affirmed.

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39 Cal.App.2d 618

KOSTOUROS v. O'CONNELL et al.

Civ. 11093.

District Court of Appeal, First District, Division 1, California.

June 24, 1940.

1. Appeal and error 🔑1015(2)

Where testimony in trial court is in substantial conflict, action of trial court in granting a new trial on ground of insufficiency of the evidence will not be disturbed by reviewing court, unless a verdict in favor of the moving party would not find legal support in the evidence.

2. Automobiles 🔑217(6)

A pedestrian, even if he has the right of way, is not permitted to plunge ahead directly into the path of an automobile and then successfully impose liability on a motorist.

3. Negligence 🔑136(25)

The question of proximate cause is generally one for the trier of the facts, and it is only where reasonable minds cannot differ on the question that a court is justified in taking such question from trier of the facts.

4. Automobiles 🔑245(72)

A pedestrian proceeding across marked crosswalk, guarded by a "Stop" signal, was not negligent as a matter of law by failing to keep a constant watch on approaching automobile which pedestrian first observed when it was 50 feet away and traveling at 30 miles an hour.

5. New trial 🔑6

In action to recover for injuries suffered when pedestrian was struck by an automobile at marked crosswalk, guarded by a "Stop" signal, granting of pedestrian's motion for a new trial after verdict and judgment for motorists was within discretion of trial court, where pedestrian was not negligent as a matter of law.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Mary K. Kostouros against May O'Connell and Bernice O'Connell to recover for injuries suffered when plaintiff was struck by an automobile. From an order granting plaintiff's motion for a new trial, after verdict and judgment for defendants, the defendants appeal.

Affirmed.

Yale S. Kroloff, and Appelbaum & Mitchell, all of Oakland, for appellants.

Elmer P. Delany, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendants appeal from an order granting plaintiff's motion for a new trial, after verdict and judgment for defendants. The motion was granted on the ground of insufficiency of the evidence.

[1] It is now settled by a long line of cases that where the testimony in the court below is in substantial conflict, the action of the trial court in granting a new trial upon the ground of insufficiency of the evidence will not be disturbed. The appellate court may not reverse such an order unless a verdict in favor of the moving party would not find legal support in the evidence. See cases collected 2 Cal.Jur., p. 940, sec. 554. Tested by these standards there can be no doubt of the propriety of the trial court's action in the instant case.

While crossing on foot from the west to the east side of Laguna Honda boulevard at the Forest Hill station in San Francisco, plaintiff was struck by an automobile driven by Bernice O'Connell and owned by defendant May O'Connell. It is defendants' contention that the evidence demonstrates that plaintiff was guilty of contributory negligence as a matter of law.

The injury occurred on January 17, 1938, between 8 and 9 o'clock p. m. The weather was clear, visibility good, and the street well lighted. There are two clearly marked pedestrian crosswalks across Laguna Honda boulevard at the Forest Hill station, twenty feet apart on the west side of the street, and forty feet apart on the east side. At the southerly crosswalk is a "Stop-Go" traffic signal which is operated by pedestrians pressing a button on a control box. Except when thus operated the signal shows "Go" for automobile traffic running north or south on Laguna Honda boulevard, but, when the button is pressed by pedestrians, appropriately placed signals read "Stop" for such traffic.

Plaintiff, a trained nurse, was on her way to work. She alighted from a streetcar in the tunnel at the Forest Hill station, and took an elevator to the surface. She came out of the door of such station near the northerly crosswalk. She testified that it had been her intention to go to the south crosswalk to place the signal in operation, but observed a man approaching the signal, and therefore crossed the street in the northerly crosswalk. She testified that, before starting across the street, she waited until she heard the bell ring and saw the red light go on to halt automobile traffic; that she looked for oncoming vehicles and saw one, not connected with the accident, coming from the north; that she could see none approaching from the south; that she started to walk across the street within the limits of the north crosswalk; that she had proceeded about three-quarters of the way across when she observed the car driven by Bernice O'Connell approaching from the south, about fifty feet away. This would place the O'Connell car just about opposite the red light bordering on the southerly crosswalk. She further testified that at that time she was about fifteen feet from the curb on the east side of the street; that the O'Connell car was then about ten or fifteen feet from the sidewalk; that it was approaching at about thirty miles per hour; that after observing the car and its position she paid no further attention to it and continued walking across the street; that the automobile ran into her when she was about five feet from the curb; that she was struck by the right front fender of the automobile; that no horn was blown, nor did she hear the screeching of brakes.

This is a fair summary of the plaintiff's testimony. It is true that testimony in conflict therewith was offered by defendants, but on this appeal we are not concerned with the merits of the controversy—we are simply concerned with the question as to whether there was any evidence, contradicted or uncontradicted, that would support a verdict for the plaintiff had such a verdict been rendered.

[2-5] Defendants do not seriously urge that the driver of the car, as a matter of law, was free of negligence. Clearly, the jury could have found negligence on the part of such driver. It is the theory of defendants, however, that the evidence above summarized demonstrates that, after plaintiff became aware of the presence of defendants' automobile, she continued in her path without regard for her own safety under such circumstances that it must be held, as a matter of law, that she was guilty of contributory negligence. In this connec-

tion, both in their briefs and on the oral argument, defendants place their greatest reliance on the case of Foy v. Carlton, 29 Cal.App.2d 575, 85 P.2d 220. In that case the appellate court affirmed a judgment in favor of defendant based on a directed verdict, granted on the ground that plaintiff was there guilty of contributory negligence as a matter of law. In that case the plaintiff started across an intersection, there being no marked crosswalk at that spot, after first observing the car of defendant some three hundred fifty or four hundred feet away; that when part way across the street, but a few feet to the side of a safety zone, he again observed defendants' car racing toward him at about sixty miles per hour; that at that time the automobile was fifty or sixty feet away; that he nevertheless continued forward, without looking, another step or two when he was hit. The trial court held that, for a pedestrian to thus step from a place of safety beside a safety zone directly into the path of the automobile of defendant, which plaintiff knew was approaching but fifty or sixty feet away at sixty miles an hour, was contributory negligence as a matter of law. This was affirmed. The mere statement of the facts in the two cases demonstrates the differences between them. In the Foy case there was no traffic signal, while in the present case, according to plaintiff's testimony, the O'Connell car went through the red "Stop" signal. In the Foy case the defendant's car was approaching at sixty miles an hour while in the instant case the defendant's car was approaching at thirty miles per hour; in the Foy case there was no marked crosswalk for pedestrians, while in the instant case there was. Of course, a pedestrian, even though he has the right of way, is not permitted to plunge ahead directly into the path of an obvious and known danger, and then successfully impose liability on the defendant. However, the question of proximate cause is generally one for the trier of the fact, and it is only in those rare cases where reasonable minds cannot differ on the question that a court is justified in taking that question from the trier of the fact. Obviously, in the present case, reasonable minds can differ as to whether plaintiff exercised due care for her own safety. Plaintiff was in a crosswalk, plainly marked, guarded by "Stop" signals. Certainly she was not required to assume that the driver of the O'Connell car would not only violate the law by going through the red light, but would also swerve to the right, as she must have done if plaintiff's story is to be believed. Having observed the car some fifty feet away traveling at thirty miles an hour, knowing she was protected by a "Stop" signal, knowing she was but fifteen feet from the curb, and knowing she had the right of way, it can at least be said that reasonable minds may differ on the question as to whether, in proceeding forward without keeping a constant watch on the O'Connell car, plaintiff did what any reasonable person would have done under the circumstances. It must be held, therefore, and the conclusion seems obvious to us, that the evidence was conflicting, and that the granting of the motion was well within the discretion of the trial court.

The order appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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39 Cal.App.2d 562

PACIFIC GAS & ELECTRIC CO. v. ELKS DUCK CLUB et al.

Civ. 11395.

District Court of Appeal, First District, Division 2, California.

June 20, 1940.

1. Judgment ⇐866(2)

Where money judgment was entered against decedent by default on April 6, 1928, which was prior to decedent's death, and July 13, 1939, was last day to present claims against decedent's estate, and judgment creditor's successor on July 10, 1939, without obtaining permission from any court, filed claim in probate proceeding based on judgment, and in action wherein judgment was obtained an order was made on October 19, 1939, granting successor leave to enforce judgment after order to show cause was issued against decedent's administratrix, who had been substituted as defendant, enforcement of judgment against estate was not barred by 5-year statute of limitations. Code Civ.Proc. §§ 336, 685.

2. Judgment ⚷866(2)

The provisions of statute concerning enforcement of a judgment after lapse of five years from date of its entry are a limitation upon operation of 5-year statute of limitations governing actions upon a judgment to extent that the court may authorize enforcement of judgment otherwise barred by the statute by ordinary processes provided by law. Code Civ.Proc. §§ 336, 685.

3. Executors and administrators ⚷228(1)

Where enforcement of money judgment obtained against decedent in his lifetime was not barred by 5-year statute of limitations, judgment creditor's successor could file claim, based on judgment, in probate proceeding within statutory period and have claim approved or rejected without first obtaining permission to file claim from court wherein judgment was rendered. Code Civ. Proc. § 336.

4. Judgment ⚷866(2)

Where judgment creditor's successor, before expiration of time for filing claims against decedent's estate, filed a claim in probate proceeding based on money judgment rendered against decedent in his lifetime, and enforcement of judgment was not barred by 5-year statute of limitations, an order of the court wherein judgment was rendered permitting enforcement of judgment against decedent's estate after decedent's administratrix was substituted as defendant was authorized, although order was made after expiration of time for filing claims against estate and creditor had not obtained permission from any court before filing claim. Code Civ.Proc. §§ 336, 685.

◆

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Action by W. K. Slack against the Elks Duck Club and others, wherein, after a default judgment was entered against defendant W. H. Banta, the Pacific Gas & Electric Company was substituted as plaintiff in place of W. K. Slack and, after the death of W. H. Banta, Dorothy Banta, administratrix of the estate of W. H. Banta, deceased, was substituted as defendant in place of W. H. Banta, deceased. From an order granting leave to plaintiff to enforce the money judgment, defendant Dorothy Banta, administratrix of the estate of W. H. Banta, deceased, appeals.

Affirmed.

Hugh K. McKevitt, Joseph F. DeMartini, and Jack M. Howard, all of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from an order granting leave to plaintiff to enforce a money judgment. We copy the statement of facts from appellant's opening brief:

"On April 6, 1928, in the Superior Court of the State of California, in and for the City and County of San Francisco, a default judgment was entered in an action entitled W. K. Slack, plaintiff v. Elks Duck Club, W. H. Banta et al., defendants. The judgment was entered against the defendant, W. H. Banta, and in favor of the plaintiff, W. K. Slack, for the sum of $858.23. W. H. Banta died intestate on December 18, 1938, and on January 12, 1939, letters of administration upon the estate of W. H. Banta were issued to Dorothy Banta, the appellant herein. On July 6, 1939, the respondent Pacific Gas and Electric Company was substituted as plaintiff in the action in place of W. K. Slack, and on September 27, 1939, the defendant Dorothy Banta, as administratrix, was substituted as defendant in the place of the decedent, W. H. Banta.

"Dorothy Banta, the administratrix, caused notice to creditors to be duly published in the estate of W. H. Banta, deceased, and the last day to present claims against the estate was July 13, 1939. On July 10, 1939, Pacific Gas and Electric Company filed its claim based on the said judgment in the office of the Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, being the Court in which said estate preceedings were pending. This claim was filed without the judgment creditor obtaining permission to file the same from the Court in which the judgment was rendered or from any Court.

"On the 27th day of September, 1939, in the action in which said judgment had been obtained, an order to show cause was signed by Honorable Franklin A. Griffin, directed to the administratrix Dorothy Banta, to show cause why the Court 'should not make its order with respect to the judgment in the above entitled action, granting leave to plaintiff to enforce and carry it into execution in every manner allowed by law, requiring the clerk to issue a writ of execution upon said judgment, permitting plaintiff to file and prosecute suit or suits based upon supplemental process, rejected claims, and otherwise, to file, present and prosecute claims upon said judgment, and for such other order as may be proper in the premises'. Tr. pp. 5 and 6. The order to show cause was heard by the Court on October 18, 1939, and on October 19, 1939, the Court made its order", the order from which this appeal is taken.

[1-3] Appellant argues that the claim was improperly filed in the probate proceedings because permission had not theretofore been granted, and that the order appealed from is therefore error because the time for filing claims had then expired. The principles of law involved are not complicated. The judgment upon which the proceedings are founded was not barred by the statute of limitations found in section 336 of the Code of Civil Procedure. Saunders v. Simms, 183 Cal. 167, 170, 190 P. 806; Faias v. Superior Court, 133 Cal. App. 525, 529, 530, 24 P.2d 567; Palace Hotel Co. v. Crist, 6 Cal.App.2d 690, 692, 45 P.2d 415. The provisions of section 685 of that Code are a "limitation upon the operation of the statute of limitations" to the extent that the court may authorize enforcement of the judgment "by the ordinary processes provided by law of a judgment otherwise barred by the statute". Saunders v. Simms, supra [183 Cal. 167, 190 P. 808]. The statutes do not require permission of the court to file a claim against the estate upon a judgment against the testator or intestate. A claim which is not barred by the statute of limitations is not required to be rejected by the executor or administrator. Hence, since the judgment is not barred, the claimant was privileged to file his claim within the statutory period and have it approved or rejected without first resorting to the superior court for leave to file.

[4] Appellant relies upon the quotation from 11a California Jurisprudence, page 717, reading: "Although a suit on a judgment ordinarily is barred after the lapse of five years, nevertheless the judgment in all cases may be enforced or carried into execution after the lapse of five years by leave of the court upon motion. Under the power so conferred, a court may make an order that the judgment be enforced and carried into effect as provided by law against the estate of the deceased judgment debtor, and the judgment creditor may thereupon present such claim against the estate and sue thereon if it be rejected. Such a case is an exception authorized by statute as a substitute for the execution authorized by section 685 of the Code of Civil Procedure." She also refers to the language of Saunders v. Simms, supra, reading: "The judgment thus fortified and revived was thereupon presented as a claim against the estate of the deceased judgment debtor." Also to the language of Faias v. Superior Court, supra [133 Cal.App. 525, 24 P.2d 569], reading: "the court may under this section grant the judgment creditor leave to enforce the judgment by the presentation of a claim against the estate and by the bringing of an action thereon if the claim is rejected." We cannot read either of these cases as holding that a claim presented to the estate before permission to enforce the judgment is granted is a premature claim and therefore unenforceable. The point was not raised in either case and was not decided. Respondent has filed with its brief a copy of an opinion of the appellate division of the superior court in the city and county of San Francisco where the precise point was presented and determined. Upon principle and reason we are in full accord with the conclusion of that court reading: "Although the specific point presented upon this appeal does not appear to have been directly passed on by our Supreme or Appellate Courts, we find ourselves in accord with the view of the trial court that it is not material that the order permitting the enforcement of the judgment against the estate was obtained subsequent to the presentation of the claim to the administrator."

The order is affirmed.

We concur: STURTEVANT, J., SPENCE, J.

In re RICHARDS' ESTATE.*
Appeal of BENNALLACK.

Civ. 11237.

District Court of Appeal, First District,
Division 1, California.
June 22, 1940.

Hearing Granted Aug. 19, 1940.

1. Executors and administrators 🔑87

If debtor of an estate is unable to pay all his debts, a petition setting forth that it is for the best interests of the estate that the amount be compromised may be filed by the executor or administrator, and upon hearing, after posting of notice in accordance with statute, the court may give the debtor a discharge, but, if the record discloses that notice was not given, the order is void for want of jurisdiction and may be attacked directly or collaterally at any time. Probate Code, §§ 578, 1200.

2. Attorney and client 🔑70, 101(1)

Ordinarily, an attorney does not have authority to compromise a claim against an estate, but if he should do so, and the compromise has been executed, it will be presumed that he held such authority, but the presumption is disputable and may be overcome by other evidence.

3. Attorney and client 🔑69

When authority of a legal representative to sign an agreement or stipulation relative to disposition of a client's rights is challenged, evidence showing such authority must affirmatively appear.

4. Attorney and client 🔑70

Where attorney did not deny statement of client that attorney had not been authorized to sign stipulation compromising liability to estate of deceased executor, any presumption in favor of attorney ceased to exist and, in absence of attorney's testimony under oath, court would conclude that no authorization was given.

5. Attorney and client 🔑101(1)
Executors and administrators 🔑87

Attorney for party interested in estate was not, without knowledge or consent of party interested, authorized to compromise, by stipulation, amount in which deceased executor was indebted to estate, and the court, in absence of verified petition or hearing and notice as required by statute, did not have jurisdiction to make order compromising the account and supplemental account of the executor. Probate Code, §§ 578, 1200.

6. Executors and administrators 🔑87

Where order directing acceptance of less than total amount in which deceased executor was indebted to estate did not use the word "compromise" but referred to stipulation as a settlement, but stipulation was in fact a compromise and record affirmatively showed that court was without jurisdiction to make the order because of failure to comply with statutory prerequisites, validity of order could not be avoided because direction for acceptance of lesser amount did not appear to be void upon its face. Probate Code, §§ 578, 1200.

7. Executors and administrators 🔑87

Where stipulation provided, on behalf of estate, for acceptance from estate of deceased executor a less amount than appeared in the account sworn to by the executor to be owing by him to the estate, and there was no explanation concerning the reduction, the stipulation could not be upheld as a mere waiver of objections theretofore filed that money received by executor had not been included in the account and that certain disbursements by executor were illegal.

8. Executors and administrators 🔑303(1)

A compromise of interest in a decedent's estate may be authorized only by the court.

9. Executors and administrators 🔑87

Compromise of amount in which deceased executor was indebted to estate as shown by his final account could not be made without verified petition therefor and hearing and notice as required by statute, notwithstanding compromise was made after settlement of the final account. Probate Code, §§ 578, 1200.

10. Executors and administrators 🔑510(6)

Where attorney for party interested in estate, without knowledge or consent of party interested, agreed to compromise amount in which deceased executor was indebted to estate, but if party interested would have appealed from order settling accounts of executor nothing would have appeared in the record to indicate that attorney did not have authority to sign stipulation, appeal which was not taken until after party in interest had presented a motion to vacate and set aside the order of settlement was timely.

11. Appeal and error 🔑173(7)

When authority of an attorney is challenged, the initiatory proceedings must be instituted in the trial court.

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* Subsequent opinion 109 P.2d 923.

12. Executors and administrators ⟹510(6)

The time for perfecting appeal from adverse decision on petition to nullify stipulation compromising amount in which deceased executor was indebted to estate did not begin to run from time that minute order, made subsequent to hearing on objections to settlement of final account and distribution, and reciting that relief under statute was denied and that residue of estate should be divided, was entered, but commenced to run from time that formal order responsive to petition appeared in settlement of accounts and decree of distribution. Code Civ. Proc. § 473.

13. Courts ⟹202(5)

Where a jurisdictional question is raised and minute order does not recite decree or order at length, the time for appeal does not start until the order is signed by the judge and filed. Probate Code, § 1221.

14. Executors and administrators ⟹510(6)

Proceeding, initiated by executor by petition for exchange of land and terminated by court order authorizing the exchange, after protest thereto had been made, was an adjudication of the exchange of property, subject to appeal within 60 days as in the case of an order directing the conveyance of property. Probate Code, § 1240.

15. Executors and administrators ⟹346

An order granting petition by executor for exchange of land was subject to an attack collaterally if order was void on its face or if probate court did not have jurisdiction to entertain petition or had failed to follow statutory provisions conferring jurisdiction. Probate Code, § 1240.

16. Executors and administrators ⟹349(2)

Court had jurisdiction to entertain petition by executor for authority to exchange land on ground that exchange was for the best interests of the estate, and, if court erred in its determination, remedy was by direct appeal. Probate Code, §§ 860, 1240.

17. Executors and administrators ⟹349(2)

An order granting petition of executor to exchange land on ground that exchange was for best interests of estate was not subject to collateral attack four years later, by party in interest who had knowledge that exchange had been effectuated by execution, delivery, and recordation of the deed.

KNIGHT, J., dissenting in part.

Appeal from Superior Court, Nevada County; Raglan Tuttle and Arthur Coats, Judges pro tem.

Proceeding in the matter of the estate of Philip Richards, deceased, wherein Frank Bennallack, individually, and as administrator of the estate of James Bennallack, deceased, and also as administrator of the estate of Mary Ann Bennallack, deceased, filed objections to account rendered by William G. Richards, sole surviving executor of the estate of Philip Richards, deceased. A supplemental and final account was filed. Two days thereafter William G. Richards died. His wife, Mary E. Richards, was appointed administratrix with the will annexed of Philip's estate. Exceptions to the supplemental and final account were filed by Frank Bennallack, and shortly thereafter Mary E. Richards died. E. M. Rector was appointed to succeed Mary as administrator of Philip's estate. From a decree settling accounts of E. M. Rector and ordering distribution in the matter of the estate of Philip Richards, deceased, Frank Bennallack, individually and as administrator, appeals.

Appeal from portion of decree dismissed; in other respects decree reversed with directions.

James Snell, of Grass Valley, for appellant.

W. E. Wright and H. Ward Sheldon, both of Nevada City, for respondent.

Butler, Van Dyke & Harris, of Sacramento, amici curiæ.

WARD, Justice.

An appeal from a decree settling accounts and ordering distribution in the matter of the estate of Philip Richards, deceased.

Philip Richards died in 1887, leaving a will in which Wm. G. Richards, Francis Richards and James Bennallack were named as executors. The will designated certain legatees and provided that in the event of the death of any one or more of them before receiving the respective bequests, the amount or amounts thereof should be paid to his brother Wm. S. Richards. The residue of the estate was left to said brother and to Francis Richards, also known as Francis S. Richards, another brother, share and share alike. Probate of the estate proceeded and in the year 1934 Wm. G. Richards, the sole surviving executor, rendered an account covering a period of twenty-two years and showing a balance of $8,-

533.98 cash on hand. This amount included $3,000 paid as additional consideration in connection with a piece of property accepted in exchange for a piece of property belonging to Philip's estate at the time of his death. Frank Bennallack, as administrator of the estate of Mary Ann Bennallack, deceased, wife and heir of James Bennallack, assignee of the Francis Richards interest in the estate of Philip Richards, filed objections to the account, alleging among other things that no vouchers had accompanied the report; that, according to the books, all money received had not been included in the account filed, and that many items of disbursement were not properly chargeable against the estate. A supplemental and final account was filed, indicating a balance on hand of $8,767.40, in addition to the real property received in the exchange above mentioned, and a hearing thereon set for December 7, 1934. Two days after the filing of this account on November 26, 1934, Wm. G. Richards died, and his wife, Mary E. Richards, his heir, to whom he had deeded all his interest in Philip's estate, including the interest of Wm. S. Richards, theretofore assigned to him, was appointed administratrix with the will annexed of Philip's estate. Exceptions to the supplemental and final account of Wm. G. Richards were filed by Frank Bennallack. Shortly thereafter, Mary E. Richards died and E. M. Rector, the husband of the daughter of Wm. G. and Mary E. Richards, and an heir at law of their estates, was appointed, on April 5, 1935, approximately four months after the death of Wm. G. Richards to succeed Mary as administrator of Philip's estate.

In February, 1936, the attorney for Rector, as administrator of the estates of Philip Richards, deceased, and of Wm. G. Richards, deceased, and the attorneys for Rector as the administrator of the estate of Mary E. Richards, deceased, entered into a written stipulation with the attorneys for Frank Bennallack, as the administrator of the estate of Mary Ann Bennallack, deceased, and also of the estate of James Bennallack, deceased, that the account and supplemental account of Wm. G. Richards, former executor of the estate of Philip be settled and allowed, pursuant to a proposed order which the stipulation authorized the court to sign. In connection with this stipulation and order, heard in chambers, the record does not disclose the filing of a "verified petition with the clerk" (Probate Code, § 578) or that the matter was set for hearing and notice given in the manner required by section 1200, Probate Code. The order, which was annexed to the stipulation, stated that actual cash on hand belonging to the estate was the sum of $3,002.76; that certain additional items of expense were settled and allowed, and that the order was to be "a final adjudication of the accounts presented and all moneys received and disbursed by the said Wm. G. Richards as executor of the said estate, and a final settlement of all cash money due said estate from said Wm. G. Richards, as executor of said estate". By said order, Rector, as administrator of Philip's estate, was charged as of the date of the order with the amount of cash remaining on hand—$2,194.63. It should be noted in this connection that the amount of $3,002.76 is not arrived at by a deduction from the amount on hand of $8,767.40, of attorneys' fees, executor's fees, costs and an amount requested for extraordinary services of the executor, or by any combination of these amounts, but is in fact an amount arbitrarily arrived at by compromise. And respondent's claim that the court took into consideration these amounts is not borne out by the record. Thereafter, Rector as administrator of Philip's estate, filed his first and final account and petition for distribution. Frank Bennallack, individually and as administrator filed objections to settling the accounts of executor Wm. G. Richards and administrator Rector, to the petition for distribution and to the closing of Philip's estate. Subsequently supplemental accounts were filed by administrator Rector, followed by objections of appellant Bennallack, and several hearings were had in an endeavor to settle and adjust the final account and petition for distribution. On September 16, 1937, the final and supplemental accounts of administrator Rector were settled and allowed. Objections and protests filed by administrator Bennallack were denied, as was his petition that the above stipulation be declared null and void, and distribution of Philip's estate was ordered. Notice of appeal was filed September 27, 1937.

In support of appellant's contention that the order, settling Wm. G. Richards' accounts, and the proceedings leading up to its entry were irregular and that the accounts should be reopened, he sets forth that he had no knowledge of the above stipulation until after it had been made and filed; that he did not consent thereto and did not authorize or empower his attorneys, or either of them, or any other person, to enter into such stipulation or to compromise or settle his or any claim or demand; that the attorneys had been instructed and directed to the contrary; that at no time had Bennallack individually or as administrator of either the Mary Ann or the James Bennellack estates receive notice of the proposed compromise or settlement as required by law, nor in his capacity as administrator had he filed any petition showing such compromise to be to the best interests of the estates he represented.

Upon the death of Wm. G. Richards, his estate was indebted to the Philip Richards estate in the sum of $8,767.40, as shown by his supplemental and final account to which reference is above made. The procedure followed by the court in settling the claim of Philip's estate against the former executor thereof, Wm. G. Richards, deceased, after stipulation signed by the attorneys for the respective estates was a compromise, in effect the making and filing of an order settling the amount of cash on hand, $8,767.40, at the sum of $3,002.76, less attorney's fees, filing fees, etc., reducing the latter amount to the sum of $2,194.63.

[1] If a debtor of an estate is unable to pay all of his debts, a petition setting forth that it is for the best interests of the estate that the amount be compromised may be filed by the executor or administrator of the creditor estate. Upon hearing, after posting of notice in accordance with the provisions of section 1200 of the Probate Code, the court may give the debtor a discharge. Probate Code, § 578. If the record discloses that notice was not given, the order is void for want of jurisdiction (Pearson v. Pearson, 46 Cal. 609) and may be attacked directly or collaterally at any time. Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370; Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 53 P.2d 127.

[2-4] In this proceeding the order in effect recites that the attorneys representing the various interests stipulated to settle the claim. Ordinarily an attorney does not have the authority to compromise a claim, but if he should do so, and the compromise has been executed, it will be presumed that he held such authority. The presumption is disputable, however, and may be overcome by other evidence. In this matter a motion to set aside the order compromising the claim was denied. Upon hearing, both Bennallack and one of his former attorneys who signed the stipulation testified. According to the testimony, Bennallack denied giving authorization to compromise, and upon a visit to the attorney within three days after the order had been filed, terminated the attorneys' further representation in the matter. When authority of a legal representative to sign an agreement or stipulation relative to the disposition of a client's rights is challenged, evidence showing such authority must affirmatively appear. Jones v. Noble, 3 Cal.App.2d 316, 39 P.2d 486. The attorney in testifying relative to the matter, failed to deny the statement that he had not been authorized to sign the stipulation. Under the circumstances we conclude that any presumption in his favor ceases to exist, and in the absence of the attorney's testimony under oath we must conclude that no authorization was given. None of the cases cited by respondent (McLeran v. McNamara, 55 Cal. 508; Lamb v. Herndon, 97 Cal.App. 193, 275 P. 503; Bogardus v. O'Dea, 105 Cal.App. 189, 287 P. 149; Chase v. Van Camp Sea Food Co., Inc., 109 Cal.App. 38, 292 P. 179), in support of the contention that an attorney of record has the power to dismiss and that a stipulation to that effect does not depend for its sufficiency upon the special consent or authority given by the client, deals with a situation wherein the attorney, as in this case, received specific instructions not to compromise. As above noted, the stipulation is between estates, and the order attached thereto provides for the acceptance of a lesser amount of "cash money" than was due from the executor Wm. G. Richards. From a monetary standpoint, this worked to the advantage of the Wm. G. Richards estate and to the disadvantage of the Philip Richards estate, and the two Bennallack estates holding a one-half interest in the Philip Richards estate. The interests of the Bennallack heirs were compromised without approval of the court or the administrator of the Bennallack estates and settled without the filing of a petition showing the advantage of the "settlement" or "compromise" and without notice to any of the interested parties, as required. The release was not complete; it was only partial.

[5, 6] Presumably section 578, Probate Code, supra, was intended to apply be-

tween an estate and third persons, but in this instance upon the death of Wm. G. Richards he, of course, ceased to be the executor of the Philip Richards estate. Upon the appointment of E. M. Rector as administrator, the Philip Richards estate was of necessity forced to deal with the Wm. G. Richards estate as a third party. This is evidenced by the order itself which in 1936 purported to settle the final account of Wm. G. Richards as executor by charging the new administrator, following the signing of the above stipulation by the attorney for the administrator of the Wm. G. Richards estate, with the less sum of "cash money due" as of 1934, the year wherein Wm. G. Richards died, in accordance with the stipulation. The stipulation and the order purported to be an acquittance to the Wm. G. Richards estate, which, if any liability existed at the time, would have been liable for the full amount as shown by the sworn statement of Wm. G. Richards. Respondent suggests that the compromise, if any, is between the debtor estate of Wm. G. Richards and the heirs of Philip Richards, that is, not between the debtor and the estate. However, the stipulation was signed by E. M. Rector in his capacity as administrator of the estate of Philip Richards. The attorneys, representing appellant, lacked authority to sign the stipulation, and the court, not having complied with sections 578 and 1200 of the Probate Code, did not have jurisdiction to make the order compromising the account and supplemental account of Wm. G. Richards. Respondent contends that no compromise is involved in the case; that neither the stipulation nor the order amounted to a compromise. The order directing the acceptance of the lesser amount does not appear from a mere reading thereof to be void upon its face. It does not use the word "compromise", but refers to the stipulation as a settlement, which in this instance, however, was in fact a compromise. The record affirmatively shows that the court was without jurisdiction to make the order. Texas Co. v. Bank of America, etc., Ass'n, supra.

[7, 8] The records show that the former executor was charged with over $8,000 and that the estate accepted in lieu thereof, after deduction of attorney's fees and costs, a sum less than $3,000. There was no word of explanation concerning the reduction. If any part of the executor's request for compensation for extraordinary services was considered in arriving at the reduced figure, it would have been an easy matter to have so recited as was done in connection with the attorney's fee. The order "that all money belonging to said estate on November 22, 1934, was the sum of $3,002.76" was in effect a declaration that the sum set forth in the final account was not in fact the true sum. Respondent contends that the stipulation was in fact a waiver of objections. It was more than a waiver of the objections theretofore filed, in effect, that money received by the executor had not been included in the account and that many items of disbursement by the executor were illegal and should not have been charged against the estate, etc. The stipulation was an agreement to accept a less amount than appeared in the account sworn to by the executor; there was no explanation in open court or otherwise in any official way to appellant. Assuming that the attorney had authority to waive his client's interest in amounts not included in the account, and disbursements not properly chargeable against the estate—matters in connection with which objections were filed as above noted—it cannot be presumed that he had a right to stipulate for his client's proportion of a less sum than "cash on hand" as appeared in executor Richards' account. A compromise of interest in a decedent's estate may be authorized only by the court. Probate Code, § 578, supra.

[9] It is respondent's view that a failure to comply with section 578 is of no consequence after settlement of the final account, as the section does not require a party to resort to a compromise to the exclusion of his legal remedy. The cases cited by respondent construe the law as it existed in 1931 prior to the amendments in 1933 (Stats.1933, chap. 969, p. 2493) and in 1935 (Stats.1935, chap. 724, p. 1971). Prior to 1931 a petition or notice was not required. In 1933 and 1935 a verified petition to compromise was required; likewise a notice of a hearing thereof given for the period and in the manner required by section 1200. In Mazza v. Austin, 25 Cal.App.2d 85, 87, 76 P.2d 533, 534, the court said: "The power of the court to authorize a compromise is derived solely from section 578 of the Probate Code."

The order should have been set aside and procedure adopted in accordance with the code provisions.

[10, 11] Respondent contends that the appeal in so far as it applies to the settlement of the accounts was filed too late. If it be contended that appellant should have appealed from the order settling the Wm. G. Richards' accounts, only the stipulation and the order would have been part of the record on appeal. An appeal from the order of February 7th would have held up further proceedings in the estate and would have been of no avail as nothing would have affirmatively appeared in the record to indicate that appellant's attorney did not have authority to sign the stipulation. An independent action to vacate and set aside the order would likewise have further delayed proceedings until the decision thereon and possible appeal. Appellant adopted the most practical method of protecting the rights of the estates which he represented, namely, by promptly presenting a motion to vacate and set aside the order. When the authority of an attorney is challenged, the initiatory proceedings must be instituted in the trial court. Ventura County v. Clay, 119 Cal. 213, 51 P. 189; People v. Honey Lake Valley Irr. Dist., 77 Cal.App. 367, 246 P. 819; Wright v. Dorman, 155 Tenn. 189, 291 S.W. 1064.

[12, 13] Respondent's main contention is that the time for perfecting the appeal began to run from the entry of a minute order, made subsequent to a hearing upon appellant's objections to the settlement of the final account of administrator Rector and to the distribution of the estate. The facts are as follows: On February 7, 1936, the court signed an order settling the accounts of executor Wm. G. Richards as agreed in the stipulation. On February 14, 1936, Rector filed his first and final account and petition for distribution. On February 29 of the same year Bennallack filed his objections to settling the accounts, to closing the estate and to the petition for distribution. On January 4, 1937, after hearing, the court stated: "The application for relief under section 473 will be denied." Some time between January 4th and the end of that month, a minute order appeared on the records of the court, reading in part as follows: "It is ordered that relief under section 473 be denied. It is further ordered that judgment be that residue of the estate will be divided equally between the heirs and successors of William S. Richards and Francis Richards." However, a formal order appears in the settlement of accounts and decree of distribution dated September 16, 1937, and filed September 20, 1937. The notice of appeal was dated September 27, 1937. In Estate of Olsen, 9 Cal.App.2d 374, 382, 50 P.2d 70, 74, the court said: "In our opinion the appeal from the minute order should be dismissed as said order was merely a preliminary order for a decree of distribution rather than a decree of distribution. 'An order for judgment is not a judgment.' United Taxpayers' Co. v. San Francisco, 55 Cal.App. 239, 243, 203 P. 120, 121. While a decree of distribution need only be 'entered at length in the minute-book of the court' and need not be a separate instrument signed by the judge and filed (Probate Code, § 1221), the question still remains as to whether a particular entry in the minute book constitutes an order for a decree of distribution or the decree itself. It is a matter of common knowledge that a preliminary order for a decree of distribution is customarily entered in the minute book and that thereafter a separate instrument is customarily signed by the judge, filed, and copied at length into the minute book." In the instant case, the minute order that "The application for relief under section 473 will be denied" was not responsive to the relief prayed by appellant. The petition was not one filed under the provisions of section 473 of the Code of Civil Procedure, but was a petition to declare null and void and of no force and effect the stipulation referred to, and to set aside the accounts of executor Wm. G. Richards. The minute order, entered upon some indefinite date between the fourth and thirtieth of January, did not give appellant the date from which the time of appeal commenced to run, and did not correctly rule on the petition presented. We believe that in a case wherein a jurisdictional question is raised and the minute order does not recite the decree or order "at length" (Probate Code, § 1221), the time for appeal does not start until the order is signed by the judge and filed. At the time of final distribution, appellant availed himself of the provisions of article III, chapter XVI, division III of the Probate Code by resisting the application to distribute. Probate Code, § 1020. Until the taking of this appeal, each side herein treated the court's statement as requiring an order to be made in the future—appellant by not appealing within sixty days of its date, and respondent by submitting in the

order of September, 1937, a full and complete provision finally disposing of the motion to set aside the order of February, 1936, settling the accounts of executor Richards. Estate of Siemers, 202 Cal. 424, 261 P. 298.

[14-17] Appellant's second contention on appeal is that the exchange of a certain parcel of land belonging to the estate for land of the Corporation of America, plus cash, was void. On October 24, 1933, Wm. G. Richards as executor of Philip's estate filed a petition for authority to make the exchange. Subsequently Frank Bennallack and others filed a protest against such exchange upon the ground that the estate had not been distributed. The petition was granted upon the ground that the exchange was for the best interests of the estate. An order authorizing the exchange was signed and filed on November 6, 1933, which stated that notice of hearing had been duly given and that evidence oral and documentary had been introduced. No appeal from such order was filed until September 27, 1937.

This independent proceeding initiated by petition and terminated by order was an adjudication of the exchange of property, subject to appeal within sixty days as in the case of an order directing the conveyance of property. Probate Code, § 1240. It was subject to an attack collaterally if the order was void on its face or if the probate court did not have jurisdiction to entertain the petition or had failed to follow the statutory provisions conferring jurisdiction. Texas Co. v. Bank of America, etc., Ass'n, supra. The contention is that the court did not have jurisdiction to determine the petition. Respondent contends that the authority to hear and determine the petition is found in section 860 of the Probate Code, enacted in 1931, based upon section 1576a of the Code of Civil Procedure enacted in 1929. The probate section was amended in 1935 (Stats.1935, p. 1972) and in 1939 (Stats. 1939, chap. 349, p. 1684). The petition for the exchange was tantamount to a complaint in an ordinary action. The notice required by statute to parties alleged to be interested was complied with. As legatees and devisees in the Philip Richards estate, certain parties appeared in response to the notice and protested the granting of the petition, but offered no evidence against the allegation of the petition that it was to the best interests of the estate that the exchange be made. The petition might well be denominated a petition for the sale of property. Cash plus other property was the consideration for the sale. The court had jurisdiction to entertain the petition as presented. If it erred in its determination of the matter the remedy was by direct appeal. At least it should be and is impregnable, after approximately four years, against a collateral attack in the estate of Philip Richards, deceased, irrespective of any adjudication in any pending quiet title action, when it appears that appellant had knowledge that the exchange of property had been effectuated by the execution, delivery and recordation of the deeds. Estate of Pierce, 28 Cal.App. 2d 8, 81 P.2d 1037.

The appeal from that portion of the decree settling accounts and the decree of distribution relating to the exchange of property having been taken too late, is dismissed; in all other respects the decree appealed from is reversed, with directions to proceed in accordance with the views expressed herein.

I concur: PETERS, P. J.

KNIGHT, Justice (concurring and dissenting).

I concur in that portion of the major opinion holding that the order authorizing the exchange of property is not subject to review; but I dissent from that portion holding that in all other respects the decree appealed from should be reversed with directions to proceed in accordance with the views therein expressed.

The appeal was taken, as stated, from the decree settling the final accounts and granting the petition for final distribution filed by E. M. Rector, as administrator with the will annexed. However, no complaint is made about the settlement of those accounts, nor as to the manner in which the decree ordered the estate distributed. The controversy centers upon a ruling made by the probate court denying a petition presented by appellant at the time of the hearing of the Rector final accounts wherein appellant, among other things, attacked the validity of and asked the probate court to declare void two orders previously made by a different judge, involving the administration of the estate by Wm. G. Richards as sole executor of the will, whose death occurred on November 28, 1934. The adverse ruling on said petition was made on January 4, 1937, at the conclusion of said hearing of the Rector accounts, but was later incorporated in the decree of final settlement entered on September 20, 1937; and the present appeal was taken from that decree.

The first of the orders appellant sought to have annulled was the one made on November 6, 1933, authorizing the exchange of real property; the second was made on February 7, 1936, and settled two accounts filed by the said Wm. G. Richards. Section 1240 of the Probate Code afforded appellant a right of appeal from each of the orders so attacked, which right he failed to exercise; therefore, upon the expiration of the time within which those appeals could have been taken, each order became final; and it was principally upon that ground that the probate court held that it was without authority to set either of said orders aside. As will be noted, in disposing of the appeal the majority opinion holds that the probate court's adverse ruling on said petition was correct as to the order of November 6, 1933, authorizing the exchange of real property, but erroneous as to the order of February 7, 1936, settling said accounts; and it is with regard to the the question of the validity of the latter order that the present difference of opinion has arisen.

At the time the order of February 7, 1936, was made, the Philip Richards estate had been in the process of administration in Nevada county for nearly fifty years; and continuously for forty-seven years of that period Wm. G. Richards served as executor. When the decedent's will was admitted to probate in 1887 three coexecutors were appointed; but two of them died prior to 1901, and from thence on, up to the time of his death in 1934, the estate was under the management of Wm. G. Richards as sole executor. The first of the two accounts settled by the order in question was filed on June 16, 1934. Appellant through his attorney filed objections thereto, mainly upon the ground that the account was not supported by vouchers. The matter was heard and ordered submitted in open court prior to the executor's death, the order of submission being made on September 24, 1934. The second account was his final account. It was accompanied by a petition for final distribution, and was filed on November 26, 1934, two days preceding the executor's death. The two accounts covered a period of twenty-two years, and contained several hundred items of receipt and disbursement, which showed the dates, amounts, and the nature thereof. The items of receipt consisted mostly of monthly rentals collected from the tenants of the real property; and nearly all of the items of disbursement represented payments for taxes, insurance, and the improvement and upkeep of the property. A portion of the remainder represented the expenses of litigation in which the estate on many occasions had been engaged. The recapitulation set forth in the final account showed that during the twenty-two preceding years said executor received the total sum of $18,447.42, and expended $9,680.02, which left a balance on hand of $8,767.40; but as against that balance the executor made a demand, supported by a full statement of facts, for an allowance of fees in the following sums: statutory fees of the executor, $788.95; for extraordinary services performed by him during the forty-seven preceding years, $4,700. Appellant filed objections to the final account and to the petition for final distribution, one of the objections being directed against the allowance of the amount of fees demanded.

After the administrator with the will annexed was appointed, several hearings were had on the last account filed by the executor, and finally, on February 5, 1936, the matter of the settlement thereof was taken up in court chambers. The attorneys representing all parties interested in the distribution of the estate were present, and an agreement was reached in which the court joined, as to the manner in which both accounts should be settled. The agreement was reduced to the form of a written stipulation which was signed by all of said attorneys, including appellant's attorney; and the form of an order of settlement was attached to the stipulation, which the court was requested to sign and enter; and on February 7, 1936, the order was signed and entered accordingly. It appears from the record that in reaching a settlement as to the amount of money ultimately due the estate from the executor, the matter of the executor's demand for compensation was taken into consideration and that it was understood that said fees would be waived. This is shown by the testimony given later by attorneys Armstrong and Wright at the final settlement of the estate; and in accordance with the stipulation the court found that the amount so due was $3,002.76, out of which the court directed should be paid $750 attorney's fees and $52.10 clerk's fees. Also in conformity with the terms of the stipulation the order concluded as follows: "* * * this order shall be a final adjudication of the accounts presented and all moneys received and disbursed by the said Wm. G. Richards as executor of the said estate, and a final settlement of all cash money due said estate from said Wm. G. Richards, as Executor of said Estate."

Shortly after the order of settlement was filed, however, appellant substituted his present counsel, and on February 29, 1936, the petition for nullification was filed. Besides asking for an annulment of the order of settlement, the relief sought by appellant was in part as follows: That a complete hearing be had on both accounts of said Wm. G. Richards; that thereupon he be charged with the payment of large sums of money, aggregating approximately $18,447.42, plus interest amounting to about $4,000; and "That no allowance be made to said Wm. G. Richards for any item of expenditure alleged to have been made in said accounts in excess of $20.00 for which no voucher is produced or filed" or "for any item of expenditure alleged to have been made in said accounts for any item of $20.00 or less for which no voucher is produced, unless such item of expenditure shall be supported by the uncontradicted oath of the said Wm. G. Richards, positive to the fact of payment, specifying when, where, and to whom it was made; provided, however, that there shall not in any event be any allowance made for items of expenditure of $20.00 or less, where no vouchers are produced, for any sum in excess of $500.00." As to the absence of vouchers, it may be stated that at the hearing of the first account testimony was adduced showing that during the entire management of the estate the executor kept a "time" book in which he entered all receipts and disbursements as the transactions took place, and that the items of receipt and disbursement set forth in said account were copied from that book, which was produced at the hearing and introduced in evidence; furthermore, that the executor testified in support of his account that the amounts of all payments set forth therein had been actually made by him on the dates, to the persons, and for the purposes stated in the account; and so far as the record shows no contradictory testimony was produced.

At no time has appellant claimed that the order settling said accounts was made or entered as the result of mistake, inadvertence, surprise or excusable neglect. Code Civ.Proc. § 473. To the contrary, he expressly disclaims in his briefs that his petition for the nullification thereof was based on any such theory. Nor anywhere does he intimate that any fraud was practiced by anyone in connection with the making of said stipulation or the obtaining of said order. Moreover, he expressly concedes that the order upon its face is valid, and the majority opinion so holds. But going behind the order, appellant contends that it is void for these reasons: (1) That the final proceedings which resulted in the making of the order of settlement took place in court chambers; (2) that the items of expenditure set forth in said account exceeding $20.00 in amount were not supported by vouchers; (3) that said order is based on a void stipulation in that the stipulation was in effect a "compromise" of a claim against "a debtor of the decedent" as those terms are used in section 578 of the Probate Code, and that no petition was filed or court order obtained therefor as required by that section; and (4) that in any event appellant was not bound by said stipulation and that the same was ineffectual for any purpose, because appellant's attorney entered into the same without being authorized by appellant so to do.

The grounds upon which the majority opinion holds that the order of settlement is void are those urged for reversal by appellant in his first, third and fourth points. The effect of the reversal with said directions will be, therefore, not only to nullify the order of February 7, 1936, and thus again open up for future examination the accounts of the executor extending over a period of over twenty-two years, but to declare as a matter of law that a probate court is without jurisdiction to settle an account of an executor or administrator for less than the amount of the balance set forth in the account unless a court order for "compromise" is first petitioned for and granted pursuant to the proceedings prescribed by section 578 of the Probate Code. It is my judgment that for the following reasons the requirements of section 578 were never intended to apply to proceedings involving the settlement of such accounts: First, because a complete procedural setup for the settlement of the accounts of an executor or administrator is provided by article III, chapter XV, division III of the Probate Code, and no reference whatever is made therein to the provisions of section 578. It may be safely assumed, therefore, that the legislature intended that the procedure prescribed by said article III should be all-controlling. Secondly, no case has been cited by appellant indicating that a compliance with said section is a prerequisite to the settlement of such accounts, nor has any case been called to our attention where, in the settlement of such accounts, the procedure prescribed by that section has been followed. Third, there is nothing in section 578 itself from which it may be reasonably inferred that the requirements thereof must be followed in the settlement of such accounts. Quite to the contrary it would appear from the terms thereof to be impracticable to comply therewith prior to such settlement. In this regard the section in part reads: "If a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court, may give him a discharge, upon such terms as may appear to the court to be for the best interest of the estate. A compromise may also be authorized by the court when it appears to be just and for the best interest of the estate." Obviously, not until after the probate court has made and entered its order settling an account is there any determination of the amount due the estate from the executor or administrator, and clearly, therefore, not until the amount thereof has been so determined could there be any basis for a petition or an order for compromise. Fourth, if it be held that the requirements of section 578 apply to the settlement of such accounts, it would evidently preclude an attorney in a large measure from legally stipulating in court as to particular items if thereby the amount of the balance shown by the account to be due to the estate from the executor at the time the account was filed was reduced.

Entirely aside, however, from the question of the application of said section 578, the law is well established that where grounds upon which a party seeks to have an order vacated existed at the time the order was entered, and which would have been available upon an appeal therefrom, an appeal will not lie from a subsequent order refusing to set aside the original order; that is to say, a party aggrieved by an order must take his appeal from the adverse order itself, if an appeal lies therefrom; and that if he fails so to do, an appeal is unavailing from a subsequent order refusing to set aside the original order; and the foregoing rule applies to orders made in probate. (2 Cal.Jur., p. 164.) Here it is apparent that the irregularities upon which appellant bases his first three points could have been properly incorporated in a bill of exceptions and presented for review on an appeal from the order of February 7, 1936; and on oral argument counsel for appellant in effect so conceded. Such being the case, and no appeal having been taken from said order, it would seem clear that under the legal rules above stated appellant is now precluded from attacking the validity of said order on the same alleged irregularities on an appeal from a ruling refusing to set aside the original order.

With respect to appellant's fourth point, it is true, as he contends, that the facts relied upon by him to prove that his attorney entered into said stipulation without being authorized by him so to do could not have been embodied in a bill of exceptions on an appeal from the order of February 7, 1936, because that issue did not arise and the evidence pertaining thereto was not adduced until after said order had been made and entered; but I disagree with appellant's further contention that the validity of said final order of settlement can be made to depend on the question of the binding effect upon appellant of the stipulation, for the reason that by virtue of the code sections embodied in said article III the authority to settle the accounts of an executor or administrator is vested in the probate court, free from any control by the parties; and while the court may and often does exercise such authority in accordance with the stipulations or agreements of the parties or their attorneys, it is not bound to do so. Therefore, assuming that the stipulation entered into by said attorneys in the present case was for any reason not binding on appellant, the court's order of settlement, being valid on its face, could not in any event be rendered void thereby.

As heretofore mentioned, the record shows that in arriving at a settlement of the accounts, the court and the attorneys took into consideration the executor's demand for fees. Among the facts upon which the demand was based, as they are shown by the record and particularly by the executor's petition for final distribution, are these: At the time of the executor's appointment in 1887, the estate consisted of several pieces of real property and considerable personal property, including mining stock. The dispositive clauses of the will provided for approximately twenty-two cash legacies, some seven bequests of personal property, five specific devises of real property, and the residue was bequeathed in equal shares to the decedent's brothers. Several of the legatees resided in England. The terms of the will authorized the executors to pay the cash legacies, deliver the bequeathed personal property, and convey the real property to the beneficiaries entitled thereto, without order of court; also to rent, sell or otherwise dispose of the remaining property belonging to the estate. Subsequent to the death of his two co-executors, the said Wm. G. Richards had the entire management of the estate. His services in this regard consisted largely of securing tenants for the property, collecting the monthly rentals therefrom, and keeping it in repair and improving the same. During the forty-seven years he served as executor the estate was engaged as a party litigant in upwards of eight lawsuits; and according to the statement made by appellant's present counsel at the opening of the hearing on January 4, 1937, said estate had been a party to some eight appeals to the Supreme Court. At the time the executor filed his petition for final distribution he had paid all claims against the estate, and carried out all of the terms of the will with respect to the payment of the cash legacies, delivery of the bequests, and the conveyance of the real property, and besides he had sold or exchanged various other pieces of the property belonging to the estate, so that the residue of the estate consisted only of money and one parcel of real property, which by the final decree of distribution from which the appeal was taken was distributed in equal shares to the estates of Mary Elizabeth Richards, the deceased wife of said executor, and the estate of James Bennallack, deceased, the father of appellant. Up to the time of the filing of his final account no allowance had been made to him for fees, so that for the extraordinary services thus rendered by him during the preceding forty-seven years he asked for an allowance of approximately $100 a year. It would seem, therefore, that even though the question of the reasonableness of the demand was a matter that could be properly reviewed on this appeal, the facts above set forth would not warrant this court in holding as a matter of law that the amount demanded was entirely disproportionate to the value of the services rendered.

As pointed out in the majority opinion it appears that when the executor filed his final account he did not in fact have on hand the amount of money with which he had therein charged himself; and that such fact was known to the attorneys when they entered into the stipulation. Nevertheless, in determining the amount that was ultimately due the estate from the executor, the probate court doubtless had the legal authority to take into consideration and make reasonable allowance for fees demanded by the executor, and to settle the account accordingly.

For the reasons stated it is my conclusion that no legal grounds have been shown for the nullification of the order of February 7, 1936, and that therefore the decree appealed from, as rendered, should be affirmed.

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39 Cal.App.2d 535

SLATER v. SHELL OIL CO.
Civ. 11113.

District Court of Appeal, First District, Division 1. California.

June 19, 1940.

Rehearing Denied July 19, 1940.

Hearing Denied Aug. 15, 1940.

1. Trial 🔑165

Where a motion for nonsuit is made at the close of plaintiff's case, all the evidence must be construed most strongly against defendant.

2. Appeal and error 🔑927(3)
Trial 🔑165

Where a motion for nonsuit is made at the close of plaintiff's case, the trial and appellate courts must indulge in every inference or presumption fairly arising from the evidence in favor of plaintiff, and if the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the courts must take the view most favorable to plaintiff.

3. Appeal and error 🔑927(3), 989
Trial 🔑165

Where a motion for nonsuit is made at the close of plaintiff's case, all the evidence in favor of plaintiff must be taken as true, and if contradictory evidence has been introduced, it must be disregarded, since neither the trial court nor the appellate court is permitted to consider testimony tending to create a conflict.

4. Easements ⟹37
Trespass ⟹67

In action against oil company for damages allegedly resulting from the construction and maintenance of a pipe line across plaintiff's land, whether plaintiff by her conduct granted an implied parol license or easement to company to maintain pipe line was a fact question for jury.

5. Contracts ⟹285(2)

Even if plaintiff by her conduct granted an implied parol license or easement to oil company to maintain pipe line across her land, action for damages caused by construction and maintenance of pipe line should have gone to jury on issue of damages, notwithstanding agreement granting to company's alleged predecessor in interest right of way over land provided that any damages caused should be settled by arbitration, since that provision did not apply to parol license.

6. Carriers ⟹5, 6

Under statutes enacted in 1913, a pipe line company when it was organized in 1914 could not lawfully organize as a private corporation, but could only organize as a public utility corporation subject to control and regulation by the Railroad Commission. St. 1913, p. 533, § 3; p. 657, § 1; p. 938, § 2; Const. art. 12, § 23, as amended in 1911.

7. Dedication ⟹45

Whether property has been dedicated to a public use is a fact question.

8. Carriers ⟹10

In action against oil company for damages allegedly caused by the construction and maintenance of a pipe line across plaintiff's land, evidence was sufficient for jury to find that pipe line company, to whose interests oil company allegedly succeeded, was a public utility subject to control and regulation by the Railroad Commission, and attempt made by pipe line company in 1918 to transfer its properties, including right of-way to install and maintain pipe line across plaintiff's land without commission's consent, was totally ineffectual. St.1913, p. 533, § 3; p. 657, § 1; p. 938, § 2; Gen.Laws 1923, Act 6386, § 51(a); Const. art. 12, § 23, as amended in 1911.

9. Public service commissions ⟹6

Under statute declaring that every transfer by a public utility without consent of the Railroad Commission is void, a purported transfer in violation of the statute confers no rights on the transferee, and third persons may raise that defense. Gen.Laws 1923, Act 6386, § 51(a).

10. Public service commissions ⟹19½

In a proper case, the courts have power to dissolve public utility corporations without consent of the Railroad Commission, but on such dissolution the courts possess no power to transfer, directly or by operation of law, property of such a corporation devoted to a public use to a private corporation where the property will be devoted to a private use, in view of statute declaring void any attempt by a public utility to sell, lease, assign, mortgage, or otherwise dispose of its property devoted to a public use without the Commission's consent. Gen.Laws 1923, Act 6386, § 51(a).

11. Corporations ⟹610(1)
Public service commissions ⟹19½

A public utility as a "condition precedent" to dissolution proceedings must first secure from the Railroad Commission approval of a transfer of its assets as required by statute, and after it has secured such consent it may then dissolve without the commission's consent. Gen.Laws 1923, Act 6386, § 51(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

12. Judgment ⟹511

The act of a public utility pipe line company in seeking dissolution while still owning property devoted to a public use without disclosing that fact to the superior court was a legal fraud on that court rendering the court's decree, in so far as it purported to transfer expressly or by operation of law the property of the company devoted to a public use, subject to collateral attack. Gen.Laws 1923, Act 6386, § 51(a).

13. Appeal and error ⟹927(3)

Where it was stipulated that oil company was not a public utility, even if legal effect of dissolution of public utility pipe line company was to transfer to oil company pipe line company's properties including right of way to construct and maintain pipe line over plaintiff's land, the reviewing court on appeal from judgment of nonsuit in action against oil company for damages caused by construction and maintenance of pipe line was required to hold that companies intended that by attempted transfer and dissolution public purpose to which right of way had been devoted should cease.

14. Easements ⚷26(1)

Where a utility acquires an easement in the nature of a right of way for a public purpose, the abandonment of the public purpose terminates the easement and the property reverts, whether the easement was gained by grant or by exercise of the right of eminent domain.

15. Easements ⚷37

Whether a utility which has acquired an easement in the nature of a right of way for a public purpose has abandoned the public purpose so that the easement is terminated and the property reverts is a fact question.

16. Appeal and error ⚷842(1)

Even if oil company which allegedly succeeded to properties of public utility pipe line company including right of way to construct and maintain pipe line across plaintiff's land became a public utility by operation of statutes, whether oil company abandoned public use of pipe line was a fact question. St. 1913, p. 533, § 3; p. 657, § 1; p. 938, § 2; Gen.Laws 1923, Act 6386, § 51(a); Const. art. 12, § 23, as amended in 1911.

17. Appeal and error ⚷842(1)

Even if oil company which allegedly succeeded to properties of public utility pipe line company including right of way to construct and maintain a pipe line across plaintiff's land became a public utility with respect to pipe line which it had a right to maintain by adverse possession, whether that status also attached to another pipe line was a fact question.

◆

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Gertrude Slater against the Shell Oil Company to recover damages for constructing and maintaining a pipe line across plaintiff's land. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Norman H. Elkington and Joseph E. Smith, both of San Francisco, for appellant.

McCutchen, Olney, Mannon & Greene, J. M. Mannon, Jr., F. F. Thomas, Jr., Wm. E. Wright, and J. W. Thomas, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit.

In 1915 plaintiff and her husband granted to a corporation, the Valley Pipe Line Company, an easement in the nature of a right of way, under the terms of which the corporation was permitted to install and maintain a pipe line across the ranch of the grantors in Contra Costa County. Mr. Slater has since died, the plaintiff now being the sole owner of the property. In the instrument granting the easement the grantee and its successors and assigns were given the right to install an additional line or lines across the ranch upon payment for each such line a sum equal to the amount paid the grantors when the easement was first granted, that is, $86. The defendant, the Shell Oil Company, claiming to have succeeded to the rights of the Valley Pipe Line Company, constructed a second pipe across the ranch of plaintiff in 1936. It is the construction and maintenance of this second pipe line that has given rise to the present action. Plaintiff contends that the defendant has not succeeded to the rights of the Valley Pipe Line Company because, it is claimed, that company was operating as a public utility, and authorization of the Railroad Commission was not secured for the transfer of the assets of that company to the Shell Oil Company. For that reason plaintiff claims that defendant, in constructing the second pipe line, was and is a trespasser. The right of the Shell Oil Company to operate the first pipe line is not questioned in this action, the plaintiff conceding that Shell Oil Company has gained the right to maintain the first pipe line by adverse possession.

The complaint alleges that plaintiff is the owner of the property in question, and that defendant, in September, 1936, without right or consent of plaintiff, entered upon the property in question, and installed the pipe line; that in installing the pipe line the defendant appropriated a strip of land two feet in width and about two thousand eight hundred feet long, extending from the surface of the ground to a depth of about six feet. It is further alleged that in constructing the pipe line the defendant knocked down and destroyed certain trees growing upon the land, and broke and destroyed the bank of a creek running through the land; that the pipe line has leaked, causing oil to saturate the soil, rendering the land unfit for agriculture. Plaintiff prays for damages totaling $60,000.

In its answer the defendant admitted the entry and construction of the pipe line in September, 1936, but denies that such entry and construction was without right. As affirmative defenses it is pleaded that defendant owns a right of way across the ranch for the construction of the pipe line; that under the terms of the agreement granting the right of way it is provided that any damages caused by the construction or maintenance of the right of way shall be settled by arbitration; that plaintiff has not complied with the arbitration provisions. As a separate defense it is alleged that when the pipe line was constructed in 1936 plaintiff at first objected but subsequently withdrew her objections and consented thereto, and that defendant completed the construction in reliance upon plaintiff's consent and acquiescence.

[1-3] Before discussing the evidence introduced by plaintiff, some brief mention should be made of the legal rules governing the trial court in passing on a motion for nonsuit, and the rules controlling the appellate courts in passing on an appeal from a judgment of nonsuit. When such motion is made, as here, at the close of plaintiff's case, all the evidence must be construed most strongly against the defendant. The trial and appellate courts must indulge in every inference or presumption fairly arising from the evidence in favor of plaintiff. If the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the trial and appellate courts must take the view most favorable to plaintiff. All the evidence in favor of plaintiff must be taken as true, and, if contradictory evidence has been introduced, it must be disregarded. Neither the trial court nor the appellate court is permitted to consider testimony tending to create a conflict. See cases collected, 9 Cal.Jur., p. 551, sec. 35 et seq. These principles must be kept in mind in considering the evidence to which reference will now be made.

In 1914 a British corporation, the Anglo Saxon Petroleum Company, Ltd., desired to engage in the business of producing, refining and marketing petroleum oil and its products in California. Part of its plan embraced the construction of an oil pipe line from certain oil lands near Coalinga, Fresno County, to Martinez, Contra Costa County, where it contemplated constructing an oil refinery. To accomplish this purpose it was necessary to secure rights of way from various land owners for a distance of over one hundred seventy miles. On April 17, 1914, it caused to be incorporated a California corporation known as the Valley Pipe Line Company. All of the stock, except five qualifying shares, was held by the Anglo Saxon Petroleum Company, Ltd. The Valley Pipe Line Company petitioned the Railroad Commission for permission to issue its stock, and from 1914 to 1919 it filed seven supplemental petitions with that commission in connection with the issuance of its securities. These were all filed under protest, the corporation contending it was not a public utility. In 1918, pursuant to the direction of the Railroad Commission, the corporation, under protest, filed with the commission a schedule of rates and regulations applicable to the transportation of petroleum through the pipe line. By that schedule the Valley Pipe Line Company offered to carry oil for the public on certain terms and conditions.

After its incorporation, the Valley Pipe Line Company proceeded to secure rights of way and to construct its pipe line. It was stipulated on the present trial that if recalled to the witness stand Mrs. Slater would testify that, in securing the Slater right of way, the right of way representative of the Valley Pipe Line Company told the Slaters that if necessary that company "would condemn the property, which would mean additional costs to the Slaters".

About a year after the incorporation of the Valley Pipe Line Company, the Shell Company of California was incorporated by the Anglo Saxon Petroleum Company, Ltd. After the incorporation of this company (its officers being the same as those of the Valley Pipe Line Company), the capital stock of the Valley Pipe Line Company was transferred to the Shell Company of California. Later the Shell Company of California, by appropriate proceedings, changed its name to the Shell Oil Company, which is its present name, and the name under which it is here sued.

The pipe line constructed and operated by the Valley Pipe Line Company constituted the only source of supply of the Shell Oil Company. Although it had filed a schedule of rates with the Railroad Commission under which it offered, under protest, to carry oil for the public, it in fact only carried oil for the Shell Oil Company. The two corporations (until 1919) were operated as separate entities, the Shell Oil Company paying the Valley Pipe Line Company for transportation of the oil, and the latter company paying dividends to its sole stockholder, the Shell Oil Company.

By an agreement dated December 31, 1918, the Valley Pipe Line Company purported to transfer all of its properties, including the Slater right of way, to the Shell Company of California. This purported transfer was approved by the board of directors of the Valley Pipe Line Company January 23, 1919. Admittedly the consent of the Railroad Commission was not secured to this transfer. This transaction was admittedly conceived and carried out for the purpose of avoiding, if possible, the imposition of a federal tax imposed on pipe line companies. The Valley Pipe Line Company had paid this tax under protest, its contentions being (1) that in fact the Valley Pipe Line Company was the Shell Oil Company, and that company was simply transporting its own oil; and (2) that the tax was imposed only on public utility pipe line companies, and that Valley Pipe Line Company was not a public utility. The Valley Pipe Line Company sought to recover the tax paid. In Meischke-Smith v. Wardell, 286 F. 785, the Circuit Court of Appeals for the Ninth Circuit decided adversely to the plaintiff. It held that the two corporations were separate entities. After analyzing the various statutory provisions in California, and the activities of Valley Pipe Line Company as already set forth in this opinion, it also held that Valley Pipe Line Company was a public utility, and that even if it were not it was subject to the tax.

After attempting to transfer all of its assets to the Shell Company of California, the Valley Pipe Line Company filed in the Superior Court in San Francisco, under then existing statutory provisions, an application for dissolution. This application merely recites, so far as pertinent here, that the applicant is a California corporation. It does not state that it is a public utility, nor does it allege consent of the Railroad Commission. It alleges that the stockholders have authorized the dissolution, and that all claims and demands against the corporation, and all taxes due from it, have been paid. In due course, in April of 1919, the Superior Court entered its "Decree Dissolving Corporation". This decree, in addition to dissolving the corporation, appointed W. Meischke-Smith, J. C. Van Eck, John Lawson, B. D. Adamson and H. R. Gallagher trustees for the stockholders with power to settle all the affairs of the company and "to distribute and convey all the property of the said corporation to its stockholders".

After the transfer of the assets of the Valley Pipe Line Company and the dissolution of that company, the Shell Oil Company operated the pipe line, and is still operating the pipe line, carrying oil only for itself. In 1936 the Shell Oil Company determined to construct a new pipe line from Bakersfield to its refinery at Martinez. It desired to avail itself of its claimed right under the original grant to construct a second pipe line across the plaintiff's property. On September 5, 1936, a representative of the defendant visited the plaintiff's ranch, and delivered a check and a letter to one of the sons of the plaintiff. The check was in the sum of $86. The letter stated that the Shell Oil Company proposed to construct the second pipe line across the ranch under the grant originally given to Valley Pipe Line Company. The letter stated, among other things: "We are the owner and holder (by assignment from Valley Pipe Line Company) of a Right of Way Grant" originally given to Valley Pipe Line Company.

The work of constructing the second pipe line was commenced within an hour or two of the time of the delivery of the letter. The Slaters consulted their then attorney. He investigated the problem, consulted with Shell Oil Company officials, and, upon ascertaining from a title company that Shell had "succeeded to all Rights of Way of the Valley Pipe Line Company" by deed, and, having been informed of the assignment and transfer of 1918 by officials of the Shell Oil Company, but at no time having been told that Valley Pipe Line Company was a public utility, he advised the plaintiff that the Shell Oil Company had the legal right to proceed. In November, 1936, the plaintiff cashed the $86 check. Later, in August of 1937, the plaintiff's then attorney discovered the true facts, and on the ground the Shell Oil Company "did not acquire any title to this right of way" and for that reason "it now appears that you have no right at all upon this property", tendered to the defendant a cashier's check for $86, which has never been cashed. This action was thereupon instituted.

In constructing the second pipe line the Shell Oil Company, according to the evidence introduced by plaintiff, damaged the real property to a material extent.

At the conclusion of plaintiff's case the defendant moved for a nonsuit on the following grounds: (1) That the evidence is insufficient to show that Valley Pipe Line Company was a public utility; (2) that if the evidence is sufficient to show that fact, plaintiff has no standing to raise the question; (3) that upon the dissolution of Valley Pipe Line Company the Shell Oil Company succeeded to the rights and properties of the Valley Pipe Line Company by operation of law; (4) that regardless of the question as to whether Shell Oil Company possesses, by assignment or operation of law, the original easement granted to Valley Pipe Line Company, the plaintiff by her conduct, granted an implied parol license or easement by implication to Shell Oil Company to maintain the pipe line in question. In ruling on the motion, the trial court stated that, in its opinion, the Valley Pipe Line Company was a public utility and that the attempt to deed the properties to Shell Company of California was ineffectual in the absence of consent by the railroad commission. The motion was granted, however, on the third ground urged by defendant, namely, that upon dissolution of the Valley Pipe Line Company title to its property, including the right of way and the right to build a second pipe line, vested in the single stockholder, the Shell Oil Company.

[4, 5] Little consideration need be given to the fourth ground urged in support of the motion for nonsuit—namely, that Mrs. Slater by her conduct conferred an implied easement on the Shell Oil Company. This is so for two reasons. In the first place, that is a question of fact which must be left to the jury. From the evidence, to say the least, conflicting inferences might arise, one favorable to the plaintiff. In the second place, even if such parol or implied license had been conferred, the cause should have gone to the jury on the issue of damages caused by the construction and maintenance of the pipe line, the arbitration provisions of the Slater agreement not being applicable to such parol license.

We are also of the opinion that the trial court correctly refused to grant the nonsuit on the first and second grounds urged. There can be no reasonable doubt but that under the facts and the law, it was at least a question of fact as to whether Valley Pipe Line Company was a public utility. Article XII, section 23, of the Constitution, as it read at the time of the incorporation of the Valley Pipe Line Company, provided (Amendment of 1911): "Every private corporation * * * owning, operating, managing, or controlling any commercial * * * pipe line * * *, for the transportation or conveyance of * * * crude oil * * * either directly or indirectly, to or for the public * * *, is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the legislature * * *."

Section 2 of the Public Utilities Act as amended in 1913 provided: "The term 'public utility,' when used in this act, includes every common carrier, pipe line corporation * * * where the service is performed for or the commodity delivered to the public or any portion thereof. The term 'public or any portion thereof' as herein used means the public generally, or any limited portion of the public including a person, private corporation, municipality or other political subdivision of the state, for which the service is performed or to which the commodity is delivered, and whenever any common carrier, pipe line corporation, * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, pipe line corporation, * * * is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act." Stats.1913, Chap. 553, p. 938. In addition, a special statute applicable to pipe line companies was passed in 1913. Stats.1913, Chap. 327, p. 657. By section 1 of that act every private corporation owning, operating, managing or controlling any pipe line within California for the transportation of crude oil or petroleum to or for the public for compensation of any kind is declared to be a common carrier.

Another statute, also passed in 1913, provides in section 3 thereof that: "The construction hereafter of any pipe line or pipe lines intended for the transportation of crude oil, petroleum or any of its products, otherwise than as a common carrier for an aggregate distance of thirty-five or more miles within this state, continuously or otherwise, by means of such pipe line or pipe lines, in whole or in part, for any distance whatsoever, across, along, over or under any public highway or public road within this state is declared to be contrary to public policy and is hereby expressly prohibited." Stats.1913, Chap. 286, p. 533.

[6] It is a conceded fact that the pipe line constructed by the Valley Pipe Line Company was about one hundred seventy miles in length, and it is also conceded that it crosses public highways and railroads within the state. Respondent at the present time makes no attack on the constitutionality of these statutes. Under such circumstances it is obvious that when Valley Pipe Line Company was organized in 1914, it could not lawfully organize as a private corporation, but could only organize as a public utility corporation. It was on this very ground, among others, that the Federal Circuit Court in Meischke-Smith v. Wardell, 9 Cir., 286 F. 785, held as one of the main grounds of its opinion that the Valley Pipe Line Company was a public utility. After analyzing the California statutes above set forth, the federal court, at page 793 of 286 F., stated: "We must presume, therefore, that the Valley Pipe Line Company constructed its pipe line from the oil fields of Coalinga to the refinery at Martinez, a distance of 170 miles, for the purpose of transporting oil as a common carrier under the provisions of the Public Utilities Act, and that the transportation here in question was so carried on, and this presumption is not overcome by the claim that the pipe line was engaged only in transporting oil for the Shell Company (owning all the stock of the Valley Pipe Line Company), and not for the public."

In addition to these statutes, and, in our opinion, of more importance, the evidence shows that the Valley Pipe Line Company applied to the railroad commission for permission to issue its stock. Such permission and consent was granted on eight occasions. The company also filed with the commission its rates and regulations for the transportation of crude petroleum as a common carrier. While it is true that these acts were all done under protest, nevertheless the company did not see fit to litigate the question, and, in fact, submitted to the jurisdiction of the commission and held itself out to the public as a common carrier of oil. Moreover, it was stipulated that, had Mrs. Slater been recalled as a witness, she would have testified that the representative of the Valley Pipe Line Company in securing the original right of way agreement represented that the company could resort to eminent domain proceedings if the right of way was not granted. In other words, in order to secure the right of way, the Valley Pipe Line Company represented to the Slaters that it was a public utility, and that it possessed the power of condemnation.

[7, 8] Whether property has been dedicated to a public use is, of course, a question of fact. 22 Cal.Jur., p. 14, sec. 11. It is quite apparent that, under these circumstances, plaintiff introduced sufficient evidence from which the jury could have found that, in fact, the Valley Pipe Line Company had dedicated its properties to a public use and was therefore a public utility. Of course, the respondent, when this cause is retried, may present evidence to rebut the testimony referred to above, but on this present appeal all facts in favor of plaintiff must be accepted as true.

From the foregoing it must be taken as established on this appeal that the Valley Pipe Line Company was a public utility. From this basic premise it follows that, as held by the trial court, the attempt made by that company on December 31, 1918, to transfer its properties, including the right of way and agreement in question, was totally ineffectual. Section 51(a) of the Public Utilities Act as it read all during the existence of the Valley Pipe Line Company provided: "No railroad corporation, street railroad corporation, pipe-line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation or water corporation shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant or system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, direct or indirect, merge or consolidate its railroad, street railroad, line, plant or system, or franchises or permits or any part thereof, with any other public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. * * * Nothing in this subsection contained shall be construed to prevent the sale, lease or other disposition by any public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value." Deering's General Laws, 1923, Act 6386, p. 2723.

[9] It is to be noted that this provision declares every transfer without consent of the Railroad Commission is void. That the section means what it plainly states, that a purported transfer in violation of the statute confers no rights on the transferee, and that third persons may raise this defense, is clearly established by the following cases: Webster Mfg. Co. v. Byrnes, 207 Cal. 630, 280 Cal. 101; Crum v. Mt. Shasta Power Corp. 220 Cal. 295, 30 P.2d 30; Napa Valley E. Co. v. Calistoga E. Co., 38 Cal.App. 477, 176 P. 699.

The respondent does not argue at length on any of the above propositions. It places its main reliance for an affirmance upon the contention that it succeeded to all rights of the Valley Pipe Line Company, including the Slater right of way and agreement, by operation of law. Respondent's argument successfully urged in the trial court, and now urged here, is substantially as follows: A public utility may be dissolved without the consent of the Railroad Commission; upon dissolution the property of the corporation becomes the property of the stockholders; section 51(a) of the Public Utilities Act, supra, has no application to the dissolution of public utilities; that even if such consent is required, the lack of such consent to the dissolution does not affect the jurisdiction of the court to entertain the petition for dissolution; that appellant's attack is collateral; the decree of dissolution is entitled to every presumption necessary to sustain it, including the presumption, if necessary, that Railroad Commission consent was secured. Based on these various premises, it is urged that the dissolution was lawful, and that upon such dissolution the respondent, as sole stockholder, succeeded to the Slater right of way.

There appears to be no decision of the appellate courts of this state as to whether consent of the Railroad Commission is a condition precedent to the maintenance of an action for dissolution of a public utility. The respondent cites two cases—Jeffries v. Commonwealth, 121 Va. 425, 93 S.E. 701, and New York & Pa. Ry. Co. v. Public Ser. Comm., 72 Pa.Super. 523—both holding that under statutory provisions there existing public utility corporations may dissolve without consent of the Commission. Respondent also refers to Matter of Application of Placentia Domestic Water Co., 30 Opinions and Orders of the Railroad Commission, p. 430, where the commission, at page 431, stated: "It is not necessary for corporations to obtain permission from this Commission to dissolve." In that case, however, the corporation had first obtained consent of the Commission to a transfer of its property.

[10-12] For the purposes of this appeal we may accept the conclusion that in a proper case the courts possess the power to dissolve public utility corporations without the consent of the commission. We do not think, however, that on such dissolution the courts possess the power to transfer, either directly or by operation of law, property of such corporation devoted to a public use to a private corporation where the property will be devoted to a private use. Section 51(a) of the Public Utilities Act, supra, declares void any attempt by a public utility to "sell, lease, assign, mortgage or *otherwise dispose of*" its property devoted to a public use, without the consent of the Commission. (Italics ours.) It would be a strange doctrine indeed to permit a public utility to gain rights of way and other property by threat or actual use of eminent domain proceedings, and then, after such property is devoted to a public use, to permit it to dissolve and thus transfer by operation of law to its sole stockholder this property freed from the public use. We believe the proper rule is that any transfer of public utility property devoted to a public use can be accomplished only by consent of the Railroad Commission. After it has secured such consent it may then dissolve without the consent of the Commission. In other words, as a condition precedent to the dissolution proceedings the public utility must first secure from the Commission approval of a transfer of its assets. In the present case it is true the parties acted in good faith. They first attempted to transfer the assets of Valley Pipe Line Company to Shell Com-

pany of California. That transfer, however, for reasons already stated, was void. For that corporation to seek dissolution while still owning property devoted to a public use, without disclosing that fact to the Superior Court was a legal fraud upon that court, rendering the decree, in so far as it purported to expressly or by operation of law transfer the property of the company devoted to a public use, subject to collateral attack.

[13-15] Even if it be conceded that the legal effect of the dissolution was to transfer the properties of Valley Pipe Line Company to Shell Oil Company, such concession would not assist respondent. This is so because for the purposes of this appeal we must presume that the Valley Pipe Line Company secured the Slater easement for and devoted it to a public use, and we must further presume that Shell Oil Company has devoted the property to a private use. During the course of the trial, while Mr. Lewin, former general manager and secretary of the Valley Pipe Line Company, and former secretary of Shell Oil Company, was on the stand, called as a witness for plaintiff, counsel for plaintiff asked the witness certain questions directed to the point as to whether Shell Oil Company was a public utility, and whether it had held itself out as a public utility. During the course of the discussion the following occurred:

"The Court: Your purpose is to show that the Shell Oil Company was not a public utility.

Mr. Elkington: Yes.

"Mr. Wright (counsel for respondent): We will stipulate that the Shell Oil Company was not a public utility, never was and never has been.

"Mr. Elkington: Very well, I will accept the stipulation. All Right, I have no further questions."

In view of this stipulation, and in view of the evidence, for the purposes of this appeal it must be taken as a fact that Shell Oil Company at no time held itself out as a public utility, and at no time devoted the right of way to a public use. Stated another way, on this appeal it must be conclusively presumed that Shell Oil Company devoted the Slater right of way to a private use. As already pointed out, whether property has been devoted to a public use is a question of fact. For the purposes of this appeal, in view of the stipulation, it must be held that the evidence demonstrates the Shell Oil Company and the Valley Pipe Line Company intended that, by the attempted transfer and dissolution, the public purpose to which the Slater easement had been devoted should cease and terminate. If this reasoning be sound, and we think it is, then where the public use has terminated or been abandoned the easement terminates and the property reverts to the grantors. This would not affect the first pipe line, the Shell Oil Company having acquired title to that line by adverse possession. It is well settled that where a utility acquires an easement (as distinguished from a fee simple title) in the nature of a right of way for a public purpose, the abandonment of the public purpose terminates the easement and the easement reverts. Northern Pac. Ry. Co. v. Townsend, 190 U.S. 267, 23 S.Ct. 671, 47 L.Ed. 1044; Barton v. Jarvis, 218 Ky. 239, 291 S.W. 38; Simons v. Munch, 115 Minn. 360, 132 N.W. 321; Chicago & N.W. Ry. Co. v. Sioux City Stockyards Co., 176 Iowa 659, 158 N.W. 769; Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208, 1 L.R.A.,N.S., 806, 114 Am.St.Rep. 509, 6 Ann.Cas. 239; Robertson v. Bertha Mineral Co., 128 Va. 93, 104 S.E. 832; California & N. Railroad Company v. Mecartney, 104 Cal. 616, 38 P. 448. In the application of this rule it makes no difference whether the easement was gained by grant or by exercise of the right of eminent domain. Hill v. Woodward, 100 Miss. 879, 57 So. 294, 39 L.R.A., N.S., 538, Ann.Cas.1914A, 390; Smith v. Hall, 103 Iowa 95, 72 N.W. 427; Abercrombie v. Simmons, supra. Whether or not there has been an abandonment of the public use is a question of fact. Utt v. Frey, 106 Cal. 392, 397, 39 P. 807; Turner v. Markham, 155 Cal. 562, 102 P. 272; Daman v. Hunt, 47 Cal.App. 274, 191 P. 376. In view of the stipulation above-referred to, and in view of the evidence, it must be held that the plaintiff proved a prima facie case of abandonment.

[16, 17] Respondent now urges that, if the Valley Pipe Line Company held the easement subject to a public use, Shell Oil Company holds it subject to the same use, and that there has, in fact, been no change in the use. It is urged also that, if the statutory provisions above-referred to made the Valley Pipe Line Company a public utility, they also operated to make Shell Oil Company a public utility. These arguments are unsound. Whatever legal effect

the statutes may have on the two corporations, it is clear that whether a corporation has held itself out as a public utility, whether a public use has been abandoned, and whether the existing use is public or private, under the situation here presented, are questions of fact. Even if Shell Oil Company became a public utility by operation of the statutes, whether it has abandoned the public use of the pipe line is a question of fact. Moreover, even if the Shell Oil Company became a public utility as to the first pipe line, whether that status also attached to the second pipe line, under the circumstances here involved, is a question of fact.

The other matters urged by respondent are matters of defense which may be developed on the new trial.

The order and judgment appealed from are reversed.

We concur: KNIGHT, J.; WARD, J.

40 Cal.App.2d 31

ALLER v. BERKELEY HALL SCHOOL FOUNDATION et al.

Civ. 6391.

District Court of Appeal, Third District, California.

July 5, 1940.

1. Action 🔑6

In suit for declaratory relief to construe provision, in deed conveying lot, that the lot and all buildings to be erected on a named drive should be used exclusively for private residences except a designated lot and lots having frontage on another street, evidence supported findings on which a judgment for grantor was based, that use of lot conveyed to grantee was confined to residential purposes, and that grantor was entitled to enforce restrictive clause contained in deed.

2. Deeds 🔑93

The object in construing a deed is to ascertain intention of parties, and especially that of grantor, from words which have been employed in connection with subject matter and from surrounding circumstances, and, when intention of parties to a deed has been ascertained, it should control.

3. Covenants 🔑51(2)

A restriction in a deed, which provided that all buildings to be erected on a named drive should be used exclusively for private residences, meant that all lots fronting on drive were to be used for residence purposes.

4. Covenants 🔑51(2)

The word "front", as used in a deed, is sometimes used to indicate any external line of property bordering on a street or road when evident purpose is merely to designate lines which abut thereon, but strictly word "front" is used to distinguish that portion from the rear or sides of an object and, as term is correctly applied to lots in a city tract of land, means that side of the land toward which house or building thereon faces or is expected to face.

See Words and Phrases, Permanent Edition, for all other definitions of "Front".

5. Covenants 🔑51(2)

In deed containing building restrictions applicable to lots "facing" and "having a frontage" on named street, quoted words as applied to oblong lots referred to the street which buildings to be erected on the lots were intended to face.

See Words and Phrases, Permanent Edition, for all other definitions of "Facing" and "Having a Frontage".

6. Covenants 🔑1

Reasonable building restrictions contained in a deed of conveyance with respect to character, location, and cost of construction of dwellings which are to be erected in accordance with a general plan affecting entire tracts in modern cities are valid.

7. Deeds 🔑171(1)

Under a deed containing a building restriction, and a forfeiture provision for breach of such restriction grantee is owner of land in fee simple absolute, and interest which grantor reserved in property is merely a residue coupled with power to terminate estate and recover possession thereof in event of a breach of express conditions.

8. Deeds 🔑144(1)

A grantor may convey an estate in land retaining a mere right of reversion of title for breach of conditions.

9. Covenants 🔑51(2)

The law does not favor forfeiture of property, and such provisions in a deed should be construed strictly against grantors, but when language of deed, construed in light of surrounding circumstances and of valid purpose for which building restrictions are imposed, is clear, such restrictions including forfeiture of title for breach of conditions may be enforced. Civ.Code, § 1442.

10. Covenants 🔑7

A purchaser of lots who accepts his deed and records it with knowledge of fact that it contains reasonable building restrictions may be deemed to have consented thereto.

11. Covenants 🔑7

A building restriction contained in deed of lot, that all buildings to be erected on a named street should be used exclusively for private residences, was valid and binding on grantee who accepted deed and failed to raise question as to building restriction until 12 years later.

Appeal from Superior Court, Los Angeles County; Harry R. Achbald, Judge.

Action by Joseph Aller against Berkeley Hall School Foundation, a corporation, and others, for declaratory relief from a building restriction contained in a deed. From an adverse judgment, plaintiff appeals.

Affirmed.

Howard F. Shepherd, of Los Angeles, for appellant.

Girard F. Baker, of Los Angeles, for respondents.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

The plaintiff brought suit for declaratory relief from a building restriction contained in his deed of conveyance to lot 317 of tract 7005 in Beverly Hills, according to the map thereof on file in the recorder's office of Los Angeles county. The deed contains a provision that the lot and "all buildings to be erected on Doheny Drive" shall be used exclusively for private residences. Lot 317 is a corner lot 70 by 120 feet in size fronting on Doheny drive, but its northern side also borders on Burton way. The deed contains another provision that "all lots *having a frontage* on Burton Way may be used for either residence or business purposes". The court held that lot 317 was subject to the restriction confining its use to residence buildings only. From that judgment this appeal was perfected.

November 5, 1924, Berkeley Hall School Foundation, a corporation, owned lot 317 of tract 7005, a subdivision of Beverly Hills. The Bank of America is trustee of the corporation, in the handling of that tract. On the last-mentioned date, for a valuable consideration, the lot was sold and conveyed to the plaintiff, who is the owner thereof. The tract consists of 17 blocks of land bounded north by Burton way, east by Preuss road, south by Wilshire boulevard and west by Doheny drive. The tract is separated into lots and blocks with intervening streets and alleys. Each lot is designated by a separate number. The blocks are divided into two tiers of lots extending east and west. These lots front either east or west on streets running north and south, except that there are two tiers of lots on the north and south portion of the tract which face on either Wilshire boulevard or Burton way. All of the 29 lots in the most westerly portion of the tract, including lot number 317, face Doheny drive, except one lot at the southern extremity of that tier which faces Wilshire boulevard. It is true that lot 317 and the other corner lots in that tier also abut along their side lines on other streets. The entire tract is subject to these restrictions.

The deed of conveyance contains elaborate specific restrictions affecting the location, character and cost of all buildings to be constructed thereon. It specifically exempts from the exclusive residence requirement, with respect to that western tier of lots, one lot, number 350, which is "governed by the same rules" applicable to lots facing on Wilshire boulevard, upon which "either residence or business" buildings may be constructed. This exception with respect to lot 350 proves the clear intention of the grantor to require all other lots in that tier, including lot 317, to be used exclusively for residence purpose. The further provision specifying the location of the buildings on that particular lot also accords with the finding that it was intended to be used only for residence purpose.

The material restrictions of the deed which are involved in this case provide as follows:

"All buildings to be erected on Doheny Drive, except lot 350, *shall be used exclusively as private residence,* with a limit of one house to each lot, except lots 360, 317 and 371, which may be occupied with one or more houses, and no residence to be erected on said lots shall cost less than $5,000.00. The foundations of all said buildings shall show a set-back from the front property line of 20 feet, and all driveways leading to the rear of said premises, excepting lot 350, shall be placed on the south side of said lots. * * * Any outbuildings, private stable or garage erected in conjunction therewith shall be located not less than 75 feet from Doheny Drive. Lot 350 is governed by same conditions as apply to property fronting on Wilshire Boulevard.

* * *

"All lots having a frontage on Burton Way may be used for either residence or business purposes, * * *."

It is also provided that a breach of any condition in the deed, after thirty days' notice thereof and a failure to remedy the breach, shall result in a forfeiture and reversion of the property to the grantor, its heirs, successors or assigns.

There is no evidence that the plaintiff has constructed any building on his lot, or that he intends or desires to construct a business building thereon. Apparently the lot is still vacant after twelve years of ownership of the property.

The court found that plaintiff's lot number 317 fronts 70 feet on Doheny drive, and on the contrary that it does not front on Burton way; that the use of the lot is confined to residential purpose and that the grantor is entitled to enforce the restrictive clauses contained in the deed. A judgment was accordingly rendered against the plaintiff. From that judgment this appeal was perfected.

[1, 2] We are of the opinion the evidence supports the findings and judgment. This is not a suit to rescind a deed for breach of a restriction or condition subsequent contained therein. It is a mere suit for declaratory relief to construe the terms of the deed. The provisions of the deed restricting the use of lot 317 to residential purpose in accordance with a common plan affecting the entire tract is clear and unambiguous. The exceptions from that residential restriction of all lots "having a frontage" on Wilshire boulevard and Burton way, and the specific exception of lot number 350, fronting on Doheny drive, clearly support the findings of the court that lot 317 is subject to that restriction. All other specific exceptions mentioned in the deed reinforce that conclusion. The intention of the parties to the deed should control the construction of the instrument. The object in construing a deed is to ascertain the intention of the parties, and especially that of the grantor, from the words which have been employed in connection with the subject-matter, and from the surrounding circumstances. Burnett v. Piercy, 149 Cal. 178, 86 P. 603; 9 Cal.Jur. 324, sec. 188; 18 C.J. 252, § 198; 3 Thompson on Real Property, 70, sec. 1980.

[3] It is clear that the restriction in the deed which provides that "all buildings to be erected on Doheny Drive" shall be exclusively for private residences, means that all lots fronting on Doheny drive are to be used for residence purpose. It is evident from the plot of tract number 7005 and from the restrictive provisions of the deed that the narrow portion of each lot adjacent to Doheny drive is considered the *front* of such lots, with the one exception of a lot at the southwest corner of that tract which fronts on Wilshire boulevard. This is confirmed by the other restrictive clause which provides that "All lots *having a frontage* on Burton Way may be used for either residence or business purposes".

[4, 5] The word "front" is sometimes carelessly used to indicate any external line of property *bordering* on a street or road, when the evident purpose is to merely designate the lines which abut thereon. Strictly speaking, the word "front" is used to distinguish that portion from the rear or sides of an object. As the term is correctly applied to lots in a city tract of land, it means that side of the land toward which the house or building thereon faces, or is expected to face. The construction of the terms "facing" and "having a frontage" as they are employed in the deed under consideration, therefore depends on the intention with which they were used by the parties. In the present case the meaning of those terms as they are employed in the deed seems to be clear. All of the lots in the tract of land which is involved are oblong in shape. They are all much longer

than they are wide. In every instance the narrow portion of the lots face the various streets, except with respect to corner lots, which necessarily also abut on side streets. But in every such instance it is clear that the buildings thereon are to be constructed to face the streets upon which the narrow lines of the lots abut. In the case of Rhinehart v. Leitch, 107 Conn. 400, 140 A. 763, 764, it was decided that the narrow end of a lot "fronts" on the street upon which it abuts, and that it does not front on another street although it was a corner lot which abutted on both streets. That case holds that the end of a bare lot fronts on the street upon which it abuts, toward which the house, when it is constructed, is intended to face according to the plan or usage in the particular block or district. In the present case it is apparent that every house or building on each lot adjacent to Doheny drive, except the most southerly one on Wilshire boulevard, is expected to face Doheny drive. Therefore the restriction applies to lot 317.

[6] Reasonable building restrictions contained in a deed of conveyance with respect to the character, location and cost of construction to be erected in accordance with a general plan affecting entire tracts in modern cities, are uniformly upheld as valid. Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann.Cas.1912D, 1190; Childs v. Newfield, 136 Cal.App. 217, 28 P.2d 924; 9 Cal.Jur. 360, §§ 214, 215; 8 R.C.L. 1117, § 178; 18 A.L.R. 451, note. It has been determined that such building restrictions, accompanied by a provision forfeiting title to the land for a breach thereof, constitute conditions subsequent, the breach of which may defeat the grantee's title. Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 200 P. 1051; Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann.Cas.1914A, 1; 9 Cal.Jur. 361, § 215.

[7, 8] Under the circumstances of this case the grantor parted with the title to the lot in question subject to compliance with the building restrictions contained in the deed. He retained no actual estate in the property. The grantee takes the entire estate of the grantor, and until the conditions are breached the grantee is the owner of the land in fee simple absolute. The interest which the grantor reserved in the property is merely a residue therein coupled with the power to terminate the estate and recover possession thereof in the event of a breach of the expressed conditions. The grantor merely retains a condition "power to terminate" the estate conveyed for breach of conditions subsequent. This is in accordance with the rule that a grantor may convey an estate in land, retaining a mere right of reversion of title for breach of conditions. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 426, 74 P.2d 738, 114 A.L.R. 562.

[9-11] It is true that the law does not favor forfeiture of property, and that such provisions in a deed should be construed strictly against the grantor for the reason that they tend to destroy estates. Sec. 1442, Civ.Code; Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 147 P. 124; 9 Cal.Jur. 341, § 200; 3 Thompson on Real Property 58, § 1970. When, however, the language of the deed, construed in the light of the surrounding circumstances and of the valid purpose for which the restrictions are imposed, is clear and unambiguous, the provisions including forfeiture of title for breach of the conditions may be enforced. In most of the cases called to our attention the courts have strictly construed conditions subsequent in deeds of conveyance to prevent forfeitures of title since that harsh penalty is not favored. Reasonable building restrictions applicable to a general plan with respect to entire districts in cities are uniformly recognized as beneficial to the grantor, and to the residents of the entire subdivision of such tracts. Such restrictions are uniformly upheld. A purchaser of such lots who accepts his deed and records it with knowledge of the fact that it contains reasonable building restrictions may be deemed to have consented thereto. In the present case the plaintiff accepted his deed to the lot in question in 1924, and raised no question with respect to those restrictions for twelve years until he filed this suit for declaratory relief. We are of the opinion the restrictions are not unreasonable or uncertain. On the contrary, they are valid and binding. The findings and judgment are supported by the evidence.

The judgment is affirmed.

We concur: TUTTLE, J., PAULSEN, Justice pro tem.

39 Cal.App.2d 609

PACIFIC FREIGHT LINES v. PIONEER EXPRESS CO. et al.

SAME v. VALLEY MOTOR LINES, Inc., et al.

Civ. 11945, 11964.

District Court of Appeal, Second District, Division 1, California.

June 22, 1940.

1. Contribution ⚷1

Although right of contribution is related to some former transaction, actual or implied, and may be the subject of an express contract, in absence of an express contract the right may exist by operation of law, under which circumstance it exists as a complete legal entity only.

2. Contribution ⚷3

The doctrine of "contribution" is founded on principles of equity and comes from application of such principles to condition in which parties are found in consequence of some of them, as between themselves, having done more than their share in performing a common obligation.

See Words and Phrases, Permanent Edition, for all other definitions of "Contribution".

3. Contribution ⚷1, 9(1)

An express contract is not necessary to give rise to a right of "contribution" and the right is not a contract implied in law, but a product or outgrowth of a contract so implied, and an action for contribution is not an action on original contract, but is one to enforce the right of contribution upon an implied contract of each to the other that they will share burden equally.

4. Contribution ⚷3

Where two or more persons are jointly liable upon an obligation, and one of them makes payment of the whole, that obligation is thereby extinguished and the one paying has a new obligation against the others for their proportion of what he paid for them.

5. Contribution ⚷4

If plaintiff paid a judgment debt owed in part by defendants, defendants, by operation of law, became indebted to plaintiff under an implied contract giving plaintiff a right of contribution from defendants.

6. Payment ⚷6

Generally, a debtor who is indebted on a money obligation is bound, if no place of payment is specified in contract, to seek creditor and make payment to him personally.

7. Corporations ⚷503(2)

Where plaintiff's cause of action to compel contribution by defendants, by corporations, was founded upon an implied contract arising out of plaintiff's discharge of claims included in a judgment allegedly rendered against plaintiff and defendants jointly and severally, and claims were discharged by plaintiff's conduct at its principal place of business in Los Angeles county, defendants' debt was due plaintiff in Los Angeles county, and hence venue of action was properly laid in such county, instead of other counties wherein defendants claimed to have their principal places of business. Const. art. 12, § 16.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Actions by Pacific Freight Lines against the Pioneer Express Company and others, and by the Pacific Freight Lines against Valley Motor Lines, Incorporated, and others, wherein plaintiff sought contribution from defendants as the result of plaintiff discharging claims included in a judgment. From orders granting motions by defendant Pioneer Express Company and by defendant United Motor Transport Lines, Incorporated, for a change of venue, plaintiff appeals.

Orders reversed.

Wallace K. Downey, of Los Angeles, for appellant.

Courtney L. Moore, of San Francisco, for respondents.

DORAN, Justice.

In the year 1930, the reduction of certain freight rates by the railroad commission engaged the attention of a number of motor truck carriers, including appellant, as a result of which an action was commenced by them before the railroad commission. A firm of attorneys employed to prosecute the action later brought suit for attorneys' fees and recovered judgment against eight of the interested, above mentioned motor truck carriers, including appellant. See Johnson v. Calif. Interurban Motor Trans.

Ass'n., 24 Cal.App. 2d 322, 74 P.2d 1073. Having discharged certain claims included in that judgment, appellant, plaintiff in the within action filed in Los Angeles county, seeks contribution from its former co-defendants, respondents herein, who, it is contended, were held to be jointly and severally liable with appellant for the payment thereof. Defendant and respondent Pioneer Express Company moved for a change of venue to the city and county of San Francisco on the ground that San Francisco was its principal place of business. United Motor Transport Lines, Inc., moved for a change of venue to Sacramento county for similar reasons. The trial court granted both motions and from the orders duly entered pursuant thereto, plaintiff appeals.

It is contended by appellant that the obligations of respondents to contribute were to be performed in Los Angeles county and that Los Angeles county therefore is the proper place for the trial of said actions, which contention is based on section 16, article XII of the Constitution of California, which is as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

Respondents, contending to the contrary, argue as follows, quoting from respondents' brief: "That a corporation is entitled to have litigation tried in the county where its principal place of business is situated is too well established to be contraverted. * * * Plaintiff sued the respondent corporations under a claim for contribution arising out of a judgment secured against the plaintiff which it subsequently had to pay. It claims that under the constitutional provision the obligation or liability arose in Los Angeles County." Referring to the facts in the Johnson case, supra, respondents continue:

"The appellants cannot question that the unauthorized contract by Mr. McLenegan" (the president of a transportation association) "with the attorneys was made in San Francisco; they cannot question that the ratification by the Pacific Freight Lines of this unauthorized contract was made in San Francisco; they cannot question that the performance of the contract by the attorneys was to be had in San Francisco, or that the attorneys involved had their residence and principal place of business in San Francisco, and that the payment for the attorneys' services would have to be made in San Francisco, nor can it be questioned that the payment was actually made for these services in San Francisco, because the check paying the same was forwarded to the attorneys in San Francisco.

"*The result is that every act out of which the present obligation could grow took place and was consummated in San Francisco, and not a solitary one occurred in Los Angeles.* Appellants argue, however, that an action for contribution is not based upon the original obligation out of which the duty to contribute arose, but that the payment creates a new liability or obligation, the situs of which is at the residence of the payor. Where the appellant has made its error is in the mental confusion of not distinguishing between an obligation and a cause of action. (Italics included.)

* * *

"We do not question that the right to compel contribution does not arise until such time as one of the codebtors had extinguished the original obligation and paid more than his equal share of it, but that is not the question here involved. The question here involved is—where, when, and how did the original obligation of contribution arise?

"* * * As we have already stated, the obligation of contribution is created by the relationship of the parties at the time of the transaction; that it remains inchoate until payment, that payment does not create a new or different obligation but merely gives rise to a cause of action upon the existing inchoate obligation. * * * We do not question that payment creates the cause of action, but payment does not create the obligation because it existed long before the cause of action arose. Appellant has confused the creation of the obligation and the arising of a cause of action on that obligation. * * * In other words, they attempt to argue that the payment by the Pacific Freight Lines created a new obligation, to-wit, the obligation of these respondents to repay their aliquot share to the Pacific Freight Lines, and that coupled with this is a presumption that the payment of this debt namely, this aliquot share, should be made at the residence of the Pacific Freight Lines in Los Angeles, and therefore that the situs of the obligation is at Los Angeles with no right of removal to the residence of the respondents. * * *

"Contracts are divided into three classes: express contracts, contracts implied in fact and contracts implied in law. The right of contribution is a contract implied in law * * *."

[1-4] Although manifestly well intended, respondents' above quoted argument is pure sophistry, and unless carefully analyzed is apt to be misleading. It proves nothing, however, because its premise is artificial; such an argument only tends to involve in confusion an issue that otherwise is extremely simple. The effort, therefore, of respondents to inject into the controversy the asserted distinction between an obligation and a cause of action as a material and controlling factor, is idle. For example respondents argue, as noted above, that "We do not question that payment creates the cause of action, but payment does not create the obligation because it existed long before the cause of action arose", and that, therefore, the argument continues, "The question here involved is—where, when, and how did the original obligation of contribution arise?" Logically, these questions are clearly beside the issue. All disputes as to the socalled original obligations long since were settled in the Johnson case, supra. To revive them would serve no purpose in connection with the settlement of the sole question herein presented for determination; that question may be stated thus: Where was the contract made or where was it to be performed, or where did the obligation or liability arise, upon which the complaint in the within action is based? The question stated in any other form would disregard the mandate of section 16 of article XII of the California Constitution, which is controlling. In that connection respondents continue to argue from a false premise in the following manner as above noted, "the obligation of contribution is created by the relationship of the parties at the time of the transaction; that it remains inchoate until payment, that payment does not create a new or different obligation but merely gives rise to a cause of action upon the existing inchoate obligation". The fallacy of the argument is at once evident. Although the right of contribution necessarily is related to some former transaction, actual or implied, and may be the subject of an express contract, nevertheless, in the absence of an express contract, it also may exist by operation of law, under which last mentioned circumstance it exists as a complete legal entity only. The right of contribution is referred to as being "inchoate" in 18 Corpus Juris Secundum, Contribution, § 4, page 7, but such a description of the doctrine is misleading. It can have no "inchoate" existence because, by inchoate, is meant partial or incomplete. That the right by implied contract to contribution may be partial, and eventually may mature, presupposes a dormant contingent existence of some legal significance, whereas in truth it has no such distinction under the law. Corpus Juris Secundum, in another section, states the doctrine correctly as follows: "* * * The doctrine is not founded on, nor does it arise from, contract, but is founded on principles of equity and natural justice and comes from the application of principles of equity to the condition in which the parties are found in consequence of some of them, as between themselves, having done more than their share in performing a common obligation. * * * The declaration, often made, that contribution does not spring from contract is sometimes misapprehended; it only means that there need not be an express contract for it; and not that contribution cannot in any case be enforced where there was an express contract in the beginning of the transaction followed by conduct out of which the right of contribution arose; and, as shown infra 13a, the right to contribution is recognized and enforced in courts of law on the theory of implied contract." 18 Corpus Juris Secundum, Contribution, § 2, page 3. And again, in 6 California Jurisprudence, page 514, the rule appears as follows: "An action for contribution is not an action on the original contract, but is one to enforce the right of contribution upon an implied contract of each to the other, that they will share the burden equally. * * * Where two or more persons are jointly liable upon an obligation and one of them makes payment of the whole, that obligation is thereby extinguished, and the one paying has a new obligation against the others for their proportion of what he paid for them." In Enscoe v. Fletcher, 1 Cal. App. 659, 662, 82 P. 1075, 1076, appears the following: "There can be no dispute as to the rule that where two or more persons are jointly liable on an obligation, and one of them makes payment of the whole, that obligation is thereby extinguished, and

the one paying has a new obligation against the others for their proportion of what he paid for them." To the same effect see Hurlbut v. Quigley, 180 Cal. 265, 180 P. 613; Richter v. Henningsan, 110 Cal. 530, 42 P. 1077, and Bunker v. Osborn, 132 Cal. 480, 64 P. 853.

The ground of plaintiff's cause of action is not an express contract but an implied contract, as indeed respondents, in part at least, concede, for as above noted respondents declare that "The right of contribution is a contract implied in law." Technically, the right of contribution is not a contract implied in law but is the product or outgrowth of a contract implied in law. Obviously plaintiff's cause of action, as above noted, is based upon such a contract, and it is therefore necessarily with relation to such a contract that the above quoted provisions of the Constitution must be considered and applied.

[5, 6] In the circumstances here considered, assuming the facts to be as contended for by plaintiff and appellant, plaintiff paid a debt owed in part by defendants. As a result, and by operation of law, defendants became indebted to plaintiff. It is upon this debt, which the law declares it is defendants' duty to pay, and upon the implied contract by the terms of which defendants agree to pay, that plaintiff's action is based. It is the general rule that "a debtor who is indebted on a money obligation is bound, if no place of payment is specified in the contract, to seek the creditor, and make payment to him personally". People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268, 269. To the same effect see Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90; Fitzhugh v. University Realty Co., 46 Cal.App. 198, 201, 188 P. 1023; Kaupke v. Lemoore Canal, etc., Co., 7 Cal.App. 2d 362, 365, 46 P.2d 204.

A debt has been defined to include any sort of obligation to pay money. Schwartz v. Brandon, 97 Cal.App. 30, 37, 275 P. 448.

[7] Obviously there is no place of payment specified in the implied contract upon which plaintiff's cause of action is based. Defendants' debt is due plaintiff at its principal place of business, and it is there that the implied contract is to be performed. By reason of plaintiff's conduct at its principal place of business, and as a result thereof, the original claim was discharged and hence the liability of defendants to pay their share then and there arose. This being true, the defendants, by virtue of section 16 of article XII of the California Constitution were sued, and properly so, in Los Angeles county.

For the foregoing reasons the orders granting the motions of defendants Pioneer Express Company and United Motor Transport Lines, Inc., for a change of venue, are, and each of them is reversed.

We concur: YORK, P. J.; WHITE, J.

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38 Cal.App.2d 674

MECCHI et al. v. LYON VAN & STORAGE CO.

Civ. 11065.

Supreme Court of California.

June 27, 1940.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

On petition for hearing.

Petition denied.

For prior opinion, see 102 P.2d 422.

Charles V. Barfield and Hadsell, Sweet, Ingalls & Lamb, all of San Francisco, for appellant.

Joseph F. Leonard and Jesse H. Miller, both of San Francisco, for respondents.

PER CURIAM.

The petition for hearing is denied.

Such denial should not be deemed an approval of the language found in the last paragraph of the opinion in so far as said language may imply a rule relating to formula instructions in conflict with the rule as stated in Douglas v. Southern Pac. Co., 203 Cal. 390, at page 393, 264 P. 237.

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15 Cal.2d 622

DINGMAN v. A. F. MATTOCK CO.

S. F. 16372.

Supreme Court of California.

July 2, 1940.

Rehearing Denied Aug. 1, 1940.

1. Negligence 🔑32(2)

A subcontractor who was injured when scantling which had been placed across open stair-well broke as subcontractor sought to ascend on scantling from one level to another was general contractor's "invitee"; where it was necessary for subcontractor, under his contract to do the electric wiring of the building, to enter every part of the building required to be wired.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

2. Negligence 🔑32(1)

One invited to do work on the premises of another may recover from the owner for injuries received owing to the dangerous condition of the premises known to the owner but not known to the person so invited, but the owner is not bound to keep his premises absolutely safe and is only required to use ordinary care.

3. Negligence 🔑52

Where there is danger attending the work which an invitee is required to do on the premises of another, and the danger is not readily apparent to the eye, it is the owner's duty to give reasonable notice or warning thereof, but the owner may assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses and need not warn of obvious danger.

4. Negligence 🔑136(24)

In subcontractor's action against general contractor for injuries sustained when scantling which had been placed across open stair-well broke as subcontractor sought to ascend on scantling from one level to another, whether dangerous condition existing in passageway across stair-well was obvious to subcontractor was a fact question for jury, as respects duty to warn.

5. Appeal and error 🔑1001(1)

Where jury reached its verdict in favor of subcontractor suing general contractor for injuries sustained when scantling which had been placed across open stair-well broke as subcontractor sought to ascend on scantling from one level to another, the finding implied in the verdict that the danger was not obvious to subcontractor was binding on the Supreme Court if there was any substantial evidence to support it.

6. Appeal and error 🔑1001(1)

Where jury reached its verdict in favor of subcontractor suing general contractor for injuries sustained when scantling which had been placed across open stair-well broke as subcontractor sought to ascend on scantling from one level to another, the jury at least impliedly found that the dangerous condition of the premises was known to the general contractor, and if there was any substantial evidence supporting that implied finding, the Supreme Court was bound thereby.

7. Negligence 🔑48, 134(7)

Evidence was insufficient to support jury's implied finding that general contractor knew of dangerous condition which caused injuries to subcontractor who fell when scantling which had been placed across open stair-well broke as subcontractor sought to ascend on scantling from one level to another, and hence general contractor could not be held liable for damages to subcontractor resulting from injuries.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action for personal injuries by Joseph Dingman against the A. F. Mattock Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Rehearing denied; CARTER, J., and PETERS, Justice pro tem., dissenting.

Prior opinion, 96 P.2d 821.

Bronson, Bronson & McKinnon and Kirke La Shelle, Jr., all of San Francisco, and Jas. T. O'Keefe, of Redwood City, for appellant.

Wayne R. Millington and Norman S. Menifee, both of Redwood City, for respondent.

CURTIS, Justice.

This action was instituted to recover damages for personal injuries sustained by the plaintiff by the breaking of a board on which he was walking, the breaking of which caused him to fall down an open stair-well into the basement of the building in which he was working. The defendant was the general contractor for the erection of said building, and the plaintiff was the sub-contractor to whom the defendant had awarded the contract for the electric wiring of said building. The building was to be a dwelling house and was located in the city of Hillsborough. It had progressed to the point where it was ready for the installation therein of the electric wiring, and at the time of plaintiff's injury he was engaged in the actual wiring of the building. The building was to contain, among other rooms, a kitchen and a maid's room. The maid's room was located over the garage and the floor thereof was four feet and nine inches above the level of the kitchen floor. Between the two rooms there was to be constructed a stairway and at the time of the accident the stairway had not been constructed, and the space to be occupied by the stairway was what is referred to in the evidence in this case as an open stair-well and extended from above the level of the maid's room down to the basement in the building. The distance across this open stair-well from the kitchen to the maid's room was fourteen feet. Across this open space, or open stair-well, a board or scantling two inches thick and four inches in width had been placed, extending from the kitchen to the maid's room. This scantling, or one similar thereto, had been so placed and used by different workmen, as well as by the respondent, in passing from the kitchen to the maid's room for several days prior to the date of the accident. On this day the plaintiff was in the kitchen and the defendant's foreman was in the maid's room, and it became necessary for the plaintiff to consult the foreman regarding the wiring to be done in the garage. Plaintiff, accordingly, stepped on the board or scantling laid across the open stair-well and started to walk across it from the kitchen to the maid's room. When only partly across, the board broke and plaintiff fell through the stair-well to the floor of the basement. The fall seriously injured the heel of each of his feet. A trial was had before a jury and a verdict was reached in favor of the plaintiff. The defendant appealed from the judgment rendered upon said verdict.

[1] While other phases of this action have been discussed by the parties in their briefs and also in their oral arguments, it appears to us that the controlling feature in the case is the relation which the subcontractor sustained to the general contractor. Respondent insists that he was an invitee upon the premises then in control and possession of the appellant, and that in the execution of his subcontract he had all the rights and privileges of an invitee upon said premises. We think that there can be no question that he bore that relation to the main contractor. Under his contract to do the electric wiring of the building, it was necessary for him to enter the building and each and every part thereof which was required to be wired. He was not only permitted to perform this service in the building but he was required to do so under his contract with the appellant. It would be difficult to imagine a clearer case of an invitee than that shown by the admitted facts in this case.

The duty imposed by law upon one inviting another to enter upon the premises of the former is well established and has been clearly defined by the decisions of this court. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801.

[2, 3] This court, in Shanley v. American Olive Co., supra, states the applicable rule in the following words [185 Cal. 552, 197 P. 794]: "A person so invited upon the premises of another may recover from such owner 'for any injuries received owing to the dangerous condition of the premises known' to the owner and not known to the person so invited; but such owner 'is not bound to keep his premises absolutely safe.' 29 Cyc. 453. The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. 29 Cyc. 471, 474; 26 Cyc. 1213."

[4, 5] Applying this rule to the facts in this case, we will first consider whether the dangerous condition existing in the passageway across said stair-well was apparent to the eye or was obvious to respondent upon the ordinary use of his own senses. Whether or not this danger was obvious to respondent was a fact to be determined by the jury. As the jury reached its verdict in favor of the respondent, the finding implied in such verdict that the danger was not obvious is binding upon the court, if there is any substantial evidence to support it. The record in this case shows that this or a similar board had been laid across the opening between the kitchen and maid's room for a number of days prior to the accident to respondent. During this time it had been used by the employees of the appellant and by respondent also, without any accident or injury to any of them. It is true that on account of the width of the board it might be apparent to anyone attempting to walk over it that there was danger of falling from it and into the stair-well below, but that was not what happened to respondent. It was the breaking of the board that caused respondent to fall into the open stair-well. As respondent had walked across the board shortly before the accident and had seen other workmen on the building do the same, it cannot be said that the danger of the board breaking was obvious to him at the time he made his last attempt; at least, this evidence, if believed by the jury, was sufficient to support its implied finding that the danger was not obvious.

[6, 7] However, the rule approved by this court and quoted above provides further that an invitee "may recover from such owner 'for any injuries received owing to the dangerous condition of the premises known' to the owner and not known to the person so invited; * * *" We have shown that the jury found that the danger was not obvious to the respondent or, in other words, that the dangerous condition of the premises was not known to respondent, and that there was sufficient evidence to support such implied finding. From its verdict in favor of respondent it is evident that the jury at least impliedly found that the dangerous condition of the premises was known to the appellant. If there is any substantial evidence supporting this implied finding of the jury, this court is bound thereby. There is no evidence as to the identity of the person or persons who placed the 2 x 4 scantling, or either of them, if there were more than one, across the open stair-well leading from the kitchen to the maid's room. While there was evidence that the board which broke when respondent attempted to cross over it, or one similar thereto, remained across the open stair-well for several days and was used by appellant's employees and by respondent, and during this time must have been observed by appellant's foreman, there is no evidence that the foreman or the contractor or any of his employees knew any more about the dangerous character of this board, in that it might break when the respondent attempted to cross over it, than the respondent himself.

We have attempted to show that respondent did not know of the dangerous character of the board, that is, of its liability to break from the weight of the respondent.

As the appellant had no greater opportunity to observe the condition of said board than the respondent, and respondent failed to observe its dangerous condition, we are compelled to hold that the appellant did not know of the dangerous condition of said board. In this connection the following language found in Slyter v. Clinton Construction Co., 107 Cal.App. 348, 355, 290 P. 643, 646, appears to be pertinent: "From the facts it is clear that the plaintiff, as readily as the appellant, * * * by the exercise of his faculties of sight and judgment in an ordinarily diligent manner, could have observed and known of the danger * * *." In like manner the opportunities of the respondent in this action to observe the condition of the plank across the open stair-well were equal to those of the appellant contractor, or his foreman, or any of the appellant's employees, and, as the respondent failed to observe the dangerous condition in the board over said stair-well, the only rational conclusion to be drawn from these facts is that the contractor was likewise ignorant of such dangerous condition. If there were any evidence whatever in the case showing that the contractor or his foreman or other employee placed the board over the open space or in any other way had an opportunity other than that possessed by the respondent to observe said board and to note any defect therein, then the case might be different. But with the facts before us, as they have been shown above, we see no alternative but to hold that the contractor had no knowledge of the dangerous condition which caused respondent's injuries and therefore cannot be held liable for any damages to respondent resulting from said injuries.

This conclusion renders it unnecessary to consider any of the alleged errors in the instructions, which the appellant contends the court committed in its charges to the jury.

The judgment is reversed.

We concur: GIBSON, C. J.; EDMONDS, J.; SHENK, J.

CARTER, Justice (dissenting).

I dissent. I am unable to agree with that portion of the opinion of the majority of the court holding in effect that the burden was on the plaintiff to prove knowledge on the part of the defendant that the board or plank which broke and resulted in injury to the plaintiff was defective or in a dangerous condition. In my opinion, it was a question of fact for the jury to determine from the evidence as to whether or not the defendant exercised ordinary care in placing the board or plank in question across the stair-well to be used by those desiring to cross said well. It may be that defendant was not required to provide a means for respondent or other invitees to the building to cross said well, but when such means were provided by the defendant, it was required to use ordinary care in the selection of the material and in the manner in which the material was placed to provide the means of passing across said well.

Proof having been established that the plank or board in question was provided by the defendant, the question of whether or not the same was adequate for that purpose, was a question for the jury to determine.

Let us suppose, for example, that the defendant had actually constructed a passageway across said stair-well for its employees and invitees to use, and the same was so defectively constructed that it gave way when plaintiff was crossing, and he was injured thereby, there would appear to be little doubt but that defendant was guilty of negligence, and unless there was some proof of contributory negligence on the part of the plaintiff, the latter would be entitled to recover against the defendant. The mere fact that the passageway provided was somewhat meagre and improvised should not change the situation.

In my opinion the question of whether or not the defendant was guilty of negligence in providing the passageway in question and whether or not the plaintiff was guilty of contributory negligence in using the same, were both questions of fact for the jury, and both of these issues having been decided by the jury in favor of the plaintiff, their determination should be conclusive on this court.

In my opinion the judgment of the trial court should be affirmed.

15 Cal.2d 573

CITY OF OAKLAND v. CALIFORNIA CONST. CO.

S. F. 14699, 14700.

Supreme Court of California.
June 27, 1940.

1. Contracts ⇨123(1)

Public officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members. Pol.Code, § 920.

2. Contracts ⇨123(1)

Contracts in violation of rule that public officers must not be interested in any contract made by them in their official capacity are void as against "public policy" on ground that interest of officer interferes with unbiased discharge of his duty to the public, and that contract in violation of express statutory provision is void. Pol.Code, § 920.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

3. Municipal corporations ⇨375

In action by city to recover proceeds of street improvement contract, complaint which alleged that a commissioner who was member of city council was in employ of contractor as an attorney was demurrable, where it was not alleged that commissioner voted to award contract or that he had an interest in contract at time it was awarded. Pol.Code, § 920; St.1911, p. 730.

4. Contracts ⇨98
Fraud ⇨31

When one makes a contract upon representations in nature of inducements to enter into it and there is no misunderstanding as to its nature, contract is voidable but not void, and in such case if contract has been completely executed, injured party's remedy is an action for damages.

5. Municipal corporations ⇨375

In city's action to recover proceeds of executed street improvement contract, complaint which alleged that contractor made false and fraudulent representations to effect that it would perform work and furnish materials according to specifications, and that it had no intention of doing so, was demurrable, since contract being executed, city's remedy was an action for damages. Pol. Code, § 920; St.1911, p. 730.

6. Contracts ⇨132

Any agreement which tends to deprive government of competition in bidding is unlawful, and where it is shown that bids made were collusive and a contract is awarded by public officers in ignorance of such combination, resulting contract is void as against "public policy." St.1911, p. 730.

7. Municipal corporations ⇨375

In action by city as trustee for property owners to recover proceeds of street improvement contract, complaint which alleged that prior to city's call for bids paving companies, including the defendant contractor, entered into conspiracy to control street work in the city and inflate prices by refraining from competitive bidding, and that because of such unlawful combination defendant was the lowest bidder and was awarded the contract, stated cause of action. Pol.Code, § 920; St.1911, p. 730.

8. Municipal corporations ⇨375

The statute providing that action to correct any assessment or to question validity of assessment or to enjoin issuance of bonds for street improvement must be brought within 30 days after recording of assessment was inapplicable to action by city as trustee for property owners to recover proceeds of street improvement contract which was allegedly void because of contractors' conspiracy to refrain from competitive bidding. Pol.Code, § 920; St.1923, p. 117, § 26.

9. Municipal corporations ⇨375

A city as trustee for property owners had legal capacity to maintain action to recover proceeds of street improvement contract allegedly void because of contractors' conspiracy to refrain from competitive bidding. St.1911, p. 730; Code Civ.Proc. § 369.

In Bank.

Appeals from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Actions by the City of Oakland, as trustee, against the California Construction Company to recover proceeds of a street improvement contract, wherein defendant filed demurrers. From judgments for defendant, plaintiff appeals.

Reversed, with directions.

F. Bert Fernhoff and C. Stanley Wood, City Attys., and John W. Collier, Deputy City Atty., all of Oakland, for appellant.

Humphrey, Searls, Doyle & MacMillan, Morgan J. Doyle, and George N. Crocker, all of San Francisco, and Frank V. Campbell, of San Jose, for respondent.

EDMONDS, Justice.

The question for decision concerns the right of the City of Oakland to recover the proceeds of a street improvement contract. In each of the two cases which have been consolidated upon appeal, a demurrer was sustained without leave to amend, and the appeals are from the judgments which followed those orders.

In 1928, the respondent, a paving contractor, was awarded two contracts for street work to be done under the provisions of the Improvement Act of 1911. Stats.1911, p. 730. One complaint is based upon the contract for Greenly drive, the other upon that for Columbian drive, but except for the particular terms of these contracts, the same facts are pleaded in each case. By separate counts, the city alleges that the contract sued upon is void because a member of the city council which awarded it was in the employ of the respondent, the respondent secured it upon false representations, and the work was obtained as the result of a conspiracy among certain paving companies, including the respondent, to control the street work of the City of Oakland by refraining from competitive bidding.

According to the allegations of the complaint, "for a long time prior and subsequent" to the confirmation of the street superintendent's assessment for the work, Eugene K. Sturgis, a commissioner of the City of Oakland, and as such a member of the city council, was in the employ of the respondent as an attorney. In that capacity he rendered legal services to the respondent with reference to this street proceeding, his compensation being a percentage of the total cost of the work to be performed under the contract. According to the city's allegations, because of his interest in the assessments levied and bonds issued pursuant thereto, the confirmation of such assessments is void.

In support of its second count, the appellant pleads that, for the purpose of securing the contract, the respondent made false and fraudulent representations to the effect that it would perform the work and furnish the materials according to the specifications, but that it had no intention of doing so. Continuing these charges, the city alleges that during the time the paving was being put in, one of its paving inspectors, who was assigned to inspect the work performed by the respondent, was carried upon the contractor's payroll. As a result of the "fraudulent and corrupt" acts of the respondent and this inspector, and in furtherance of its "fraudulent intention", it did not perform the work as it had agreed to do. More specifically, the city asserts, the contractor poured too much concrete each day for producing pavement with the proper finish, maintained a force of incompetent workmen and finishers, neglected to mix the concrete properly, used defective material in the gutters, and in various other respects did the work in an improper manner.

As the third cause of action, the appellant alleges that prior to the city's call for bids certain paving companies, of which the respondent was one, entered into a conspiracy to control the street work in the City of Oakland and inflate prices to be paid by property owners by refraining from competitive bidding. A number of overt acts in furtherance of the claimed conspiracy are pleaded in detail. By reason of this unlawful combination, the city complains, the respondent was the lowest bidder on the proposed improvement and was awarded the contract.

Later, the complaint in the case concerning Greenly drive (S.F.No. 14699) continues, the superintendent of streets filed an assessment to meet the cost of the improvement, and following its levy the respondent sold and assigned the warrant, diagram and assessment, and the bonds issued thereunder for approximately $27,500, to which amount the city is entitled as trustee for the owners of the property within the assessment district. In the other case (S.F.No. 14700) the contractor is said to have received approximately $63,000, and judgment is asked in the same form for that amount.

The respondent's demurrer to each complaint specified, as its grounds, that it does not state facts sufficient to constitute a cause of action; that the court has not jurisdiction of it or the subject of the said action; that the city has not the legal capacity to sue; and that each of the causes of action is barred by the provisions of section 26 of the Improvement Act of 1911, as amended in 1923. Stats.1923, p. 117. The respondent also specifically demurred to the first cause of action upon the ground of uncertainty.

[1, 2] It has long been the law of California that public officers "must not be

interested in any contract made by them in their official capacity, or by any body or board of which they are members". Pol. Code, sec. 920; Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am. St.Rep. 31; Stockton P. & S. Co. v. Wheeler, 68 Cal.App. 592, 229 P. 1020; Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095. Contracts in violation of this rule are held void as against public policy, both upon the ground that the interest of the officer interferes with the unbiased discharge of his duty to the public (Nielsen v. Richards, 75 Cal.App. 680, 243 P. 697; Stockton P. & S. Co. v. Wheeler, supra), and also that a contract in violation of an express statutory provision is void. Smith v. Bach, 183 Cal. 259, 191 P. 14; Duntley v. Kagarise, 10 Cal.App.2d 394, 52 P.2d 560.

[3] But the city does not allege that Mr. Sturgis was the respondent's attorney at the time the contracts were awarded to it. The most specific statement upon this point is that, at the time of the execution of the contract, he was both a member of the city council and an employee of the construction company. It is significant that the city does not charge him with voting to award the contract to the respondent. The facts pleaded do not show that Mr. Sturgis had an interest in the contract at the time it was awarded, and do not state a cause of action upon the ground of his disqualification. The demurrer to this cause of action was, therefore, properly sustained.

[4] Concerning the second cause of action, when one makes a contract upon representations in the nature of inducements to enter into it and there is no misunderstanding as to its nature, the contract is voidable but not void. Wilson v. Southern Pacific Land Co., 46 Cal.App. 738, 189 P. 1040; Burns v. Grosvenor Inglis Corp., 120 Cal.App. 688, 8 P.2d 546; Williston, "On Contracts", sec. 1488; Restatement of the Law of Contracts, sec. 475. Under such circumstances, if the contract has been completely executed, as in the present case, the injured party's remedy is an action for damages.

[5] The case of Hunter v. County of Santa Barbara, 110 Cal.App. 698, 294 P. 1082, relied upon by the appellant, arose when it was found that a contractor had increased his bid to an amount which included a sum estimated to be the difference between the par value and the market value of bonds to be taken in payment for the work. But before the contractor had done any work under the contract, the board of supervisors rescinded it and rejected the contractor's bid. That is a far different situation from the facts pleaded in the present case. There the contractor sought damages for breach of contract and it was held that he could not recover because the contract was void. Here the work has been completed and the city is suing to recover all of the consideration for the contract upon the ground that because it was not faithfully performed it is void. Upon this cause of action the demurrer was also properly sustained.

[6, 7] The third cause of action presents a different question. Proceedings under the Improvement Act of 1911, supra, include an invitation for sealed proposals or bids upon the proposed work. The purpose of such bidding is to secure a price based upon competition. Any agreement which tends to deprive the government of competition in bidding is unlawful (Swan v. Chorpenning, 20 Cal. 182; McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L. Ed. 1117), and where it is shown that the bids made were collusive and a contract is awarded by public officers in ignorance of such a combination, the resulting contract is void as against public policy. Morgan v. Gove, 206 Cal. 627, 275 P. 415, 62 A.L.R. 219; Dillon on Municipal Corporations, 8th Ed., vol. 2, sec. 781, p. 1165; McQuillin on Municipal Corporations, 2d Ed., vol. 3, sec. 1326, p. 904. The allegations of the city state a cause of action under these principles.

[8] However, the respondent contends that any rights the city may have had to sue upon the contracts are barred by the provisions of section 26 of the Improvement Act of 1911 as amended in 1923, Stats. 1923, p. 117. This section provides that an action "to set aside, cancel, avoid, annul or correct any assessment or reassessment, or to review any of the proceedings, acts, or determinations therein, or to question the validity of, or to enjoin the collection of the said assessments or reassessments, or to enjoin the issuance of bonds to represent the same", must be brought within 30 days after the recording of the assessment.

However, the present action is not one within the terms of this section. The city does not seek to set aside any assessment, or to review any "proceedings, acts, or determinations" concerning the method of meeting the improvement's cost. It does not question the validity of any assessment, but as trustee for the property owners it seeks to reach money alleged to have been collected by the respondent upon a void contract. If successful in its action, no assessment would be changed and no bond would be affected, but the property owners in the assessment district would have the benefit of any money recovered by this city in their behalf.

[9] The point that the City of Oakland has not the legal capacity to sue is also not well taken. The facts of the complaint are substantially the same as those shown in the case of City of Oakland v. De Guarda, 95 Cal.App. 270, 272 P. 779, 273 P. 819, where it was held that under the provisions of the Improvement Act of 1911, supra, the city is a trustee for the property owners within the assessment district, and it may maintain an action without the necessity of joining the persons for whose benefit the action is prosecuted. Sec. 369, Code Civ.Proc.

The judgment is reversed with directions to the trial court to overrule the demurrer as to the third cause of action and allow the respondent to answer.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; CARTER, J.

15 Cal.2d 628

PEOPLE v. KNOTT.

Cr. 4272.

Supreme Court of California.

July 2, 1940.

Rehearing Denied Aug. 1, 1940.

1. Embezzlement 🔑9

A county auditor, who, although not in possession of county's money, had authority to issue warrants payable by the treasurer had "control" over public money within meaning of the statute making a public officer who fraudulently misappropriates any property which he has in his possession or under his control by virtue of his trust guilty of embezzlement. Pen.Code, § 504; Pol.Code, § 4101.

See Words and Phrases, Permanent Edition, for all other definitions of "Control".

2. Embezzlement 🔑11(2)

The statute making a public officer guilty of embezzlement who fraudulently appropriates any property which he has in his possession or under his control by virtue of his trust is complementary of the statute which denounces, as a felony, any misapplication of public money by an officer charged with its "receipt, safe-keeping, transfer, or disbursement." Pen.Code, §§ 424, 504.

3. Embezzlement 🔑9

The statute making a public officer guilty of embezzlement who fraudulently appropriates any property which he has in his possession or under his control by virtue of his trust was enacted to make it a crime for one who, although not having possession of public funds, is in such control of them that he can appropriate money for his own purposes. Pen.Code, § 504.

4. Criminal law 🔑324

Conclusive presumptions and estoppels will not be allowed to prevent proof of the corpus delicti.

5. Embezzlement 🔑38

In prosecution of county auditor for embezzlement, admission of evidence concerning falsity of facts stated by auditor in two claims for money advanced in payment of office expenses, which claims were approved by county board of supervisors, was not error, since rule that determination of a county board of supervisors that county has incurred an indebtedness is final, if claim shows on its face that amount is clearly chargeable to county, is not applicable in a criminal prosecution. Pen.Code, § 504.

6. Criminal law 🔑1172(9)

In embezzlement prosecution, trial court did not commit error in failing to state in instruction on restoration of property embezzled that such restoration "authorizes court to mitigate punishment in its discretion," since if such additional words had been used, instruction would have been prejudicially erroneous. Pen.Code, §§ 504, 513.

7. Criminal law 🔑1037(2)

Defendant could not complain of statement by district attorney in his closing argument to jury, where defendant objected to the statement but made no request that jury be admonished to disregard it.

8. Criminal law 🔑730(7)

In embezzlement prosecution, statement of district attorney in closing argument that certain witnesses, who were absent but who were under subpoena, would have testified against defendant if present, did not constitute reversible error, where jury was instructed to consider only evidence presented during the trial.

9. Embezzlement ⚷47

In prosecution of a county auditor for embezzlement, a defense based on statutory ground that property was appropriated openly and under a claim of title preferred in good faith presented an issue of fact, not of law, and it was for jury to determine whether auditor secured county's money in manner prescribed in the statute as justification. Pen.Code, §§ 504, 511.

10. Embezzlement ⚷49

In prosecution of county auditor for embezzlement, jury by verdicts of guilty, returned after instructions which included statute making it a defense to an embezzlement prosecution, that property was appropriated openly and under a claim of title preferred in good faith, impliedly found that auditor did not take county's money openly and avowedly and under a claim of title preferred in good faith. Pen.Code, §§ 504, 511.

11. Criminal law ⚷1186(4)

In prosecution of county auditor for embezzlement, there was no "miscarriage of justice" by reason of erroneous rulings of trial judge, where auditor was convicted after a fair trial at which she declined to testify or offer any evidence concerning acts of which she stood convicted. Pen.Code, §§ 504, 511.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Butte County; Ben R. Ragain, Judge.

Luella Knott was convicted of embezzlement, and she appeals.

Affirmed.

Rehearing denied; CARTER, J., dissenting.

Prior opinion, 94 P.2d 635.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and J. M. McPherson, Dist. Atty., and Charles H. Andrews, Asst. Dist. Atty., both of Chico, for respondent.

EDMONDS, Justice.

By its verdicts, a jury found that upon three different occasions Luella Knott, while auditor of Butte county, violated section 504 of the Penal Code relating to the duties of public officers. But, quite in contrast with most cases, she does not dispute the facts relating to the charges against her, and the principal question for decision upon her appeal from the judgments of conviction and from the order denying a motion for a new trial concerns the construction of the statute under which she was prosecuted.

The first of the charges concerns certain interest coupons on highway bonds. On July 1, 1937, interest was due upon outstanding highway bonds of Butte county, and as one of the duties of her office, the appellant was required to draw warrants authorizing the payment of the amounts specified in the coupons when and as they were presented. By drawing a warrant for $625, she secured that amount from the county treasury upon the pretext that it was due for certain of such coupons, although they were paid under another warrant. A year later she deposited the same sum with the county treasurer as a "refund on double payment".

By a second indictment containing two counts, the appellant was accused of embezzling other public money. It appears that the board of supervisors had authorized the installation of a new bookkeeping system in the auditor's office, and the appellant made claim for $110, asserting that it was due on account of money advanced by her for "time and expense of tax expert". Later, she presented another claim for $270 which she stated was the cost of a part of that system. These claims were approved by other county officers and were paid by the treasurer. Over the objection of the appellant, evidence was received to the effect that Miss Knott had expended no money for either of the purposes declared by her.

When the state concluded the presentation of evidence, the appellant moved the court to advise the jury to acquit the appellant, and upon the denial of that motion offered only the testimony of character witnesses in her behalf.

Section 504 of the Penal Code provides: "Every officer of this state, or of any county, * * * who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust, * * * is guilty of embezzlement." Each of the indictments accuses Miss Knott of violating this section in that while she was county auditor, "and was a person entrusted with and having [public money] under her control * * *" she embezzled a stated amount of such funds.

The appellant's principal contention is that as county auditor she did not have any of the county's money in her possession or under her control within the meaning of this statute and therefore cannot be guilty of embezzlement as charged. Other points urged by her are that the trial court committed prejudicial error in admitting evidence to impeach the two claims which had been allowed and ordered paid by the board of supervisors; that the trial court misdirected the jury as to matters of law; that the district attorney was guilty of prejudicial misconduct in his argument to the jury; that upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable; and, finally, that on the whole case, by reason of erroneous rulings of the trial court, there has been a miscarriage of justice.

[1] Although the county treasurer is charged with the receipt and disbursement of county money (sec. 4101, Pol.Code), such funds, at least to a limited extent, are within the control of the auditor. One who is not in possession of money may have it under his control in the sense that it is under his direction and management. Indeed, that is exactly the situation shown in the present case. Miss Knott, as auditor, although not in possession of the county's money, had authority to issue warrants payable by the treasurer. The one for $625 issued by her to obtain payment of what was alleged to be an obligation of the county fixed by law, required no approval by any other public officer. It was the duty of the county treasurer to pay such a warrant, regular on its face, upon presentation, provided there were funds available therefor. Under such circumstances to say that the auditor had no control over the money of the county would exalt form and ignore substance.

[2, 3] Section 504 of the Penal Code clearly indicates that it is complementary to section 424 of that Code, which denounces, as a felony, any misapplication of public money by an officer charged with its "receipt, safe-keeping, transfer, or disbursement". Obviously, the statute under which appellant was prosecuted was enacted to make it a crime for one who, although not having the possession of public funds, is in such control of them that he can appropriate money for his own purposes. The results accomplished by the appellant show that she had enough control of the county's money to secure it for her own purposes upon the warrants which she wrongfully issued and presented to the county treasurer for payment, and her acts clearly fall within the legislative definition of the felony of which she stands convicted.

[4, 5] The appellant's contention that the trial court erred in admitting evidence concerning the falsity of the facts stated by her in the two claims for money advanced in payment of office expenses, is based upon the general rule that the allowance of such a claim is conclusive. Although, in civil cases, the determination of a board of supervisors that the county has incurred an indebtedness in a reasonable amount for goods or services has been held to be final if the claim shows on its face that the amount is clearly chargeable to the county, and within the jurisdiction of the board to accept or reject (County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125; County of Alameda v. Evers, 136 Cal. 132, 68 P. 475), this rule has no application in a criminal prosecution of a claimant. Conclusive presumptions and estoppels will not be allowed to prevent proof of the corpus delicti. For example, in People v. Lanterman, 9 Cal.App. 674, 100 P. 720, the state proved that railroad fare charged to the county was not in fact paid, and in People v. Ralph, 67 Cal.App. 270, 227 P. 642, the prosecution was based upon evidence that coal charged for was not delivered. Although in each of these cases the defendant was charged with presenting a false claim (sec. 72, Pen.Code), there is no difference, in principle, between them and the present case.

[6] The appellant next complains that the jury was erroneously instructed, because the trial judge, in stating that restoration of property embezzled is not a ground of defense to a criminal prosecution, did not tell them that it "authorizes the court to mitigate punishment, in its dis-

cretion". Sec. 513, Pen.Code. Had these words been used, the instruction would have been prejudicially erroneous. People v. Smith, 206 Cal. 235, 273 P. 789.

[7, 8] Another point relied upon by the appellant relates to the conduct of the district attorney in his closing argument to the jury. He mentioned the absence of certain witnesses, who were under subpoena, indicating that they would have testified against her if present. The appellant objected to this statement but made no request that the jury be admonished to disregard it. Under these circumstances there is no foundation for the assignment of error. People v. King, 13 Cal.2d 521, 90 P.2d 291; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. DuBois, 16 Cal.App.2d 81, 60 P.2d 190. However, it may be noted that the jury was fully charged concerning their duty to consider only the evidence presented during the trial, and the remark complained of falls far short of conduct amounting to reversible error.

[9, 10] Another point urged by the appellant concerns her motion that the court advise the jury to return a verdict of acquittal upon the two counts in the second indictment. It is contended that this motion should have been granted as a matter of law. She relies upon the statutory rule that in a prosecution for embezzlement, "it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable". Sec. 511, Pen.Code. But a defense upon this ground presents an issue of fact, not of law, and it was for the jury to determine whether she secured the money in the manner prescribed by the legislature as justification. By its verdicts, returned after instructions which included this Code section, the jury impliedly found that she did not take the county's money "openly and avowedly, and under a claim of title preferred in good faith".

[11] Finally, says the appellant, by reason of erroneous rulings of the trial judge there has been a miscarriage of justice. But she refers to no specific act, other than the rulings which have been passed upon, to support this contention. The record shows that the appellant was convicted upon a fair trial at which she declined to testify or offer any evidence concerning the acts of which she stands convicted.

The order denying a new trial and the judgments are, and each of them is, affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.

CARTER, Justice.

I dissent. In my opinion, the evidence produced at the trial of this case was insufficient to support the conviction of the defendant on any of the three counts of the indictment charging her with a violation of section 504 of the Penal Code. It was the obvious intention of the legislature in the enactment of this section to limit its application to cases where public officers or their deputies, clerks or servants fraudulently appropriate to any use or purpose not in the due and lawful exercise of the trust reposed in them, any property which they have in their possession, or under their control by virtue of such trust. To my mind, it is absurd to say that money in a county treasury is under the control or in the possession of a clerk or deputy in the county auditor's office, or is in the possession or under the control of any county official except the county treasurer and the clerks and deputies in his office. The mere fact that the law authorizes the auditor to draw a warrant on the county treasury for the payment of certain disbursements authorized by law, does not place the funds of the county treasury under the control of the auditor. It is true that the auditor has a function to perform in disbursing the funds in the county treasury, but this function is clerical in its nature and the county treasurer is not authorized to pay any money to the county auditor or anyone else except upon warrants which the law authorizes to be issued for the payment of obligations against the county.

One indictment charged the defendant with embezzling the sum of $625 coming into her possession and under her control by virtue of her trust as auditor. This money was drawn from a special highway bond fund in the possession of the county treasurer by means of a warrant drawn by the defendant in favor of the Chico branch of the Bank of America for the purported payment of 37 interest-bearing coupons of highway bonds, which had been previously paid. The county treasurer was not required to pay this warrant and should not have paid the same without the surrender to him for cancellation of the coupons which the warrant was purportedly drawn to pay; in other words, if the treasurer had insisted upon the surrender of the coupons covered by the warrant at the time the warrant was presented for payment, the warrant would never have been cashed by him, and the defendant would not have received the money covered thereby. How, then, can it be said that the defendant had the money covered by said warrant in her possession and under her control? It is true that under the law she had the right to draw warrants for the payment of maturing interest coupons on bonds issued by the county, but the treasurer was not authorized to pay such warrant until the interest coupons were surrendered to him for cancellation. If such procedure had been followed, money could not have been fraudulently and unlawfully taken from the possession or control of the treasurer. Manifestly, it was not in the possession or under the control of the defendant until the treasurer cashed the warrant which he was not authorized to do without the surrender of the interest coupons which it was purportedly drawn to pay.

While the evidence produced at the trial might be sufficient to support a conviction under an indictment charging the defendant with a violation of section 424 of the Penal Code, it falls far short of being sufficient to support a conviction for a violation of section 504 of that Code.

The situation with reference to the alleged embezzlement by the defendant of the sums of $110 and $270 alleged to have come into her possession and under her control by virtue of her trust as auditor is somewhat different than that with reference to the alleged embezzlement of the sum of $625 by her. In my opinion, the evidence was clearly insufficient to support the conviction of the defendant on either of these counts for a violation of section 504 of the Penal Code.

It is the claim of the prosecution in this case that the defendant presented claims against the county of Butte for the sums of $110 and $270, respectively, for alleged expenses incurred by her in installing in the auditor's office a double entry bookkeeping system. These claims were filed by the defendant with the county clerk of Butte county, and approved by the board of supervisors of said county. They were then audited by the defendant as legal claims against the county and presented to the treasurer for payment. They were paid in due course. It is claimed that both of these claims were fraudulent because the alleged expenses covered thereby were never incurred by the defendant. Certainly, it cannot be said that the defendant had the sums of money represented by these claims, in her possession or under her control within the meaning of section 504 of the Penal Code, as the method which she used to obtain these sums was the same method used by any other claimant against the county. Can it be said that a laborer employed by a member of the board of supervisors to perform work on the county road who presents a claim against the county for work which he never performed, and obtains money from the county treasurer on such claim, is guilty of a violation of section 504 of the Penal Code? This conclusion would necessarily follow if the defendant in the case at bar is guilty of such violations in obtaining the above-mentioned sums on the claims presented by her, as section 504 applies with equal force to a servant of such officer as it does to the officer himself, and the members of the board of supervisors have a function to perform in approving the claims on which funds are drawn from the county treasury. In other words, the sums of $110 and $270 which it is claimed defendant obtained from the county treasurer on the claims presented by her, were no more under her control or in her possession than the sum which the laborer on the county road obtained from the county treasury on his claim which had to go through the identical procedure followed by the defendant in the presentation, approval and payment of the claims presented by her.

To my mind, it is obvious that it was the intention of the legislature in the enactment of section 504 of the Penal Code to make it applicable only to cases where public officers or their deputies, clerks or servants misappropriate property belonging to the political subdivision by which they are employed, when such property is in their possession or under their control in the sense that they have dominion over the property and they appropriate the same in violation of their trust.

In my opinion the defendant in the case at bar was in no different position with respect to obtaining the sums of $110 and $270 on the claims presented by her than anyone else presenting an alleged fraudulent claim against the county and that if such claims were presented with intent to defraud the county, she was guilty of a violation of section 72 of the Penal Code.

In view of the settled rule that penal statutes must be strictly construed, it is obvious to my mind that to construe section 504 of the Penal Code as applicable to the facts of this case, is clearly in violation of this rule.

I am therefore of the opinion that the evidence presented at the trial of this case was insufficient to prove the defendant guilty of any violation of section 504 of the Penal Code, and the judgment of conviction against her on all three counts should therefore be reversed.

15 Cal.2d 612

SALE et al. v. RAILROAD COMMISSION et al.

S. F. 16306.

Supreme Court of California.

July 2, 1940.

1. Automobiles 🔑84

Petitioners, who were engaged in transportation business as highway carriers, could challenge action of Railroad Commission in permitting a rival transportation company to operate a truck line in competition with petitioners, notwithstanding that no one has a legally enforceable right at common law to conduct his business free from competition, in view of provisions of Public Utilities Act. Gen.Laws 1937, Act 6386, §§ 60, 62.

2. Judgment 🔑547

Although decisions and orders of Railroad Commission ordinarily become final and conclusive if not attacked in manner and within time provided by law, such decisions are not "res judicata" in sense in which that doctrine is applied in law courts. Gen.Laws 1937, Act 6386, §§ 64–67.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Automobiles 🔑105

If Railroad Commission, in proceedings respecting the transfer of right to operate as a highway common carrier, erroneously decided a question of law which went to commission's jurisdiction to act in transfer proceedings, commission's determination was subject to review by Supreme Court. Gen. Laws 1937, Act 6386, § 50¾(c).

4. Corporations 🔑617(2)

Under statute concerning suspension of corporate powers of corporations which have failed to pay taxes, a corporation which has failed to pay its annual gross receipts tax can exercise none of its corporate powers, rights, or privileges, and a contract to sell or transfer property entered into by such a corporation is void. Pol.Code, § 3669c.

5. Corporations 🔑599

The purpose of the statutory prohibition under statute concerning suspension of corporate powers of corporations which have failed to pay taxes is to prevent a delinquent corporation from enjoying the ordinary privileges of a going concern in order that some pressure will be brought to bear to force payment of taxes. Pol.Code, § 3669c.

6. Automobiles 🔑105
Corporations 🔑617(2)

The validity of decision by Railroad Commission authorizing a corporation which had a right to operate as a highway common carrier to transfer such right to another was not affected by fact that, at time of transfer proceedings and unknown to commission, the corporation's corporate powers were suspended, since commission could have authorized transfer upon its own motion and its action was not dependent upon appearance of a party to invoke its jurisdiction. Pol.Code, § 3669c; Gen.Laws 1937, Act 6386, §§ 50¾(c), 53, 60, 62, 64–67.

7. Public service commissions 🔑1, 6

The railroad commission was designed to protect people of the state from consequences of destructive competition and monopoly in public service industries, and power and duties of commission extend beyond those exercised by judicial arm of government. Const. art. 12, §§ 22, 23.

8. Courts 🔑1

A "court" is a passive forum for adjusting disputes and has no power to investigate facts or to initiate proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Court".

9. Automobiles 🔑105

Rule that a court acquires no jurisdiction over a controversy unless a party with capacity to act appears before it and initiates the proceedings did not apply to proceedings before Railroad Commission concerning transfer of a right to operate as a highway common carrier, since commission, unlike a court, could act sua sponte and its action was not dependent upon appearance of a party to invoke its jurisdiction. Gen. Laws 1937, Act 6386, § 50¾(c).

10. Automobiles 🔑105

That a corporation which proposed to transfer its right to operate as a highway common carrier might have been prevented, by reason of suspension of its corporate powers, from complying with rule of Railroad Commission providing that application for authority to transfer the right should be made by all parties to proposed transaction did not affect commission's inherent jurisdiction to entertain transfer proceedings. Pol.Code, § 3669c; Gen.Laws 1937, Act 6386, §§ 50¾(c), 53.

11. Automobiles 🔑105

Where Railroad Commission made an order approving a corporation's transfer of its right to operate on highways as a common carrier, on review of commission's decision refusing to set order aside, Supreme Court was bound to assume that public convenience and necessity required continuance of service and that transferee had facilities and financial ability to furnish needed service. Gen.Laws 1937, Act 6386, §§ 50¾(c), 53, 60, 62, 64–67.

12. Public service commissions 🔑6

The Railroad Commission cannot disregard laws representing legislative policy of state even though enforcement of such policy is outside scope of commission's functions.

13. Automobiles 🔑105

Refusal by Railroad Commission, upon petition by persons engaged in transportation business as highway carriers, to set aside commission's previous order authorizing a corporation to transfer its right to operate as a highway common carrier to a company which operated a truck line in competition with petitioners was justified where over a year had elapsed since transfer and decision setting aside order would have thwarted commission's duty to safeguard public interests with respect to need for adequate transportation facilities. Gen. Laws 1937, Act 6386, §§ 50¾(c), 53, 60, 62, 64–67; Pol.Code, § 3669c.

CARTER, J., dissenting.

In Bank.

Proceeding by William A. Sale and another, a copartnership doing business as Winters Dray Line, and Pete Rampone, an individual doing business, under the firm name and style of Rampone Bros., against the Railroad Commission of the State of California and Ray C. Wakefield and others, as members of and constituting said Railroad Commission, to review a decision by the Commission refusing to rescind a previous order by the commission authorizing the transfer of a right to operate as a highway common carrier.

Order of the Railroad Commission affirmed.

Decoto & Hardin and Ezra W. Decoto, all of Oakland, and Reginald L. Vaughan and Varnum Paul, both of San Francisco, for petitioners.

Ira H. Rowell, Roderick Cassidy and George E. Howard, all of San Francisco, for respondents.

Ware and Berol, of San Francisco, amici curiae.

PER CURIAM.

By this proceeding the petitioners, who are engaged in the transportation business as highway carriers, challenge a decision of the respondent commission the effect of which is to permit a rival transportation company to operate a competing truck line.

In 1927, Misener Motor Drayage Company, a California corporation, acquired certain operative rights for the seasonal transportation of farm produce as a highway common carrier. In the following year the corporation was suspended for failure to pay its 1927 franchise tax. Although its corporate powers were never revived, the suspended corporation continued to operate until 1935, when the state seized its trucks and equipment. Upon an ex parte application made during 1936, the Railroad Commission granted the corporation the right to suspend operations for six months, and following that order the Misener Company entered into an agreement to sell its operative rights to J. J. Leonardini, doing business as the O. K. Trucking Company. Section 50¾(c) of the Public Utilities Act (Deering's Gen. Laws 1937, Act 6386) prohibits the transfer of operative rights except upon the authorization of the commission, and the contracting parties applied to the commission for authority to make the transfer.

Their application set forth the terms of the proposed sale and alleged that the transferee had sufficient equipment and resources to furnish the proposed public service, but did not disclose that the transferor's corporate powers were then under suspension. Without holding a public hearing the commission made its order authorizing the proposed transfer, and thereupon Leonardini began furnishing public transportation over the routes described in the certificates he had acquired.

More than a year later, the petitioners, who compete with Leonardini over part of his truck routes, discovered the circumstances under which he had acquired his operative rights. They filed a complaint against him, claiming that he was operating unlawfully and also petitioned the respondent to reopen the transfer proceedings and revoke its order authorizing the transfer. The respondent reopened the transfer proceedings for the purpose of determining whether its former order should be rescinded, and set the matter for hearing in conjunction with the hearing upon the complaint against Leonardini. At the hearing the facts concerning the suspension of the transferor's corporate powers were presented, but the commission concluded that public convenience and necessity would not be served by prohibiting the transferee from operating over the routes in question. Accordingly it rendered a decision refusing to rescind the order authorizing the transfer. Upon the denial of a rehearing the petitioners brought this proceeding to review the commission's decision.

[1] The briefs contain a suggestion that the petitioners have no standing to challenge the commission's action because they are merely competitors of Leonardini. The point has no merit. True, no one has a legally enforceable right at common law to conduct his business free from the competition of others. Aetna Ins. Co. v. Hyde, 275 U.S. 440, 447, 48 S.Ct. 174, 72 L.Ed. 357; Public Service Comm. v. Great Northern Utilities Co., 289 U.S. 130, 134, 53 S.Ct. 546, 77 L. Ed. 1080; Alabama Power Co. v. Ickes, 302 U.S. 464, 479–484, 58 S.Ct. 300, 82 L.Ed. 374. But this means no more than that the petitioners have no constitutional rights at stake in the orders of which they complain. The legislature may believe that the Public Utilities Act will be more strictly enforced or that questions affecting the public interest will be more thoroughly canvassed and solved if those whose pecuniary interests are affected are permitted to appear before the commission and challenge the rights of their competitors. See Federal Communications Comm. v. Sanders Bros. Radio Station, Mar. 25, 1940, 60 S.Ct. 693, 84 L.Ed. 869.

By section 60 of the Public Utilities Act the right to make complaints for the "violation, of any provision of law or of any order or rule of the commission" is conferred upon "any corporation or person", and by section 62 it is provided that "any public utility shall have a right to complain on any of the grounds upon which complaints are allowed to be filed by other parties". That these provisions confer upon competitors the right to complain against or contest the rights of rival operators has never been questioned by the Railroad Commission in its proceedings. Such a right has also frequently been recognized by the courts and cannot now be doubted. Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436; Truck Owners, etc., Ass'n v. Superior Court, 194 Cal. 146, 228 P. 19; Western Ass'n of R. R. v. Railroad Comm., 173 Cal. 802, 162 P. 391, 1 A.L.R. 1455.

No petition either to rehear or to review the decision authorizing the transfer of operative rights was filed within the time limited in sections 66 and 67 of the Public Utilities Act. From this the respondent argues that it was under no duty to rescind a prior decision which was valid on its face and which had become final. Public Utilities Act, supra, sec. 65. On the other hand, the petitioners point out that the decision authorizing the transfer was made ex parte and without their knowledge, that they proceeded to challenge it as soon as they learned of its existence, and that the respondent itself recognized the timeliness of their complaint by reopening the prior proceedings and receiving evidence upon the validity of the prior order.

[2, 3] It is true that the commission's decisions and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law. Public Utilities Act, supra, sec. 65; Marin Municipal Water Dist. v. North Coast W. Co., 178 Cal. 324, 327, 173 P. 473; Coast Truck Line v. Asbury Truck Co., 218 Cal. 337, 340, 23 P.2d 513; Miller v. Railroad Comm., 9 Cal.2d 190, 201, 70 P.2d 164, 112 A.L.R. 221. This is not to

say, however, that such a decision is res judicata in the sense in which that doctrine is applied in the law courts. Stratton v. Railroad Comm., 186 Cal. 119, 127, 198 P. 1051. The commission has continuing jurisdiction to rescind, alter or amend its prior orders at any time. Public Utilities Act, supra, sec. 64. This provision is analogous to sections 5803, 5804 and 5805 of the Labor Code, St.1937, p. 301 (formerly section 20(d) of the Workmen's Compensation Act, St.1917, p. 831) under which the industrial accident commission has been held to have the power to reopen its prior decisions upon a showing of mistake or newly discovered evidence. Bartlett Hayward Co. v. Industrial Accident Comm., 203 Cal. 522, 265 P. 195; Brunski v. Industrial Accident Comm., 203 Cal. 761, 265 P. 918; Western Pipe, etc., Co. v. Industrial Accident Comm., 126 Cal. App. 225, 14 P.2d 530. In the proceedings now under review the petitioners presented undisputed facts which were unknown to the respondent at the time of its prior decision and which, they claim, as a matter of law deprived the respondent of the power to make the prior decision. If this contention be correct and the commission erroneously decided a question of law which went to its jurisdiction to act in the transfer proceedings, that determination is subject to review and correction by this court.

This brings us to the principal issue in the case. The petitioners contend that because the Misener Company's corporate existence was suspended, it had no power either to transfer its operative rights to Leonardini or to invoke the respondent's jurisdiction to approve the transfer. In consequence, it is said, the entire proceedings, including the respondent's order approving the transfer, were void. The respondent takes the position that its function is limited to determining questions of public convenience and necessity, and that it had neither the duty nor the right to inquire into the legal capacity of a party to transfer its operative rights.

[4-6] It must be conceded that under section 3669c of the Political Code a corporation, which has failed to pay its annual gross receipts tax, can exercise none of its corporate rights, powers or privileges, and that any contract to sell or transfer property entered into by such a corporation has been held to be void. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446; Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 68 P.2d 968; Vogue Creamery Co. v. Acme Ice Cream Co., 8 Cal.App.2d 357, 47 P.2d 757. The purpose of the statutory prohibition is to prevent the delinquent corporation from "enjoying the ordinary privileges of a going concern, in order that some pressure will be brought to bear to force the payment of taxes". Boyle v. Lakeview Creamery Co., supra, 9 Cal.2d at page 19, 68 P.2d at page 970. We are of the opinion, however, that the transferor's legal incapacity to transfer its operative rights does not affect the validity or regularity of the order now under review.

[7, 8] The petitioners' argument is based upon a misconception of the fundamental nature of the California Railroad Commission and the functions which it performs. Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries. Calif.Const., art. II, secs. 20-23; Pacific Tel. & Tel. Co. v. Eshelman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas. 1915C, 822. Although it has been termed a "quasi-judicial" tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. Stratton v. R. R. Comm., supra, 186 Cal. at page 126, 198 P. 1051; 24 Cal.L. Rev. 330. A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.

The powers and functions of the railroad commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. Calif.Const., art. XII, sec. 22, 23. The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. See Public Utilities Act, supra, passim; 15 Cal.L.Rev. 445. All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. "No informality * * * shall invalidate any order, decision, rule or regulation made * * *." Public Utilities Act, supra, sec. 53. Hence, unless the act requires the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order.

In the exercise of its authority over highway common carriers, with which we are here particularly concerned, the commission is governed chiefly by section 50¾ of the Public Utilities Act. Under that provision it is required to supervise and regulate such carriers in all matters affecting their relationship with the shipping public. It may grant or deny operative rights with or without a hearing and upon such terms as, "in its judgment, the public convenience and necessity require". After a hearing, it may amend, suspend or revoke an existing certificate of public convenience and necessity for good cause shown. No operative right may be transferred except upon the authorization of the commission. When, after a hearing initiated by complaint or by the commission upon its own motion, it is found that a carrier is operating without a certificate or is otherwise violating the act, it may order the offending party to cease and desist. It will be noted that in the exercise of all of these powers public convenience and necessity is the criterion of administrative judgment.

[9, 10] With this background before us, we turn to the petitioners' contentions. First, it is said that because the corporate powers of the Misener Company were suspended, it had no capacity to invoke the commission's jurisdiction to approve the transfer. The argument thus made derives from the rule of judicial procedure that a court acquires no jurisdiction over a controversy unless a party with capacity to act appears before it and initiates the proceedings. The fallacy of the petitioners' position lies in their assumption that this legal rule applies with equal validity to administrative proceedings. The Supreme Court of the United States has recently declared that the divergence of function between the judicial and the administrative process "preclude[s] wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts". Federal Communications Comm. v. Pottsville Broadcasting Co., Jan. 29, 1940, 309 U.S. 134, 60 S.Ct. 437, 441, 84 L.Ed. 656. This observation has apt illustration here. The legal rule does not apply because the railroad commission, unlike a court, may act sua sponte and is not dependent upon the appearance of a party to "invoke" its jurisdiction. Nor does the Public Utilities Act require the commission to follow any particular procedural steps in authorizing a transfer of operative rights. It is true that under its rule-making power the commission has provided that an application for such authority "be made by all the parties to the proposed transaction". Rule 24, Rules of Procedure of the Railroad Commission. But, assuming that the transferor's legal incapacity might have prevented compliance with this rule, that fact does not go to the jurisdiction of the commission to entertain the proceeding. Its powers of surveillance and supervision over all public utility matters are inherent.

Petitioners rely upon Hanlon v. Eshelman, 169 Cal. 200, 146 P. 656, 657, in which this court declared that the provision requiring the commission's consent to a sale of operative rights "implies that there must be an owner ready to sell and seeking authority so to do before the commission is called upon to act". However, when read in its context, this statement means no more than that the commission has no occasion to give its consent where there is no transferor and transferee before it willing to transfer and receive the operative rights. Once it is realized that the commission could, upon Leonardini's or its own motion, have entertained proceedings to grant him the operative rights which the Misener Company had no legal right to exercise, its jurisdiction to entertain the transfer proceedings becomes obvious.

[11] The petitioners' next contention goes to the substantive power of the commission to authorize the transfer in view of the Misener Company's legal incapacity to enter into such a transaction. It has been noted that any attempt by a suspended corporation to transfer its property is void under section 3669c of the Political Code. Yet we are bound to assume that public convenience and necessity require continuance of the service which the present

operative rights entail and also that Leonardini has the facilities and financial ability to furnish the needed public service. These assumptions are implicit in the commission's original grant of the operative rights and in its order authorizing their transfer.

The commission insists that under the principles established in Hanlon v. Eshelman, supra, it could concern itself solely with the question of public convenience and necessity and had no authority to consider the legal status of the parties before it. In that case the owner of a municipal water system first contracted to sell the system to Hanlon and then refused to complete the transaction. Hanlon unsuccessfully petitioned the railroad commission to approve the transfer, claiming that he had a legal right to a conveyance of the properties. He then sought a writ of mandate to compel the commission to act upon his application, but this court denied the writ, holding that the commission was under no duty to pass upon a disputed legal question raised by the parties before it. Concerning the proper sphere of the commission's authority the court said: "The commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone. * * * All that the commission is concerned with, therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the railroad commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public."

It may be conceded that the principles expressed in the Hanlon case do not provide a universal test for determining the commission's authority to pass upon questions of law. Because the commission cannot decide questions concerning the legal rights and duties of private parties inter se does not mean that it is powerless to decide all legal questions or that it may, in its own discretion, disregard established rules of law. Cases may arise in which the legal status of a party before it would be an operative fact which the commission could not disregard. Thus, if a proposed transferee lacked the legal capacity to do business, such fact would directly affect its ability to furnish the service which it proposed to assume.

[12] Moreover, the commission is not entitled wholly to disregard other laws representing the legislative policy of the state, even though the enforcement of such policy is outside the proper scope of its functions. In the present case, if the commission had been apprised of the transferor's incapacity when the transfer proceedings were pending, it would have been faced with just such a problem. A duty, on the one hand, to insure adequate transportation facilities for the shipping public would have prescribed a decision which would permit the transferee to assume the operative rights. But a due regard for the state's taxing power and the laws by which that power is made effective would have weighed against giving consent to the transfer. To be sure, the commission was never intended to be an instrument for the vindication of the taxing power, but it could not flout the tax laws or collude in their evasion. Possibly the dilemma could only have been solved by revoking the transferor's rights and granting them anew to the transferee.

[13] It is plain, however, that the commission was faced with no such dilemma when called upon to make the decision under review. The transfer had been completed and more than a year had gone by. To have rescinded the prior order at that time assuredly would not have satisfied the purpose for which section 3669c of the Political Code was enacted. And such a decision would have effectually thwarted the constitutional and legislative duty of the commission to safeguard the interests of the public with respect to the need for adequate transportation facilities. Under the circumstances, it is clear that the commission regularly pursued its authority under the law.

The order under review is affirmed.

Mr. Justice CARTER dissents from the foregoing decision, and is of the opinion that the writ of review should be granted and the order of the railroad commission annulled.

40 Cal.App.2d 25

FUNARI v. GRAVEM-INGLIS BAKING CO.

Civ. 6284.

District Court of Appeal, Third District, California.

July 5, 1940.

Rehearing Denied Aug. 3, 1940.

Hearing Denied Aug. 31, 1940.

1. Judgment ⚿199(1)

In determining whether judgment notwithstanding verdict should be granted, courts are guided by the same rules which apply to nonsuits and directed verdicts.

2. Judgment ⚿199(3)

A judgment notwithstanding a verdict should not be granted when there is any substantial evidence, which, with the aid of all legitimate inferences favorable to plaintiff, would support the verdict of the jury. Code Civ.Proc. § 629.

3. Negligence ⚿32(1, 2)

A truck driver delivering truckload of sugar to baking company was an "invitee" to whom baking company owed duty to exercise only ordinary care for protection of driver on company's premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Negligence ⚿32(1)

An owner of premises sued for injuries sustained by invitee could assume that invitee would perceive that which would be obvious to invitee on ordinary use of invitee's senses.

5. Negligence ⚿134(3)

Evidence warranted denial of truck driver's recovery from baking company for injuries sustained when truck driver slipped in elevator and was struck by elevator guard gate while unloading truckload of sugar which was being delivered to baking company, on ground that baking company exercised the degree of care required for protection of truck driver, who was an "invitee".

6. Negligence ⚿136(10)

In personal injury action wherein all testimony concerning alleged negligence of defendant and contributory negligence of plaintiff came without contradiction from plaintiff and plaintiff's witnesses, under circumstances affording no indication that testimony was result of mistake or inadvertence, presumption that plaintiff exercised ordinary care, which under some circumstances might be relied upon to produce a conflict in the evidence, was dispelled.

7. Negligence ⚿66(2), 105

A truck driver, delivering truckload of sugar to baking company with whose premises and elevator he was entirely familiar, assumed risk of obviously slippery condition of elevator floor, and was as a matter of law guilty of contributory negligence which barred his recovery from baking company for injuries sustained when he slipped on floor in elevator and was struck by elevator guard gate while unloading the sugar.

8. Negligence ⚿67

In invitee's action against owner of premises for injuries sustained when invitee was struck by elevator guard gates which automatically began to close when elevator began to move, invitee, if in possession of his faculties, should have made use of his faculties and perceived the obvious danger of moving elevator before attempting to enter elevator.

9. Negligence ⚿32(1)

In invitee's action against owner of premises for injuries allegedly sustained at two different times while delivering sugar to owner, the second injury, if invitee was practically unconscious at time thereof as result of first injury, was a direct and continuing result of first injury, and all questions of negligence would relate back to time of first injury.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Personal injury action by Thomas J. Funari against the Gravem-Inglis Baking Company. From a judgment for the defendant notwithstanding a verdict in favor of the plaintiff, the plaintiff appeals.

Affirmed.

Levinsky & Jones, Gilbert L. Jones, J. J. Miller, and Wm. H. Woodward, all of Stockton, for appellant.

Honey & Mayall, of Stockton, and Christopher M. Bradley, of San Francisco, for respondent.

HAWKINS, Justice pro tem., delivered the opinion of the court.

Appellant appeals from a judgment non obstante veredicto, following a jury's verdict awarding damages for personal injuries to appellant.

The essential facts are:

Appellant and one Nelson were employees of Overland Transfer Company. On the day appellant was injured they received orders from their employers to deliver a truck load of sugar to the plant of respondent at Stockton. They loaded the truck with about one hundred sacks of sugar, proceeded to said plant and backed the truck up to the curb, opposite the door to the freight elevator which was the receiving entrance.

At said time appellant was twenty-five years old and had been working at truck driving, stevedoring and other heavy manual labor since he was sixteen. He had been employed by said Overland Transfer Company off and on for two years. Both appellant and Nelson had delivered sugar and flour at the plant on other occasions and were entirely familiar with the premises and in particular with the operation of said elevator. This elevator was maintained by respondent for the use of tradesmen delivering goods, was ordinarily operated by them, and was controlled by pulling on a cable which was exposed throughout the length of the shaft. There was no evidence that respondent operated said elevator at any time on the day appellant was injured.

It was about twelve feet across the sidewalk from the truck to the door of the elevator. The elevator was so small that a man wheeling a hand truck had to back into it so he could "break down" the truck to take the merchandise out of the other side on the second floor, where said merchandise was stored.

Between the elevator and the entrance door was a sliding guard gate, made of iron and heavy wire, which automatically slid down as the elevator rose, and rose as the elevator came down. There was no warning signal of any kind on the elevator. There was a bell button but it was not connected and appellant had observed that fact on all occasions when he used the elevator. Appellant and Nelson gave warning of the starting of the elevator by "hollering" up and down the shaft.

Appellant and Nelson arrived at said plant about 9 o'clock in the morning. There was a very wet, dripping fog. They noticed a lot of wet flour on the sidewalk and marks where people had slipped and fallen recently. They loaded one hand truck with sugar and Nelson started to move it, but slipped and fell immediately. Appellant then entered the building and consulted the man with whom they usually dealt when delivering merchandise and asked for some sawdust to put on the sidewalk. He replied, "This is a bakery, and not a saw mill", but got a bucket of warm water and a broom, went out and washed off a path in the sidewalk from the truck to the elevator door. After that they did not again slip on the sidewalk.

The elevator floor was dry when they started unloading except for a wet spot near the front, which they covered with a sack. The floor of the elevator had always been slippery, even when dry, and this fact was known to both appellant and Nelson. They observed that there was flour on the elevator floor.

Appellant first went upstairs to the second floor while Nelson started hauling sugar to the elevator in the hand truck, taking six one-hundred-pound sacks to the load. As Nelson worked, he carried more or less water into the elevator on his shoes and on the wheels of the hand truck. From time to time he conversed with plaintiff up the elevator shaft. He slipped and fell twice at intervals on the floor of the elevator, bruising himself but sustaining no serious injury.

At the second fall, plaintiff, who was a much stronger man physically than Nelson, called down the shaft and said he (plaintiff) would come down and relieve him, and he did so immediately. Plaintiff and Nelson had discussed the slippery condition of the elevator floor even before the first load was hauled. Nelson went upstairs and plaintiff proceeded with the loading. He sent up several loads without mishap, then, while exerting considerable extra force to lift the hand truck over an elevated threshold, both feet slipped out from under him and he fell backwards, striking his head and shoulders against a door on the far side of the elevator and his back on a projecting wooden "lip" on the bakeshop door at the base of said door. The truck loaded with sugar fell on top of him.

Plaintiff immediately lost consciousness but after a short time regained consciousness but could remember but little of what had happened prior to the time he was taken to the hospital.

Nelson proceeded with the work alone. When he had about finished, plaintiff, while apparently trying to help him with the work, backed into the elevator without looking, but after some unknown person had started it from the second floor. The guard gate heretofore mentioned came down and struck him a blow on the head. He staggered onto the sidewalk, but did not fall.

Plaintiff has never at any time had any recollection of this second accident or the events leading up to it. Plaintiff did not suffer any fracture or other permanent injury from the blow on the head. His only permanent injury was to his back which resulted from his fall on the elevator floor.

There are two questions to be determined on this appeal:

(1) Is there any substantial evidence to show that respondent failed to exercise the degree of care which the law requires for the protection of invitees?

(2) Was the plaintiff guilty of contributory negligence as a matter of law?

The first question must be answered in the negative.

[1, 2] It is true, as urged by appellant, that in determining whether or not a judgment non obstante veredicto should be granted, courts are to be guided by the same rules which apply to nonsuits and directed verdicts. It is also true that a judgment non obstante veredicto should not be granted when there is any substantial evidence, which, with the aid of all legitimate inferences favorable to plaintiff, would support the verdict of the jury. Sec. 629, Code Civ.Proc.; Long v. John Breuner Co., 36 Cal.App. 630, 172 P. 1132.

[3, 4] But appellant was an invitee on the premises of respondent, whose duty it was, therefore, to exercise only ordinary care. Appellant had equal, if not superior, knowledge of the dangerous conditions which brought about his injuries. The danger was obvious and respondent was "entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses". Weddle v. Heath, 211 Cal. 445, at page 452, 295 P. 832, at page 835; Mautino v. Sutter Hospital Association, 211 Cal. 556, 296 P. 76; Sylvia v. Mellema, 17 Cal. App.2d 728, 62 P.2d 746; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801; Vitrano v. Westgate Sea Products Co., 34 Cal. App.2d 462, 93 P.2d 832.

[5] There is no substantial conflict in the evidence upon the question of the negligence of respondent or the contributory negligence of appellant. Under the facts of this case and the authorities cited, respondent was not guilty of any actionable negligence.

The second question is answered in the affirmative.

[6] All testimony relative to the alleged negligence of respondent and the contributory negligence of appellant came, without contradiction, from the lips of appellant and his own witnesses, under circumstances which afforded no indication that the testimony was the result of mistake or inadvertence. Therefore, the presumption that appellant exercised ordinary care, which under some circumstances might be relied upon to produce a conflict in the evidence, is dispelled and has disappeared from the case. Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529.

[7] From the uncontradicted evidence in the instant case, we are led to the conclusion that respondent assumed the risk and was guilty of contributory negligence as a matter of law.

[8, 9] Appellant asserts that the principles of law hereinbefore stated cannot be applied to the "second accident" in which appellant received the blow on the head from the descending guard gate. This position is not tenable. Under the rule enunciated in Weddle v. Heath, supra, if appellant was in possession of his faculties at the time, he should have made use of those faculties and perceived the obvious danger of the moving elevator before he attempted to enter it. If, as he testified, he was practically unconscious, his second injury was a direct and continuing result of his first injury and all questions of negligence would relate back to the time of said injury.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

39 Cal.App.2d 685

HEARD et al. v. BOARD OF ADMINISTRATION OF ALL CITY EMPLOYEES' RETIREMENT SYSTEM OF CITY OF LOS ANGELES et al.

Civ. 12550.

District Court of Appeal, Second District, Division 2, California.

June 28, 1940.

1. Municipal corporations 🔑220(9)

Owners of trucks employed by city of Los Angeles under ordinance providing for operation and rental of privately owned dump trucks by city, and who could be discharged by city at will were not "employees" of city, within provision of city charter providing for a retirement plan for city employees, notwithstanding claim that owners had completed more than 10 years of continuous service for city and that they were directed in performance of their tasks by foreman and city engineer where orders to owners by foreman and engineer were only with reference to materials requiring transportation. St.1925, pp. 1043, 1062, 1064; St. 1937, pp. 2945, 2946, § 502, subds. A, B.

See Words and Phrases, Permanent Edition, for all other definitions of "Employees".

2. Municipal corporations 🔑220(9)

The purpose of provisions in charter of city of Los Angeles providing for a plan for retirement of city employees is to provide a means whereby superannuated public employees may be replaced in order to promote economy and efficiency in public service. St. 1937, pp. 2945, 2946, § 502, subds. A, B.

3. Municipal corporations 🔑220(9)

Under provisions of charter of city of Los Angeles providing for a plan for retirement of city employees, it was intended that retirement system was to be applied to those persons holding positions created by city council at a regular salary of $60 or more per month. St.1937, pp. 2945, 2946, § 502, subds. A, B.

4. Municipal corporations 🔑79

In determining whether persons who owned trucks and who were employed by city of Los Angeles under ordinance concerning operation and rental of privately owned dump trucks by city were "employees" of city within provision of city charter providing for a plan for retirement of city employees, provisions of Workmen's Compensation Act defining an employee and decisions construing such Act were not controlling since city charter was the paramount authority in municipal matters. St.1925, pp. 1043, 1062, 1064; St.1937, p. 267, § 3351; pp. 2945, 2946, § 502, subds. A, B; Pol.Code § 4482.

5. Municipal corporations 🔑220(1)

Where a city charter makes specific provision for appointments or assignments to particular positions in employment of the city, it is an essential condition to a recovery of the salary annexed to such positions that the prescribed method of appointment or assignment be followed.

6. Municipal corporations 🔑177

The statutory rule providing that any chapter of a title which deals with a specific subject must prevail as to all matters and questions arising out of the subject matter of such chapter was applicable to a city charter which made provision for method of employing personnel of departments of city's service. Pol.Code, § 4482; St. 1925, pp. 1043, 1062, 1064; St.1937, pp. 2945, 2946, § 502, subds. A, B.

7. Pensions 🔑1

Pension statutes are to be liberally construed.

8. Municipal corporations 🔑220(9)

Where owners of trucks were employed by city of Los Angeles under ordinance concerning operation and rental of privately owned dump trucks by city, fact that agencies of city may have been derelict in failing to require execution of writings at time of engaging owners' trucks and that owners might not have contracted with city for use of trucks for any certain period of time did not make owners "employees" within meaning of provision of city charter providing for a plan for retirement of city employees. St. 1925, pp. 1043, 1062, 1064, 1142; St.1937, pp. 2945, 2946, § 502, subds. A, B.

9. Municipal corporations 🔑220(9)

Owners of trucks who had been employed by city of Los Angeles under ordinance concerning operation and rental of privately owned dump trucks by city and who were subject to discharge at any time could not claim benefit of provisions of city charter providing for a plan for retirement of city employees on ground that owners had been blanketed into classified civil service pursuant to a section of charter where, on effective date of such section, owners had not been in classified civil service continuously for a period of six months prior to adoption of the section. St.1925, pp. 1062, 1064, 1142; St.1937, pp. 2945, 2946, § 502, subds. A, B.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding by R. J. Heard and another against the Board of Administration of the All City Employees' Retirement System of the City of Los Angeles, William J. McNichols, and others, as members of and constituting the Board of Administration of the All City Employees' Retirement System, wherein the question was whether plaintiffs were employees of the City of Los Angeles within the intent and meaning of certain provisions of the city charter. From a judgment denying them the status of employees of the city, plaintiffs appeal.

Affirmed.

Loren A. Butts, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., of Los Angeles, F. Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

MOORE, Presiding Judge.

From a judgment denying them the status of "employees" of the city of Los Angeles plaintiffs appeal.

Plaintiffs have for some time been owners of trucks which for definite compensations they drove for the city of Los Angeles. Herman entered the city service in 1911. At first he furnished a team to be used on a grader which he operated under the supervision of the foreman while another man drove the horses. This he continued for six years, receiving his pay twice a month on a daily rate. In 1917 he purchased a truck to haul materials for the street department, where he was again under the control of the foreman. In 1928 he was injured in the course of duty, for which he was compensated and his physician paid by the city. He was allowed vacations with pay until 1932. He was paid about $4,000 annually from 1930 to 1936. In 1936 he ceased to operate his truck and employed a substitute driver. From 1930 to 1936 his two sons operated the truck a total of 641 days. He is not permitted to drive a truck for another while his own is in the service of the city.

Prior to June 1, 1921, Heard worked for a private concern, while one H. J. Fox was in the service of the city. On said date they exchanged jobs, when Heard began to work for the city at a maintenance plant on "permit work", which consisted of repairing pavements that had been cut to install utilities. He hauled rock, gravel and oil and took orders from the foreman. He continued there until 1932, although he had done extra jobs in picking up after storms and in cleaning streets and transporting debris. For a while after 1931 he drove to the dirt piles, where dirt was shoveled into his truck to be delivered to points designated by the foreman. In more recent years he has operated a service truck, hauling such supplies as were required by the foreman. He took orders from the foreman as to when to begin his work, when to quit and what to do. In 1937 he was ill for a period, during which he was allowed to employ a substitute driver for 90 days. Prior to 1932 he took vacations with pay, but none has been allowed him since then. At the beginning, his compensation was $375 per month, later raised to $381.50. Since July 1, 1932, he has been paid on an hourly basis.

During the six months prior to July 1, 1925, both Heard and Herman continuously did the same work they did subsequent to said date on which certain charter provisions operated to give civil service status to employees who had been in the service during said six months' period. They were first employed under the authority of the standardization ordinance, code No. 8592 V, which authorized the board of public works to employ truck owners at a rate of $381.50 per month for a four-yard five-ton automatic dump truck. On and after July 1, 1932, they were employed pursuant to the authority of ordinance 71539 and ordinances 74088, 75964 and 76191, which are amendatory of said ordinance 71539. Said ordinance and amendments contain the specifications for dump trucks, fix the rates of pay according to the capacities of the truck, and require the driver of the vehicle to perform such work as may be assigned to him by the city engineer.

In 1937 article XXXIV was added to the city charter, St.1937, p. 2943, providing a plan for the retirement of city employees. Subdivisions A and B of section 502 thereof read as follows:

"A. All employees in city service in the classified Civil Service of the city under the provisions of this charter, on the 1st day of July, 1937, shall become members of said retirement system, and all persons entering the city service as Civil Service employees after said date shall, upon the expiration of their probationary period, become members of said system; provided that any employee who would be excluded from membership under the foregoing provisions may become a member of the system upon filing with the Board of Administration a written declaration of his desire to become such member, such written declaration to be filed within thirty (30) days after July 1st, 1937, as to all persons in the city service on said date, and within thirty (30) days after the commencement of such city service in the case of all employees entering the service after said date. In the event of such declaration being filed, membership in said system shall be effective, for all purposes of this Article, as of the said 1st day of July, 1937, or as of the date of entry into the city service, as the case may be. Nothing herein contained, however, shall permit the inclusion in said system of those persons excluded by the provisions of subdivision B of this section.

"B. The following employees shall not become members of said retirement system:

"(1) Elective officers;

"(2) All appointive officers, other than those holding full-time positions at a regular salary, wage, or compensation fixed by this charter or by ordinance. Nothing in this subsection, however, shall be deemed to exclude the employee members of the Board of Administration created by this Article.

"(3) Those members or employees of the Fire Department and the Police Department who are entitled to benefits under the provisions of Article XVII of this Charter; the employees of the Department of Water and Power, entitled to benefits under the general plan and system authorized under the provisions of Sec. 220.1 of this charter.

"(4) The employees of the Board of Education, of the Advisory Borough Boards, of the Board of Trust Commissioners, of the Municipal Housing Commission, and of any other board or department now or hereafter excluded by this charter from pension provisions.

"(5) Employees appointed to temporary positions other than employees who, at the time of such appointment, are not members of said retirement system.

"(6) Employees serving under emergency appointment to positions in the classified Civil Service who, at the time of such appointment, are not on a leave of absence from a Civil Service position.

"(7) Inmates of city institutions who are allowed compensation for such services as they are able to perform.

"(8) Persons in city institutions principally for the purpose of receiving training but who receive compensation.

"(9) Persons employed under contract for a definite period or for the performance of a particular special service.

"(10) Employees serving on a part-time basis of less than one-half (½) time."

Subdivision C of section 508 provides for the amount of compensation for those retired under subdivision B.

By virtue of said section 508 plaintiffs contend that they are entitled to become members of said retirement system, having survived the age of sixty years, having completed ten or more years continuous service and having filed with said board of administration a written application for retirement pursuant to the provisions of said subsection B.

Thus plaintiffs present a single question for our determination, viz.: whether they are "employees of the city of Los Angeles within the intent and meaning of Article XXXIV of the charter". In their attempt to demonstrate that they are employees they stand upon section 501 of the charter and undertake (1) to show, by reason and authority, that they are employees within the purview of said section, and (2) that by the provisions of section 121 of article IX, adopted July 1, 1925, St.1925, p. 1069, they were blanketed into the classified civil service, as a result of which they say that they would automatically be entitled to retire.

Prior to the adoption of the rule of 1935 requiring that the truck owner personally operate his truck unless he first obtained a special permit for a sub-driver, it was the common practice to employ substitute drivers. Before the new rule no record was kept of the days the owner himself actually drove his truck. The use of such substitute drivers still continues. In March of 1939 the city had on its books 71 truck owners. Of these, 25, or 35 per cent, were permanent sub-drivers. Twenty-two of those were authorized prior to July 1, 1937. Fifteen of them were allowed because of the physical inability of the owner to operate his own truck. There are 10 sub-drivers on account of the death of the owners. Plaintiff Herman has had a permanent substitute since August 24, 1936. Of the entire list of 71 only 4 are limited as to the terms of their tenures, 2 owners were temporarily ill and 2 were on brief vacations. From this view of the city's list of truck owners servicing the city, they do not bear the aspect of employees according to the charter and ordinances of the city, but rather of independent contractors. Section 502, subd. B(9) of the charter.

[1] Appellants claim that they are employees because of the fact that they were directed in the performance of their tasks by the foreman and city engineer. But from the evidence it appears that the orders to plaintiffs were only with reference to materials requiring transportation. To use a truck thus rented to economic advantage is possible only by having it serve the requirements as they arise. Where the engineer is obliged for public safety promptly to fill and repave excavations or ditches on the streets, it would be impracticable to contract with a truck owner to haul materials to the street and the surplus dirt to a dump at a price per ton. A truck might be without work for an indefinite time. Since the truck owner may be directed from one place to another, to operate his truck, he is kept busy without being required to work as a laborer. Neither plaintiff has worked otherwise than as driver of his truck.

[2] Plaintiffs argue that because they have completed more than ten years of continuous service, as defined in article XXXIV, § 508, subd. B, they are employees regardless of whether their positions are classed as "an office or employment" (charter, sec. 501), and notwithstanding the specifications as to who shall not become members of the system, as provided in section 502, subd. B. It was the purpose of said article XXXIV to provide "a means whereby superannuated public employees * * * may be replaced" (sec. 513(e) in order to promote economy and efficiency in the public service. At the time of said amendment the city was already a metropolitan municipality of a million souls or more, with far-flung activities in the nature of public improvements and with a populous personnel comprising the usual municipal services. The council was authorized by section 33 of the charter to create the necessary positions, to authorize the necessary employees, to provide "suitable equipment" and to fix salaries, whereas the only authority for the employment of truck owners is contained in said ordinance 71539. But article IX of the charter creates a civil service which places all employees of the engineering department under a civil service classification in which each class includes all positions sufficiently similar in respect to the duties and responsibilities thereof in which the same requirements as to education, experience, knowledge and ability are demanded of incumbents; the same tests of fitness may be used in selecting qualified appointees and the same schedule of compensation may be equitably applied (sec. 100). Also, said article requires that applicants be examined in order fairly to test the relative capacity of those examined (sec. 103); that appointment be made from among those certified (sec. 109); that they may be discharged only for cause subject to review (sec. 112(a); that an employee can be paid no salary unless the payroll be certified by the civil service commission to the effect that the persons named on the list have been employed in accordance with said article IX.

[3] When the retirement system was created in 1937 (art. XXXIV) the city had for years operated under said charter provisions both as to the operation of said civil service plan and as to the creation of all positions, officers and employees and their salaries. By said article all civil service employees automatically became members of the retirement system by operation of said section 502-A. But it is to be remembered that the employees to be replaced by more capable persons were those who held positions under civil service, that is, service rendered for pay. In view of the foregoing provisions it was manifestly intended that said retirement system was to be applied to those persons holding positions created by the city council at a regular salary of $60 or more per month. If a truck owner is not an "employee" in the light of the foregoing, what is the authority for

his presence among those in the city service?

For five years prior to the creation of said retirement system the only authority for employing truck owners was said ordinance 71539. It is an "ordinance providing for the operation of privately owned dump trucks", etc., and providing for the rentals to be paid therefor. It contains minimum requirements for the trucks and establishes classification and rates of pay. It provides that any truck so rented shall be directed by the city engineer; that its rental shall include all repairs, damages, depreciation, driver's wages, public liability, property damage and compensation insurance; that the owner furnish certain policies of insurance to protect persons and property against damage caused by negligent operation; that a substitute driver be furnished if the regular driver be absent; that substitute truck be furnished if the rented truck be out of service, and that the driver shall perform such work as may be assigned to him by the engineer and shall furnish daily reports of his operation. It thus appears that by said ordinance a special provision was made for the city engineer to rent privately owned dump truck at rates to include the wages of a driver; and that its authority is found in said section 33 of the charter to furnish "equipment and supplies for the various departments" and not in that section which employs the council to "create the necessary positions" and "fix salaries of employees". Nothing in said ordinance indicates its purpose to create any position for the truck owner. In the cases of all those widows whose trucks have continued in service under substitute drivers surely it will not be claimed that the widow is an employee, since she does not work, or that her own hired man is a city employee, since his duty is to serve her. Under the ordinance any owner may lease his truck to the city with a hired driver in command. If he never drove his truck he would not be an employee. If he drove two days a week would that make him an employee? Moreover, if the council alone is authorized to create positions and to fix salaries of employees, to conclude that the board of public works may give the status of "employee" to a truck owner, by any requirement, would confer a power upon said board contrary to the language of the charter. If truck owners cannot be employed by the application of civil service rules, they cannot come within the category of employees as provided by said article IX, because they have not been given "tests of fitness" before entering their special line of service. Also, if an employee must undergo a test to determine his relative capacity to perform the duties of his position, the truck owner is, by the very fact of leasing his truck, removed from the circle of employees, because there is no mental test provided for a man who undertakes to furnish a truck to the city and none is suggested. The requirements expected of the owner are the type, age, power, speed and model of his truck. Those qualities may be beyond the ken of an examiner of intellectual attainments. Since all qualified civil service employees automatically became members of the retirement system July 1, 1937, plaintiffs, perforce, acknowledge that they are not of the civil service by applying to become members of the system. And if they are not of the civil service they are not employees, unless they can qualify as such under some distinct provision of the charter of which we have no knowledge.

[4] Plaintiffs invoke the Workmen's Compensation Act, St.1917, p. 831, and decisions thereunder to demonstrate that they are employees. The Labor Code does not control, although it makes an employee of "every person in the service of an employer" (sec. 3351, St.1937, p. 267). It is true that it has been held that in determining whether a person is an employee or an independent contractor it must be determined "who has the power of control as to the means and method by which the result is accomplished" (Victory Auto P. Co. v. Industrial Accident Commission, 75 Cal. App. 729, at page 731, 243 P. 61, 62), and whether the employer has the right to terminate the service at his pleasure. Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570. But these were cases arising under the Workmen's Compensation Act in which no factor entered into consideration as to whether the insured party was employee or independent contractor, except the nature of the contract of the parties. The definition of "employee" was taken from the act and conclusions were derived from the contractual relations. Neither case goes any further than to hold that any person "rendering service for another" is an employee if he is not an independent contractor. In none of the cases cited was the commission confronted with the hiring by a city of a

truck with driver to do a series of acts each day, under the direction of a foreman, with one compensation stipulated for both, as we have in the instant case. Moreover, the situation of the case at bar arose out of a city charter and ordinances enacted pursuant thereto. With reference to the contention that the status of plaintiffs should be governed by the language of the Workmen's Compensation Act, we are reminded that the legislature's approval of the city charter gave to that document force and vitality equal to that contained in any general statute. Said charter provision had to do primarily with gaining for the city the services of privately owned trucks, and not the hiring of human agencies in whom certain skill and efficiency are required. The fact that plaintiffs might be discharged at will is proof that they are not employees, because the department heads of the city are powerless to discharge employees except for cause and to the satisfaction of the civil service commission.

[5, 6] Where the charter makes specific provision for "appointments or assignments to particular positions * * *, it is an essential condition to a recovery of the salary annexed to such positions that the prescribed method of appointment or assignment be followed". Nash v. City of Los Angeles, 78 Cal.App. 516, 519, 248 P. 689, 690. There is a rule prescribed by the Political Code (sec. 4482, tit. II) which provides that any chapter of a title which deals with a specific subject must prevail as to all matters and questions arising out of the subject-matter of such chapter. By analogy said rule may be applied to the city charter, which has made provision for the method of employing the personnel of the several departments of the city's service. The provision of that instrument, in purely municipal affairs, prevails over a general statute such as that contained in the Workmen's Compensation Act. Boyd v. City of Sierra Madre, 41 Cal.App. 520, 183 P. 230; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745.

Plaintiffs' reliance upon Department of Water & Power v. Industrial Accident Commission, 220 Cal. 638, 32 P.2d 354, and Fidelity, etc., Co. v. Industrial Accident Commission, 191 Cal. 404, 216 P. 578, 579, 43 A.L.R. 1304, and numerous decisions of sister states is unavailing for the reason that in the former the operator of a power shovel, loaned to the department by the Mono Construction Company, was a "special" employee of the department and hence the city was liable for his injuries received in the course of his duty, and consequently for special compensation. It is true that in the Fidelity case it was held that an independent contractor is "one who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished". But that very decision demonstrates the distinction between cases arising under the Workmen's Compensation Act and those arising under a city charter providing for a retirement system for superannuated employees. Under the Workmen's Compensation Act an injured party has no right of recovery "unless the employer retains the right to direct the mode and manner in which the job shall be done". Fidelity, etc., Co. v. Industrial Accident Commission, supra. But under that act we have no special provision for leasing trucks of various capacities at specified rates to include wages of a driver, repairs, etc. If proceedings be instituted under the Workmen's Compensation Act to recover for injuries received while serving another, the first question for decision is, Was the applicant working for the defendant or for himself? If he entered the defendant's employment at a stipulated wage to do only as directed, he is a workman; but if he engages to furnish and maintain a truck to haul freight to a distant point at a designated rate per ton, he is an independent contractor, as in the Fidelity case. And if killed en route his heirs have no master to compensate their losses. The framers of the charter of the city of Los Angeles, facing the prospect of the city's being compelled to supplement its own fleet of trucks, sought to do so by providing for the leasing of privately owned trucks to serve as occasion might arise. The economy of such a scheme is obvious. Merely because the nature of the work to be done by such trucks necessitated the administration of them and the direction of their drivers is no sound argument that their owners became city employees, even without complying with the other charter provisions for hiring through the civil service plan. Decisions applying the Workmen's Compensation Act shed no light upon the question involved in this case, because the city charter, which created the city employees' retirement system, established the civil service system, and authorized the city council to make provision for the employment of the personnel of the city service, is the paramount authority in municipal matters.

[7] Plaintiffs' suggestion that pension statutes are to be liberally construed meets with a responsive chord. Of course, they are to be liberally construed, and it must be the wish not only of all parties to this litigation but very probably it is the wish of even the city council of said city that they might so liberalize the pension laws as to retire upon pension these plaintiffs as well as all other persons who have rendered any service over an extensive period and who have lived beyond the age of sixty years. But in the framing of the charter we must assume that its authors were governed by economic as well as humane considerations. At any rate, in arriving at a determination of the question whether these plaintiffs are employees of the city we must be controlled by the provisions of the charter and not by the desire of the plaintiffs, or of the city council or of this court. Since the language of the charter is free from ambiguity, and the ordinances enacted pursuant thereto are emphatic in their clarity, we are bound to resolve against the claims of plaintiffs.

[8] Section 385 of the charter provides that every contract involving an expenditure of more than $500 shall, except in certain cases, be entered into in a particular manner. Plaintiffs undertake to convince us that because they have not executed a contract for a definite period of time for the use of their trucks they must therefore be employees. But they must know that the manner in which a contract may be entered into is not determinative of whether a contract is the end desired by the city and the truck owners at the time their relationships were created. Even though said ordinance 71539 was intended to require that a written contract be executed for the hiring of trucks, and even though such contract violated the provisions of section 385, those facts would not determine whether or not plaintiffs are employees or independent contractors. The fact that the agencies of the city may have been derelict in failing to require the execution of writings at the time of engaging the trucks could not make employees out of contractors contrary to law. However, since it is conceded that plaintiffs are subject to discharge at any time, it must follow that they are engaged from day to day, which, in itself, renders inapplicable said last-mentioned ordinance requiring a writing to evidence every contract for an expenditure in excess of $500.

[9] These plaintiffs are not of the civil service and cannot claim under charter provisions regulating it, because they are not elective officials, or members of boards, or assistants or deputies of the city attorney, or any other of those especially exempted from civil service. Also, since they are not civil service employees their claim that they were "blanketed into the classified civil service" pursuant to section 121 of the charter has no basis, for the reason that on the effective date of said section they had not been in the "classified civil service" continuously "for a period of six months prior to the adoption of this article".

For the reasons indicated the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

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39 Cal.App.2d 642

CRANE v. FRENCH et al.

Civ. 2379.

District Court of Appeal, Fourth District, California.

June 24, 1940.

1. Mines and minerals 🔑38(16)

In action to quiet title to mining claim, evidence supported trial court's finding that there was no continuous or adverse possession on the part of the defendants during any period of five years.

2. Limitation of actions 🔑19(3)

The statute providing that no action for the recovery of realty, or for recovery of the possession thereof, can be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action, has no application where an action to quiet title is brought by an owner who is in actual possession of the property. Code Civ.Proc. § 318.

3. Statutes 🔑225

The statute providing that no action for recovery of realty, or for recovery of the possession thereof, can be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before commencement of the action, should be considered with code sections relating to adverse possession. Code Civ.Proc. § 318.

4. Limitation of actions 🔑5(3)

The statute providing that no cause of action, or defense to an action, arising out of the title to realty, or to rents or profits out of the same, can be effectual unless it appears that the one prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense is made, does not apply to actions for recovery or realty, but applies only to actions for rent or damage to realty, or the like. Code Civ.Proc. § 319.

5. Limitation of actions 🔑44(1)

The statute providing that no entry on realty is deemed sufficient or valid as a claim unless an action be commenced thereon within one year after making such entry, and within five years from the time when the right to make it accrued, did not bar action to quiet title, where plaintiff began the action within five years after her right to make entry accrued and about six months after she took possession. Code Civ.Proc. § 320.

6. Quieting title 🔑10(1)

A plaintiff in an action to quiet title must recover on the strength of his own title rather than on any lack of title in his adversary.

7. Mines and minerals 🔑38(2)

Where former officers and a majority of the directors of a dissolved foreign corporation executed a deed to mining claim after dissolution of the corporation, and each acknowledged the deed individually, and there was no corporate acknowledgment, there was sufficient passing of title to grantee to enable her to maintain an action to quiet title against those who had no title to the mining claim. Rev.St.Me.1930, c. 56, §§ 82, 90, 91.

8. Corporations 🔑638

The stockholders of a foreign corporation in coming into the state impliedly accepted the laws of the state with respect to property located within the state or business done within the state.

9. Mines and minerals 🔑107

Where former officers and a majority of the directors of a dissolved foreign corporation stated in executing deed to mining claim that they were acting as trustees in liquidation of the dissolved corporation, there was sufficient showing that they were acting "as a board" within meaning of statute providing that in case of a dissolution of a corporation the board of directors shall continue to act "as a board" with full powers to wind up and settle its affairs, notwithstanding that they acknowledged the deed individually. Civ.Code, § 401.

See Words and Phrases, Permanent Edition, for all other definitions of "As a Board".

10. Mines and minerals 🔑38(2)

Even though deed executed by former officers and a majority of the directors of dissolved foreign corporation in conveying mining interest belonging to corporation be deemed insufficient in law because of the fact that they acknowledged the instrument individually, it was effective at least to the extent of giving the grantee an equitable title thereto, so as to entitle her to maintain an action to quiet title against those who had no title.

11. Mines and minerals 🔑38(2)

Where stockholders of dissolved corporation acquiesced in and ratified deed of mining claim by former officers of corporation, and all stockholders, other than grantee, relinquished all right, title, and interest in and to mining claim, and grantee at all times since dissolution of corporation was owner as tenant in common of mining claim and had never abandoned nor relinquished the claim, grantee had sufficient real interest in the claim to bring an action to quiet title against those who had no title.

12. Quieting title 🔑10(2)

Though a plaintiff in an action to quiet title must prevail, if at all, on the strength of his own title, a perfect record title is not always essential.

13. Mines and minerals ⟹34

Where deed for mining claim came from persons who were authorized to issue it for corporation, and who intended thereby to convey to grantee the interest possessed by the corporation, and the consideration was not attacked, and neither the corporation nor any stockholder objected to the conveyance, outsiders could not object, in action to quiet title, that deed was deficient.

14. Mines and minerals ⟹38(2)

The only title which grantee of mining claim was required to show in herself, in action to quiet title against those who had no title, was the right to apply for a patent or to continue operations to that end.

15. Mines and minerals ⟹23(7)

Where it was established in former action between the parties that defendants' relocation of mining claim in 1931 was invalid, and, before they attempted to relocate the property in 1937, the plaintiff resumed work by placing a man on the property to protect buildings, equipment, and the ore which was stored there, there was sufficient "resumption of work" to prevent a forfeiture. 30 U.S.C.A. § 28.

See Words and Phrases, Permanent Edition, for all other definitions of "Resumption of Work".

16. Appeal and error ⟹1008(1)

The question whether there has been a sufficient resumption of work to prevent the forfeiture of a mining claim is a fact question for the trial court.

17. Mines and minerals ⟹24

The matter of the abandonment of a mining location depends largely on the locator's intention.

18. Mines and minerals ⟹24

"Abandonment" of a mining claim takes place whenever the locator leaves the claim without any intention of holding it and regardless of who may appropriate it.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

19. Mines and minerals ⟹24

Mere absence from a mining claim, even for a period of five years, does not operate as an "abandonment" in the absence of proof of an intent to abandon.

20. Mines and minerals ⟹38(21)

The intent to abandon a mining claim must be established by clear proof.

21. Mines and minerals ⟹105(2)

The directors of a corporation have no authority to give away the corporation's property, and have no authority to abandon a mining claim, without the consent of the stockholders.

22. Mines and minerals ⟹24

In view of statute expressly recognizing the rights of co-owners of a mining claim to do the assessment work or to take the necessary steps to preserve the title, if one co-owner abandons his interest, it is not an "abandonment" of the entire claim, but merely passes his interest to the other cotenants. 30 U.S.C.A. § 28.

23. Mines and minerals ⟹38(21)

The action of officers and directors of corporation which was dissolved, but which had a continued existence under Maine statute for three years, of disposing of mining claim within three years, was some evidence of the absence of an intention to abandon the claim. Rev.St.Me.1930, c. 56, § 82.

24. Mines and minerals ⟹38(21)

In action to quiet title to mining claim, wherein defendants contended that the claim had been abandoned, evidence sustained trial court's finding that there had been no "abandonment".

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Blanche C. Crane against Norman C. French and Fred J. Rynerson to quiet title in and to a certain mining claim. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Herndon J. Norris and Robert E. Rosskopf, both of Los Angeles, for appellants.

Rorick & Cottingham, of Oceanside, and C. M. Monroe, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal by the defendants from a judgment quieting the plaintiff's title in and to a certain mining claim in San Diego County known as the "Stewart Mine".

This claim, formerly the property of a Maine corporation known as American

Lithia & Chemical Co., which will be hereafter referred to as the corporation, was originally located in 1898. Although it was worked for many years and much ore was removed it was not patented. On August 4, and August 6, 1931, the appellants attempted to locate the same property, filing two notices of location. At that time there were extensive mine workings, ore bins filled with ore, dump cars and tracks, buildings, equipment and supplies on the property, belonging to the corporation. Thereafter, the appellants were on the property at various times, made repairs to the road, posted signs and attempted to keep other people off the property, and in succeeding years filed proofs of labor or notices of intention to take advantage of moratorium statutes excusing such requirements. They conducted no actual mining operations, but sold some of the ore which they found in the bins. It may be here observed that certain lands, including the land in question, were withdrawn from entry in 1903, subject to rights then existing, by the federal government.

The respondent, who was a stockholder in the corporation, learned that the appellants had attempted to file on this claim, and so informed the corporation. An attorney was employed who advised that the claims of the appellants were invalid. The respondent was assured that necessary steps would be taken to protect the interest of the stockholders of the corporation. In January, 1933, a proceeding was brought in the courts of Maine for the dissolution of the corporation, resulting in a decree dated March 21, 1933, reading: "Said corporation be and it hereby is dissolved." The respondent did not learn of this dissolution of the corporation until July 3, 1934. In the meantime, on June 26, 1934, she had filed a notice of intention to hold the mining claim, under the moratorium statute, which notice she had signed "American Lithia & Chemical Co., Per Blanche C. Crane, Agent". She visited the mine from time to time and erected signs which were maintained during 1934 and 1935, except when they were torn down by the appellants.

When she learned that the corporation had been dissolved the respondent opened negotiations with its former officers for the purpose of securing a conveyance of the corporation's title to the mining claim. She obtained a deed, which was executed on March 15, 1935, by the four individuals who were the former officers and a majority of the directors of the dissolved corporation. In April, 1935, she placed a man upon the property, furnished with supplies, with instructions to protect the mining equipment and ore bins and to keep off other parties. At that time the appellants were not on the property and had not been for nine months. The appellants appeared some two weeks later and evicted this man from the property, although they knew he was holding possession for the respondent. In September, 1935, the respondent had the property surveyed, made application for a patent and posted notice of this application on the premises, which notice was maintained for much more than the statutory period. She filed the necessary notices of intention to hold under the moratorium acts or the necessary notices of labor, and from time to time erected notices on the property that she was the owner of the claim, which notices were torn down by the appellants. The appellants admitted at all times that they knew of the claims of the respondent.

The appellants opposed the respondent's application for a patent and the Land Department ordered that no patent issue until the adverse claims were settled by court decree. On August 6, 1936, these appellants brought an action to quiet their title to this mining claim as against this respondent. In that action the court expressly refrained from making any finding with respect to whether this respondent had or had not any right in the mining claim in question, but found that up to August 6, 1931, the corporation was the owner of the claim, had complied with all requirements of law with respect to holding the same, and had not abandoned nor intended to abandon the claim. It was further found that these appellants had no interest in the claim either as locators or through adverse possession, and judgment was rendered against them which has become final.

The oral decision in that case was given on March 17, 1937. The next day the appellants went upon the property and filed a new purported notice of location. Their motion for a new trial in that case was denied on May 7, 1937, and on May 29, 1937, the respondent took possession of the property through her brother, who has remained there since that time. The present action was filed by the respondent on December 17, 1937. The court found in all respects in her favor and this appeal followed the judgment.

[1] It is first contended that the appellants have acquired title to this claim by adverse possession and that the findings to the contrary are not supported by the evidence. It is clear that any rights of the appellants to the property must depend upon adverse possession since their several locations are all invalid, the land having been withdrawn from entry in 1903 and never having been restored. The former action was begun more than five years after the appellants entered upon and attempted to locate the property in 1931, and the court's finding in that action that they had not had continuous possession of said claims for a period of five years prior to the commencement of the action could mean only that it was found that their possession had been interrupted at some time during that period. In the present action there is evidence that a representative of the respondent was in possession of the premises for some two weeks in April, 1935, and that the appellants had then not been on the place for a period of nine months. There is also evidence that the brother of the respondent was in possession of the place from May 29, 1937, continuously down to the trial of the action. He testified that the appellants were not there when he took possession, but stated: "Then they would come up occasionally and stay two or three days and pick around there a little and do a little work and were gone again. Then maybe I wouldn't see them for two or three weeks. Then maybe they would drop in again and stay for a day or two. And they kept that up for pretty near a year now." The appellants knew that this man was in possession of the property and that he was holding it for the respondent. While there are some conflicts, the evidence supports the court's finding that there was no continuous or adverse possession on the part of the appellants during any period of five years.

[2-5] The appellants contend that the respondent's action is barred by the statute of limitations under the provisions of section 318, 319 and 320 of the Code of Civil Procedure. Section 318 has no application where an action to quiet title is brought by an owner who is in actual possession of the property. Faria v. Beteencourt, 100 Cal. App. 49, 279 P. 679. This section is to be considered with the code sections relating to adverse possession. 16 Cal.Jur. 434. The respondent had a deed which purported to convey to her the rights which had been held by the corporation, and she was also in possession of the property within five years before the action was filed. Section 319 does not apply to actions for the recovery of real property, but applies only to actions for rent or damage to real property, or the like. Hagely v. Hagely, 68 Cal. 348, 9 P. 305. The appellants construe section 320 as meaning that any entry upon real estate, however rightful, is ineffectual to toll the statute of limitations or to interfere with another's adverse possession unless a suit is brought within the prescribed time. No cases are cited in this state which have so held. To thus construe this statute would directly conflict with other cases in which it has been held that no title by adverse possession can be established if such possession has been broken by the entry of the owner within the five-year period. In any event, this section would not bar the respondent since she took possession in May, 1937, and began this action about six months later, and since she brought the action within five years after her right to make the entry accrued, whether that was when she obtained the deed in 1935 or when she learned of the dissolution of the corporation and took steps to protect her interest in the property in 1934. The court correctly found that respondent's cause of action was not barred by the code sections referred to or by any other statute of limitations.

[6] Relying on the well-known rule that a plaintiff in a quiet title action must recover on the strength of his own title rather than upon any lack of title in his adversary, the appellants contend that the respondent has established no title in herself to the mining claim in question. It is contended that the deed which she obtained was insufficient to convey to her any right or title which the corporation may have had. This deed recites that it is made by four named persons "as trustees in the liquidation of the American Lithia & Chemical Company" as grantors, and to the respondent as grantee. After reciting that the grantors were at the time of dissolution the directors of the corporation and that as such they became trustees in liquidation, the deed recites that, in consideration of $10 paid to them "and additional mutual and valuable considerations", the grantors grant, sell, release, convey, assign and quit-claim to the grantee all the right, title and interest which they as said trustees have in and to the mining claim in question.

The deed is signed by the four individuals "as trustees in liquidation for the American Lithia & Chemical Company". Each of the four persons signing the deed acknowledged the same individually and there is no corporate acknowledgment.

It is argued that this was not a deed from the corporation itself, that in the dissolution proceeding no receiver or trustees were appointed by the court, that the four former directors who signed the deed had no authority to act for the dissolved corporation, and that the deed was, therefore, ineffective for any purpose. Reliance is placed upon two Maine statutes, Rev.St.Me. 1930, c. 56, §§ 90, 91, the first of which provides that the court may dissolve a corporation without the appointment of trustees or receivers, upon proof that there are no existing assets requiring distribution among the stockholders, and the second of which provides that the courts have jurisdiction to appoint receivers and shall, upon dissolving a corporation, appoint one or more trustees who shall have general powers as well as any special powers given them by the court.

Although the petition for the dissolution of this corporation contained a statement that it had no assets requiring distribution among the stockholders, no finding to that effect was made and the decree recited merely "that said corporation be and it hereby is dissolved". Another section of the Maine statutes provides: "Corporations, whose charters expire or are otherwise terminated, have a corporate existence for three years thereafter"; for the purpose of doing certain designated things, including "to dispose of their property". Rev.St.Me. 1930, c. 56, § 82. In Carter, Carter & Meigs Co. v. Stewart Drug Co., 115 Me. 289, 98 A. 809, it was held that this statute has no application where the court appoints trustees or receivers for a dissolved corporation, but that where no such trustees or receivers have been appointed "the corporation and its officers may do all things authorized by that section necessary to wind up its affairs".

[7] In the instant case, therefore, the corporation and its officers had authority during the three-year period to dispose of any property which belonged to the corporation. The deed in question was delivered within that time. While the officers and directors of such a dissolved corporation are not referred to in the statutes as trustees in liquidation, in a very practical sense that is what they are during the three-day period. The Maine statutes are not very clear in defining the procedure to be followed by such officers of a corporation which has already been judicially declared to be dissolved, without the appointment of trustees. It is apparent, however, that the officers and directors are the persons who are authorized to act for the corporation in disposing of its property. The persons who signed this deed had been the officers of the corporation at the time it was dissolved and also constituted a majority of its board of directors. The consideration for this deed is not here attacked and, as far as our attention is called to the record, the consideration paid by this respondent may have been considerable and entirely adequate. Clearly, the persons signing this deed were the ones authorized to dispose of this property. It is equally clear that they intended and attempted to do so. The only question is as to whether the form in which they did it was sufficient. Perhaps the corporation still had an actual existence and these same officers should have given the deed in the name of the corporation, signing and acknowledging it as officers thereof. Whether or not legal forms were properly observed in the execution of the deed, it would not appear that there was a complete failure to pass any right or title to the respondent under equitable rules, and the Maine statutes.

[8, 9] A further consideration is that the property in question is an interest in land which is situated in this state. In coming into this state the stockholders of a corporation impliedly accept the laws of this state with respect to property here or business done here. Williams v. Gold Hill Min. Co., C.C., 96 F. 454. Section 401 of our Civil Code provides that in case of a dissolution of a corporation the board of directors shall continue to act "as a board" with full powers to wind up and settle its affairs. It further provides that any act authorized or approved by a majority of the directors acting as a board shall be valid and binding, as though authorized and consented to by all of the directors. Our laws formerly provided that the directors of a dissolved corporation should act as trustees in the liquidation of the affairs of a corporation. While they are no longer spoken of as trustees in liquidation, the directors still have about the same powers. In stating, in the deed

here in question, that they were acting as trustees in liquidation of the dissolved corporation, the majority of the directors sufficiently showed that they were acting as a board and not individually. The fact that they acknowledged the instrument individually does not affect that situation. Under our laws, the majority of the directors had authority to dispose of the assets of the corporation, and this they attempted to do.

[10] Both under the laws of this state and of Maine it must be held that the deed thus executed conveyed some interest in this property to the respondent. Even if it was insufficient, in law, as a conveyance of the legal title to such rights as the corporation owned in and to this claim, it was effective at least to the extent of giving the respondent an equitable title thereto.

A further consideration is that if no interest in this land was conveyed to the respondent by this deed, any interest owned by the corporation would still be held by the stockholders as tenants in common. The respondent was one of those stockholders, and apparently was the only one who took any interest in protecting the title to this claim. Over a period of years she made every effort to protect her interest and to preserve her title to the property, endeavoring to keep possession, filing notices under the moratorium act, keeping men on the place to guard the ore and equipment, and bringing and defending actions. In Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 1086, 74 P. 444, 98 Am.St.Rep. 63, the court said: "It is to be borne in mind that a location such as this, though it contain 160 acres, is still a single location, a single claim, with undivided interests, covering the whole of it. Any work done upon the claim is done for the benefit of all the co-locators. It is undisputed that, when the location has once been perfected, one of the associates may by conveyance acquire all of the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates had stood idle and refused to contribute their share to the necessary work of developing, and Miller under these circumstances had alone prosecuted the work to a successful discovery, no one could contend, in the face of section 2324 of the Revised Statutes of the United States [30 U.S.C.A. § 28], but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole 160 acres. If, then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by a refusal to join in the work, should effectuate any different result."

In McCleary v. Broaddus, 14 Cal.App. 60, 111 P. 125, 127, the court said: "Section 738 of the Code of Civil Procedure authorizes the owner of any interest in real property to bring an action to quiet his title against any one claiming adversely to him. He is not required to join the owner of any other interest in the suit. The rule is that tenants in common may but need not join as plaintiffs."

[11] Without going into the tenant in common theory in detail we think it must be held, in this connection alone, that the respondent has established a real interest in the property in question. The court found that all the stockholders of this corporation have acquiesced in and ratified the deed of conveyance given to the respondent by the former officers of the corporation and that all of the stockholders other than the respondent have relinquished and abandoned all right, title and interest in and to said mining claim to her, that she at all times since the dissolution of the corporation has been an owner as tenant in common of said mining claim, that she has never abandoned nor relinquished the same, and that by reason of said conveyance and said abandonment and relinquishment and ratification she has become the sole owner of said claim. These findings are sufficiently supported by the evidence and are sufficient to sustain the judgment in the absence of other rules of law which would prevent such a result.

[12] While a plaintiff in a quiet title action must prevail, if at all, upon the strength of his own title, a perfect record title is not always essential. In Dement v. Pierce, 122 Cal.App. 254, 9 P.2d 884, 885, it is said: "It is true, as appellant points out, that an action to quiet title cannot be maintained by the owner of an equitable interest against the owner of the legal title. Chase v. Cameron, 133 Cal. 231, 65 P. 460. But here the situation is different, in that the equitable owner is seeking to have his interest declared paramount to that of

a holder of an equitable claim (i. e., a lien) against the property." In Martin v. Bartmus, 189 Cal. 87, 207 P. 550, 551, we find: "It has been repeatedly held by this court that a person who is in the course of acquiring title to government land may maintain an action to quiet title or in ejectment, the same as against other parties to whose claims of title her equities are superior." In Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23, 24, the court said: "When plaintiff made his proof, as he did, of citizenship, and that he had made a discovery of gold-bearing quartz in the land, and had shown a location according to the requirements of the law, he established his case prima facie. * * * The burden was then put upon defendant to show that the location under which he claimed title was prior in time and superior in right."

[13, 14] The deed here in question came from persons who were authorized to issue it for the corporation and who intended to thereby convey to the respondent the interest then possessed by the corporation in this mining claim. In an action against the corporation, a court of equity could have cured any defects in the form of the conveyance and protected the respondent in the rights intended to be conveyed to her. The consideration is not attacked and neither the corporation nor any stockholder is objecting to the conveyance thus made. This should be conclusive in the absence of any such objection and as against outsiders who have no interest in the property and who are not in a position to acquire any such interest. The claimed deficiencies in the conveyance are as to its form only, and they in no way indicate either a lack of power to convey or a lack of intent to convey the interest held by the dissolved corporation. It would be unreasonable, under the circumstances, to hold that the respondent has shown no title in herself and that, upon that ground, the appellants, with no right in the property, can defeat her equitable title and prevent a court of equity from giving her relief and curing the existing technical defects in the form and manner in which the interest of the corporation was conveyed. The only title which it was necessary for the respondent to here show in herself was the right to apply for a patent or to continue operations to that end. Her showing in that regard was sufficient to enable her to maintain the action and recover as against the appellants.

It is further argued that the respondent failed to show title in herself for the reason that all her rights, as well as those of the corporation, were forfeited by the failure to do the necessary assessment work or to file notices of intention to hold under the moratorium statutes, and also because the corporation had abandoned the property and thereafter had no right which could be conveyed.

[15, 16] With respect to the matter of forfeiture there is evidence of the doing of the necessary work or the filing of notices of intention to hold for each year material here with the exception of the year ending July 1, 1933. However, the statute (Sec. 28, Title 30 U.S.C.A.) provides that upon the failure to comply with such conditions the claim shall be open to relocation only if the original locators, their assigns or representatives, have not resumed work upon the claim before such a relocation is made. Not only was there a moratorium statute in effect in 1933, but the appellants could make no valid relocation of the claim since the land had been withdrawn from entry. Moreover, it was established in the former action between these parties that the appellants' relocation in 1931 was invalid, and before they attempted to relocate the property in 1937 the respondent resumed work by placing a man on the property to protect the buildings, equipment and the ore which was stored there. This was a sufficient resumption of work to prevent a forfeiture. Clarke v. Mallory, 22 Cal.App.2d 55, 70 P.2d 664; Belcher Con. G. M. Co. v. Deferrari, 62 Cal. 160; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047. The question of whether there has been a sufficient resumption of work to prevent a forfeiture in such a case is a question of fact for the trial court. Peachy v. Frisco Gold Mines Co., D.C., 204 F. 659. The court expressly found that work had been resumed by the respondent and this finding is sufficiently sustained by the evidence.

[17-24] The matter of the abandonment of a mining location depends largely on the intention of the locator. Taylor v. Middleton, 67 Cal. 656, 8 P. 594. Abandonment takes place whenever the locator leaves the claim without any intention of holding it and regardless of who may appropriate it. Bell v. Bed Rock T. & M.

Co., 36 Cal. 214. Mere absence from the claim, even for a period of five years, does not operate as an abandonment in the absence of proof of an intent to abandon. Judson v. Malloy, 40 Cal. 299. The intent to abandon must be established, and this by clear proof. Clarke v. Mallory, supra. The court here found that there was no intent to abandon the claim either on the part of the respondent or of the corporation. It was found in the former action that the corporation had not abandoned the claim on August 6, 1931, when these appellants first attempted to relocate it. There is evidence that during 1932 the corporation was consulting lawyers and trying to take steps to contest the attempted location which had been made by these appellants in 1931, but that these efforts were hampered by the lack of finances. The respondent consistently opposed the claims of the appellants, and when she discovered that the corporation had been dissolved, secured a deed, took possession of the property, resumed work, and defended and brought actions in court. The only evidence justifying an inference that the corporation had abandoned the claim arises from the fact that the corporation was dissolved. The dissolution decree, however, did not state that there were no assets or that this claim was abandoned. We are not told that there was a resolution of the board of directors declaring that this claim was abandoned, either in connection with the dissolution proceeding or otherwise. If there was such a resolution it would not be binding upon the stockholders without their consent. An officer of the corporation testified that a letter was sent to the stockholders, telling them of the intention to dissolve the corporation. Such a letter was not received by the respondent, and it is not even claimed that it informed the stockholders of an intention to abandon this claim. The directors of a corporation have no authority to give away the property of a corporation, and have no more authority to abandon such a claim as this, without the consent of the stockholders. For this reason it has been held that a stockholder has a right to perform the necessary work where the same is not done by the corporation. Musser v. Fitting, 26 Cal.App. 746, 148 P. 536; Wailes v. Davies, C.C. 158 F. 667. Section 28, Title 30 U.S.C.A., expressly recognizes the rights of co-owners of a mining claim to do the assessment work or to take the necessary steps to preserve the title. When one such co-owner abandons his interest it is not an abandonment of the entire claim but merely passes his interest to the other cotenants. 40 C.J. 842; Worthen v. Sidway, 72 Ark. 215, 79 S.W. 777. Not only did the respondent never abandon her interest as a co-owner in this claim but there is no direct evidence of an intent, on the part of the corporation, to abandon the claim. While the corporation was dissolved it had a continued existence for three years for the purpose of disposing of its property, and within that time its officers and directors, for a valuable consideration, conveyed the claim to the respondent. That action in itself is some evidence of the absence of an intention to abandon the claim. Under the circumstances appearing it cannot be held that the court's finding, with reference to abandonment, is without support in the evidence.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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39 Cal.App.2d 593

LARRABEE v. TRACY et al.

Civ. 12607–S.

District Court of Appeal, Second District, Division 1, California.

June 21, 1940.

Rehearing Denied July 8, 1940.

1. Appeal and error 🔑917(1)

In determining whether trial court correctly sustained demurrer to complaint, facts stated therein must be accepted as true.

2. Judgment 🔑443(1)

"Extrinsic fraud," within rule that equity will give relief from order in probate proceeding procured by extrinsic fraud, is established by showing that unsuccessful party was prevented by his adversary from presenting all of his case to the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

3. Judgment ⚷460(4)

A complaint alleging that fraud and deceit of executor prevented daughter of deceased legatee from either appearing in court or presenting her side of controversy involving construction of provision in will under which daughter claimed, sufficiently alleged "extrinsic fraud," entitling daughter to equitable relief from order adjudging that daughter was not entitled to inherit under such will.

4. Wills ⚷552(1)

The daughter and sole lineal descendant of testator's cousin who was deceased at time of execution of will leaving cousin one-sixth interest in estate, took such interest in the same manner as cousin would have done had cousin survived the testator, which was as a devisee under the will, and did not take as heir at law of testator. Probate Code, § 92.

5. Property ⚷12

Property may be acquired by operation of law, that is, by descent, which is the title, whereby on the death of an ancestor, one acquires his estate by right of representation as his heir at law, or by purchase, which includes all other modes of acquisition.

6. Descent and distribution ⚷74

An "estate by inheritance" descends on heir and is cast upon him by the single operation of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate by Inheritance".

7. Wills ⚷721

A devisee does not inherit, in the technical sense of the term, but takes by purchase.

8. Judgment ⚷461(1)

In action in equity to set aside order construing will, it would be assumed that testator's estate was still pending in probate court, and that any intermediate orders made in course of administration would not become strictly final until decree of final distribution was entered, where order was made on petition for approval of a third current account.

9. Wills ⚷716

A bequest to a person designated as "my Executor hereinafter named" is presumed to be given to executor in his official character as executor rather than to him individually.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action in equity by Edith Larrabee against Mary Tracy, Ernest P. Wellman, individually and as executor of the last will and testament of Mark H. Rice, deceased, and others, to vacate and set aside an order of the superior court sitting in probate. Ernest P. Rice, individually and as executor, interposed a demurrer. From a judgment of dismissal, the plaintiff appeals.

Reversed, with orders to trial court to overrule the demurrer.

Robert M. Kaufman and J. B. Mandel, both of Los Angeles, for appellant.

Winterer & Ritchie, of Los Angeles, for respondent.

YORK, Presiding Judge.

The instant action in equity was instituted by appellant on July 22, 1938, to vacate and set aside an order of the superior court sitting in probate which, it is alleged, was predicated upon the fraud and deceit of the respondent Wellman. The record herein reveals that one Mark H. Rice died on August 6, 1931, leaving a last will and testament providing as follows:

"First: I hereby direct my Executor, hereinafter named, to pay all my just debts and funeral expenses as soon after my demise as can be lawfully and conveniently done.

"Second: The entire, residue and remainder of my estate, both real and personal and wheresoever situated, I give, devise and bequeath as follows:

"One Sixth (1/6) thereof to my cousin Mary Tracy, of Northfield, Vermont;

"One Sixth (1/6) thereof to my cousin Kate Chase, also of Northfield, Vermont;

"One Third (1/3) thereof equally, share and share alike to the Children's Hospital, now located on Sunset Blvd., Los Angeles, California, the Salvation Army and the Goodwill Industries, of So. Calif., Inc., of Los Angeles, California.

"Third: I hereby generally and specifically disinherit each, any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this will.

"Fourth: All of my estate is my separate property, having had a property settlement with my present wife, Rose Rice; there having been such settlement and understanding between myself and my present wife, I specifically declare that she is not to participate in any manner or form in my estate.

"Fifth: All the rest, residue and remainder of my estate of whatever kind or nature or wherever situated, I give, devise and bequeath to my Executor hereinafter named.

"Sixth: I hereby nominate and appoint Ernest P. Wellman, as sole Executor of my estate, and request that he act as such without bond. * * *"

At the time the will was executed said Kate Chase had been dead for several years.

Respondent was appointed executor on September 1, 1931, and for approximately six years thereafter, he corresponded with appellant, a nonresident, and the daughter and sole lineal descendant of said Kate Chase, deceased. Finally, without notice to appellant, said respondent sought a construction of the will contemporaneously with his petition for ratable distribution and approval of a third account current. Pursuant to such petition, the superior court sitting in probate entered its order on October 21, 1937, adjudging that by virtue of the terms of the will the legacy to Kate Chase had lapsed and appellant was not entitled to inherit in said estate, the said court distributing $3,000 among the legatees named in the will, respondent receiving the sum of $1,500. These proceedings were given nothing more than the usual posting notice, notwithstanding that respondent (as alleged in the complaint) had repeatedly written appellant that "he was doing everything in his power to hasten the receipt by the plaintiff of her one-sixth share in said estate which he would distribute to her as soon as he obtained a court order to that effect; that she should not worry at not receiving her share because of the delays of court proceedings". Appellant further alleges that she had no actual notice or intimation that such proceeding had been instituted, nor of the time of the hearing, nor that said respondent was claiming her share had lapsed, and that she did not learn of said order or decree until February, 1938. Appellant also alleges that until her discovery of the fact that she had been deprived by said order of the share of the estate left to her mother, she had reposed great trust and confidence in the honesty and integrity of respondent and had relied upon his advice and assurances that it was not necessary for her to retain counsel to protect her interests under the will; that she fully believed his promises and statements that she was going to receive a one-sixth interest, and at no time prior to the making of said order did she have any notice or suspicion that said respondent in his petition laid claim as residuary legatee to her share in said estate, consequently, she did not retain counsel to defend her rights and interests; that because of the fraud and deception on the part of respondent, she was prevented from contesting the claim of respondent to her share of said estate; was lulled into a sense of security and was thereby prevented from being present at the hearing, of making an appearance therein, or of presenting a defense thereto; that said order of ratable distribution was not the result of an adversary trial, but that all the proceedings therein and leading up thereto were ex parte, so far as this appellant was concerned, and the fraud and deceit of respondent were imposed with the intent to induce appellant to permit the order to be made as entered and with intent to allow the probate court to be induced and misled into making said order, contrary to the laws and decisions of this state. It is also alleged that immediately upon discovering such fraud, appellant at once set about retaining an attorney to recover her share in said estate; that her husband had recently died and because of ill-health she was compelled to leave her home in the state of New Hampshire and reside in Florida; that she was in Florida at the time she discovered the fraud, as well as at the time the application for ratable distribution was instituted and at the time the court ordered such distribution; that consequently and because of the fact that her financial means were limited, she was compelled to correspond at length with her attorney in New Hampshire before the latter could effect a retainer of counsel in California; and that the delay in filing the instant action was caused solely because of the difficulty in retaining counsel, and not because of neglect or lack of due diligence on her part. Further, that no appeal was or can be taken from said order of ratable distribution and appellant has no remedy at law or in equity to maintain her rights in said estate except by the instant action.

Appellant then prays that the order of ratable distribution be vacated and set aside in so far as it decrees that the legacy to Kate Chase has lapsed and distributes the same to respondent Wellman, and that the proportion of said estate so distributed be declared to be the property of appellant and distributed to her; that respondent Wellman be declared to be a trustee of the share so awarded to him as the lapsed legacy of Kate Chase, and that he forthwith pay the same over to appellant; that hereafter under any decrees or orders, either ratable or final, that it be adjudged that the share of the estate of Mark H. Rice, deceased, willed to Kate Chase be distributed to appellant.

Respondent interposed a demurrer to the aforesaid complaint, which was sustained without leave to amend. From the judgment of dismissal which was thereafter entered this appeal is prosecuted.

Respondent claims in effect, (1) that appellant has no interest in the estate, having been deprived thereof by the disinheritance clause in the will; (2) that the probate court has concluded her interest by its order construing the will; and (3) that the complaint does not state facts sufficient to warrant a reconsideration of matters not originally presented to the court sitting in probate.

Appellant urges that she neither claims as an heir at law of testator, nor that she takes by inheritance from him; that she bases her right upon section 1310 of the Civil Code, now section 92 of the Probate Code, i. e., that she is a statutory legatee taking by substitution for her mother. Also, appellant contends that a court of equity has jurisdiction to review the order adjudging that the devise to her mother had lapsed, for the reason that the conduct of respondent, whereby she was denied her day in court and deprived of her right to present a defense to the petition for ratable distribution and construction of the will, constitutes extrinsic fraud.

[1] The case is presented upon the question of the correctness of the order sustaining respondent's demurrer, consequently the facts alleged in the complaint must be accepted as true, at least for the purpose of the present argument. Assuming them to be true, does the complaint herein state facts sufficient to entitle appellant to the interposition of the aid of a court of equity to avoid the effects of the order of the probate court already made and entered. The claim of appellant that she is entitled to such aid is predicated upon the fraud and deceit practiced upon her by respondent, who was the executor, as well as a residuary legatee under the will. Furthermore, she admits that the allegations of her complaint were drawn to conform to the facts and holding in the case of Caldwell v. Taylor, 218 Cal. 471, 23 P. 2d 758, 88 A.L.R. 1194, which she cites in support of her right to the aid of a court of equity.

In the cited case it was held that the fraud practiced by a beneficiary under a will upon the testator's son in making misrepresentations as to her marital status before and at the time of her marriage to testator, and as to her identity and character, thereby preventing the son's discovery of the real facts which would enable him to fully and properly contest the will, constituted extrinsic fraud sufficient to warrant the aid of equity. It was there stated at page 475 of 218 Cal., at page 759 of 23 P.2d, 88 A.L.R. 1194: "The jurisdiction of equity to afford appropriate relief from judgments generally and from orders and decrees in probate proceedings upon a showing of proper circumstances is well settled. Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184. It has been specifically held that equitable relief may be granted against orders and decrees of a probate court, including a decree of distribution, and a decree probating a will. Estate of Ross, 180 Cal. 651, 182 P. 752; Nicholson v. Leatham, 28 Cal.App. 597, 153 P. 965, 155 P. 98; Bacon v. Bacon, supra. Since the probate of a will is a matter exclusively within the jurisdiction of the probate court equity may not set aside the probate, but it may declare the beneficiary a trustee for those who have been defrauded. [Citing authorities.] And such character of relief is common. The judgment, order, or decree from the effect of which relief is sought cannot constitute a bar to equitable relief. A proceeding for equitable relief is not a collateral attack, and since its sole aim is to avoid the effect of said judgment, the doctrine of res judicata can have no application to such judgment. Bacon v. Bacon, supra; Campbell-Kawannanakoa v. Campbell, supra. * * * In United States v. Throckmorton, supra [98 U.S. 61, 25 L.Ed. 93], the court stated that the cases where such relief would be granted are those in which, 'by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff * * * —these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citing authorities.) In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud *practiced directly upon the party seeking relief* against the judgment or decree, that party has been prevented from presenting *all* of his case to the court.' (Italics ours.) This definition has become the well-recognized and standard definition of extrinsic fraud. * * * And in Clavey v. Loney, 80 Cal. App. 20, 251 P. 232, 234, the court held the fact that by mistake an entire interest in property was by decree of distribution distributed to one entitled to only a fractional interest therein, would not in the absence of extrinsic fraud, warrant equitable relief. The court there stated that 'the extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such fraud as prevents a real trial upon the issues involved in the case, like conduct which prevents the injured party from receiving notice of the action, or which causes the absence of necessary witnesses.'

"It also seems to be the rule that the fraud alleged must not be the fraud which is in effect the issue in controversy, the fraud upon which the cause of action in the former suit was based. In other words, the rule awarding equitable relief cannot be held to include such frauds as could have been relieved by the probate court itself by refusing probate, where the injured party had actual notice of the probate proceedings in time to make his contest and was not prevented from so doing by some fraud of the other party. * * * It is apparent from the foregoing discussion that the issue of fraud practiced upon the testator which was the issue involved in the contest of the probate of the will (although in fact the case was decided upon the issue of whether or not the contest had been filed within the statutory time allowed) is forever foreclosed from further consideration *unless it be successfully established by plaintiff that by a different and distinct fraud practiced directly upon him by his opponent he was prevented from presenting all of his case to the court.*" (Italics added.)

[2, 3] It therefore appears that the main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting *all* of his case to the court. One of the examples given is that of a party who is prevented from appearing in court. From the allegations of the complaint in the instant case, if true, it is apparent that the fraud and deceit of respondent prevented appellant from either appearing in court or presenting her side of the controversy. That this constitutes extrinsic fraud is established by the cited case of Caldwell v. Taylor, supra, consequently, appellant stated a cause of action for the intervention of a court of equity.

With respect to respondent's argument that appellant was deprived of any interest in the estate by reason of the disinheritance clause contained in the will, hereinbefore set out, it should be noted that appellant does not base her claim to an interest in the estate as an heir at law of testator, but rather upon her status as a lineal descendant of Kate Chase, under the provisions of section 92 of the Probate Code, to-wit: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; *except* that when any estate is devised or bequeathed to any *kindred of testator,* and the devisee or legatee dies before the testator, leaving lineal descendants, or *is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he* survived the testator." (Italics added.)

[4] Appellant is the daughter and sole lineal descendant of Kate Chase, a cousin of testator, who was deceased at the time testator executed his will leaving her one-sixth interest in his estate, and consequent-

ly appellant takes such interest under the provisions of the statute in the same manner as her mother would have done had she survived the testator, i. e., as a devisee and legatee under the will.

In Estate of Pew, 10 Cal.App.2d 41, 50 P.2d 1045, 1046, it is held that the right of a son of a predeceased legatee to take a legacy flows from section 92 of the Probate Code and not through the estate of his father, and the court, in construing the will, is bound to read into it the provisions of said section. In said last cited case the court stated, quoting from Denise's Ex'rs v. Denise, 37 N.J.Eq. 163, 168: " 'The statute-made legatee is a mere substitute; he is thrust, by force of the statute, in the place made vacant by the death of the legatee named in the will, and is given what, but for his death, would have gone to the primary legatee. * * * It [the statute] is in derogation of the right of testamentary disposition; it makes persons legatees not designated as such by the testator * * *. Statutes must always be construed so as to give effect to the intent and object of the legislature, and this one * * * should be held to put the substituted legatee in the place of his parent, and to give him just what his parent would have been entitled to * * *. He must take in the same manner that his parent would have taken.' "

[5] It is well-settled law that property may be acquired in two ways: (1) By operation of law, i. e., by descent, which is the title, whereby on the death of an ancestor, one acquires his estate by right of representation as his heir at law; and (2) by purchase, which includes all other modes of acquisition.

[6, 7] An estate acquired by inheritance is one that descends upon the heir and is cast upon him by the single operation of law. A devisee does not inherit, in the technical sense of the term, but takes by purchase. Estate of Donahue, 36 Cal. 329.

From this it is apparent that appellant's interest in the estate herein is acquired by virtue of section 92 of the Probate Code, and not as an heir at law of testator.

[8] Since the order which appellant seeks to have vacated was made upon petition for approval of a third account current, it must be assumed that the estate of testator is still pending in the probate court, and that any intermediate orders made in course of administration do not become strictly final until the decree of final distribution is entered.

[9] While the question is not raised herein, there is respectable authority to the effect that a bequest to a person designated, as here, "my Executor hereinafter named", is presumed to be given to him in his official character as executor rather than to him individually. Note, 104 A.L.R. 114, 115.

It follows from what has been stated that the lower court was in error in its conclusion that the complaint herein failed to state a cause of action. Therefore, the judgment is reversed, with orders to the trial court to overrule the demurrer of respondent.

We concur: DORAN, J.; WHITE, J.

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39 Cal.App.2d 757

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. CRYER et al.

Civ. 11940.

District Court of Appeal, Second District, Division 1, California.

July 2, 1940.

Rehearing Denied July 29, 1940.

Hearing Denied Aug. 29, 1940.

1. Judgment 🔑185

The effect of provisions of statute concerning when defendant's answer in certain actions may be stricken and judgment entered for plaintiff on motion, so far as provisions apply to a defendant, require that defendant, in order to defeat a motion for summary judgment, must present an affidavit setting forth evidentiary facts sufficient, if accepted as true, to show that defendant has a defense to plaintiff's claim, or to some part thereof. Code Civ.Proc. § 437c.

2. Judgment 🔑183

A "motion for summary judgment" is not a trial upon merits, but is merely to determine whether there is an issue to be tried. Code Civ.Proc. § 437c.

See Words and Phrases, Permanent Edition, for all other definitions of "Motion for Summary Judgment".

3. Mortgages ⚿360

A trustor is not estopped as against trustee to deny regularity of the sale under a deed of trust.

4. Mortgages ⚿360

That auctioneer at trustee's foreclosure sale of realty described in deeds of trust questioned trustor's ability to pay in cash a bid by trustor and adjourned sale to a later hour of same day to afford trustor opportunity to produce amount of money represented by bid did not prejudice trustor, where no attempt was made to establish trustor's financial responsibility or that he was a bona fide bidder. Code Civ.Proc. § 437c.

5. Evidence ⚿383(7)

Recitals contained in a trustee's deed are not conclusive as between parties to trust deed.

6. Judgment ⚿185

In action against trustors to recover deficiency alleged to exist after a trustee's foreclosure sale of realty described in deeds of trust, where plaintiff made a motion for summary judgment, it was incumbent upon trustors in order to defeat motion to present evidentiary facts to controvert recitals in trust deed to effect that sale was legally held, thereby raising an issue, the merits of which would be determined upon trial. Code Civ.Proc. § 437c.

7. Judgment ⚿185

Where complaint, in action against trustors to recover deficiency after trustee's foreclosure sale of realty described in deeds of trust, alleged that after trustors failed to pay notes secured by deeds of trust realty was sold to plaintiff by trustee at public auction and trustors' answer denied that trustee sold realty and that plaintiff was highest bidder, and affidavits filed by trustors in opposition to plaintiff's motion for summary judgment alleged that one of the trustors had made higher bids than plaintiff at trustee's sale and that auctioneer postponed sale to permit such trustor to produce amount of bids, and there was no showing that the trustor could pay bids in cash, answer and affidavits did not present a defense to complaint, and hence motion for summary judgment was properly granted. Code Civ.Proc. § 437c.

8. Mortgages ⚿363

Where plaintiff, at trustee's foreclosure sale of realty described in deeds of trust, bid $12,769.87 and $11,147.66 for the two pieces of property, and sale was held on September 17, 1937, and properties were valued at $16,620 and $18,440 for assessment purposes for fiscal year 1937–1938, and an experienced appraiser placed a value of from $14,000 to $15,000 on one of the properties, and on date of sale trustors bid only $14,000 for property which plaintiff purchased with bid of $12,769.87, plaintiff's bids were not grossly inadequate.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenney, Judge.

Action by the Security-First National Bank of Los Angeles, a national banking association, against George E. Cryer and another, to recover a deficiency alleged to exist after a trustee's foreclosure sale of certain real estate described in deeds of trust. From a judgment for plaintiff, and an order denying a motion to vacate the judgment and grant a rehearing, defendants appeal.

Affirmed.

R. Alston Jones, of Los Angeles, for appellants.

Thorpe & Bridges and Roane Thorpe, all of Los Angeles, for respondent.

WHITE, Justice.

In an action to recover a deficiency alleged to exist after a trustee's foreclosure sale of the real property described in two deeds of trust, judgment was entered for plaintiff under the provisions of section 437c of the Code of Civil Procedure, which section provides that in an action upon a debt or liquidated demand, if it is claimed there is no defense to the action, on motion of plaintiff supported by affidavits the answer may be stricken out and judgment entered, in the discretion of the court, unless the defendant shall show by affidavit such facts as may be deemed sufficient to entitle him to defend. From such judgment, as well as from an order denying a motion to vacate the same and grant a rehearing, defendants prosecute this appeal.

Plaintiff set forth in its complaint the execution and delivery by defendants of two promissory notes for $20,000 and $15,000 respectively, each secured by a deed of trust upon real property in the city of Los Angeles, the failure of defendants to pay the principal when due, the execution and recordation of notice of breach and election to sell, and thereafter the sale by the trustee to plaintiff at public auction of the respective pieces of property in the manner and form required by law. It was also alleged in the complaint that the real property securing the $20,000 note was sold to plaintiff for the sum of $12,769.87; that the fair market value of the property at the time of sale was not in excess of said sum, and that after applying the proceeds of sale to the payment of expenses, interest, taxes, advances and principal, there remained a deficiency of $10,000; that the property securing the $15,000 note was sold to plaintiff for the sum of $11,147.66, which sum was the fair market value of the property, leaving a deficiency of $5,000.

Defendants by their answer denied that the trustee gave notice of sale as required by law, or that the defendants were notified thereof; denied that the trustee sold the property at the time and place of the alleged sale; denied the plaintiff was the highest bidder; alleged that the fair market value of the properties was over $18,000 and $15,000 respectively; and charged generally that the trustee never "made a legal or valid sale" and failed to comply with the provisions of the note or "with the law with reference to the sale of said property".

In support of the motion for summary judgment there was filed an affidavit by R. T. Adams, an assistant secretary of plaintiff bank, containing as exhibits photostatic copies of the trust deeds, notes, notices of default and election to sell, and trustee's deeds, establishing that the properties were sold to plaintiff at public sale. The affidavit also set forth the amounts of fees and expenses of sale, advances, interest and principal unpaid, the balances due after sale, and concluded, "That the facts stated in this affidavit are within the personal knowledge of affiant, and that affiant, if sworn as a witness, could testify thereto from his own knowledge."

In opposition to the motion defendants filed two affidavits, one of which was by Leland S. Bower, who deposed that he was present at the place where and the time when the sale of the property allegedly took place as recited in the trustee's deed; that at said time and place the trustee's agent read the notice of sale and called for bids on the property mentioned in count one of respondent's complaint; that thereupon the agent of respondent bank "bid twelve thousand and some hundreds of dollars", the exact amount of which affiant did not recall; that thereupon the trustor, George E. Cryer, bid $14,000; that the auctioneer did not call for further bids, or announce the successful bidder, or "strike off the property, or make a sale thereof", but postponed the sale to a later time. To the same effect was the other affidavit, sworn to by George E. Cryer, one of the defendants, who, however, particularly set forth in his affidavit that when he offered a bid in the sum of $10,000 for the property described in the second count of plaintiff's complaint, the trustee's agent in charge of the sale demanded to know whether the said George E. Cryer "had the money with him" and further stated that unless Mr. Cryer then and there produced the money he would not be allowed to bid for the property. It was further set forth in Mr. Cryer's affidavit that he then suggested to said trustee that he complete the sale, determine the highest bidder and "strike off the property before demanding the production of money"; that said trustee did not call for further bids, but proceeded to read another notice of sale and offered for sale the parcel of property mentioned in the first count of plaintiff's complaint, and upon asking for bids thereon affiant Cryer bid $14,000. The affidavit further states that thereupon substantially the same discussion occurred between the trustee and affiant as had followed affiant's bid for the other parcel of property; that finally the trustee made the following statement: "I am going to postpone the sale of this property until a quarter of twelve, to give you a chance to produce the money so that I can allow you to bid."

[1-4] Appellants contend that the affidavits before the court on the motion for summary judgment established for the purpose of that motion that the recitals in the trustee's deeds were false; that the plaintiff was not the highest bidder at the alleged sale, and that in fact no sale was made at all. With this claim we cannot agree. The effect of the provisions of section 437c of the Code of Civil Procedure, so far as they apply to a defendant, require that the latter, in order to defeat a motion for summary judgment, must present an affidavit or affidavits setting forth evidentiary facts sufficient, if accepted as true—as they must before the purposes of the motion—to show that the defendant has

a defense to the plaintiff's claim or to some part thereof. It must be borne in mind that a motion for summary judgment is not a trial upon the merits. It is merely to determine whether there is an issue to be tried. In neither the answers nor defendants' affidavits do we find presented any issue of actual fraud, unfairness or oppression committed by the trustee. While a trustor is not estopped as against the trustee to deny the regularity of a sale, we find no averments by defendants sufficient to raise that issue. Defendants' affidavits merely allege that on the date and at the time to which the sale was regularly postponed, defendant George E. Cryer submitted a bid and the auctioneer questioned the former's financial ability to pay in cash, following which the sale was adjourned to 11:45 o'clock on the morning of the same day, for the purpose, as announced by the auctioneer, of affording defendant Cryer an opportunity to produce the amount of money represented by his bid. This worked no prejudice upon appellants, for neither at the sale nor at the hearing on the motion for summary judgment was any attempt made to establish Mr. Cryer's financial responsibility or that he was a bona fide bidder. Quinn v. Matthiassen, 4 Cal.2d 329, 333, 49 P.2d 284. Surely it cannot be said that upon a trustee's sale under a deed of trust the auctioneer is required to accept any bid that is made, irrespective of whether the amount of the bid is produced and where no information is forthcoming as to the financial ability of the bidder. If this were true, any debtor could attend a foreclosure sale of his property and make any bid he cared to, without any intention of actually paying the amount of his bid. The sale then, of course, would have to be held all over again, new notices gotten out, etc. If such a procedure were permitted and carried to its possible ultimate conclusion, any foreclosure sale could be prevented indefinitely. Further, it must be remembered in the instant case that it was necessary to foreclose the two deeds of trust because the trustor, Mr. Cryer, had defaulted in his payments upon the notes they secured. Was not the trustee's agent at the sale warranted therefore, in assuming that if Mr. Cryer were financially responsible he would not in the first place have allowed the trust deeds to reach a sale on foreclosure? We think so. And indeed, as heretofore pointed out, at no time during the proceedings now under review was any attempt made to assert the financial ability of appellant Cryer to pay in cash the amount of the bids he proffered.

[5-7] So far as the postponement of the sale after it was commenced to a subsequent hour on that same day is concerned, this was authorized by the terms of the deed of trust. Nowhere in the showing made by defendants in opposition to the motion for summary judgment was the court enlightened as to what, if anything, took place at the time to which the sale was adjourned nor was the court advised as to whether defendant Cryer returned and participated in the bidding upon the last-named occasion. While, as heretofore stated, recitals contained in trustee's deed are not conclusive as between the parties to the trust deed (Seccombe v. Roe, 22 Cal.App. 139, 133 P. 507), nevertheless, it was incumbent upon the defendants in order to defeat the motion for summary judgment to present evidentiary facts to controvert the recitals in the trust deed to the effect that the sale was legally held, thereby raising an issue, the merits of which would be determined upon a trial. We therefore hold that taken either separately or together, the answer of appellants and the affidavits filed on their behalf at the hearing upon the motion failed to plead or present a legal defense to respondent's complaint.

[8] Appellants' claim that the bid upon which the property was sold was grossly inadequate cannot be upheld. Respondent bid $12,769.87 for one piece of property and $11,147.66 for the other. In one of appellants' affidavits it is set forth that the assessment made by the county assessor for the fiscal year 1937–1938 indicated as to one of the pieces of property an actual worth of $16,620 and for the other a value of $18,440; also that on May 12, 1937, a qualified and experienced appraiser employed by respondents placed a value of "from fourteen to fifteen thousand dollars" on one of the parcels. Nowhere do we find any averment as to the actual market value of the properties on September 17, 1937, the date of the trustee's sale, but it does appear that on said day appellant George E. Cryer himself bid only $14,000 for the parcel of property which respondent purchased with a bid of $12,769.87. Manifestly, no gross inadequacy appears in the bids submitted by respondent.

By reason of the foregoing, other questions raised need not be considered.

The purported appeal from the order denying defendants' motion for a rehearing and to vacate the minute order for summary judgment is dismissed.

For the reasons herein stated, the judgment appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

39 Cal.App.2d 657

PEOPLE v. WIEZEL.

Cr. 2100.

District Court of Appeal, First District,
Division 1, California.

June 25, 1940.

Rehearing Denied July 10, 1940.

Hearing Denied July 25, 1940.

1. Embezzlement 🔑44(1)

Evidence *held* insufficient to sustain conviction on one count of indictment for grand theft, but sufficient to sustain conviction on two other counts charging such offense.

2. Criminal law 🔑351(1), 391

In criminal case, defendant's failure to make any attempt, by his own testimony or otherwise, to contradict, explain or deny incriminating circumstances established against him, may be considered by jury in determining his guilt. Const. art. 1, § 13.

3. Criminal law 🔑563

While corpus delicti must be proved by evidence outside of defendant's declarations or admissions, prosecution need not prove it to same degree of certainty as is required to establish defendant's guilt, but slight or prima facie proof is sufficient.

4. Criminal law 🔑563

The corpus delicti may be proved by circumstances shown in evidence or by reasonable inferences therefrom, and direct or positive evidence is not essential.

5. Criminal law 🔑563

Evidence proving corpus delicti need not in itself connect defendant with perpetration of offense charged.

6. Criminal law 🔑409, 517(4)

In trial for grand theft of cigarettes from defendant's employer, evidence *held* sufficient to prove corpus delicti, so that witness' testimony that defendant said he was making money, exhibited roll of bills, and said he would sell cigarettes to witness for amount much less than wholesale price thereof was not incompetent as involving extra-judicial admission, statement or confession of defendant.

7. Embezzlement 🔑11(1)

In trial for grand theft, proof of demand for property stolen was not essential to conviction, where evidence affirmatively showed fraudulent appropriation thereof by defendant.

8. Embezzlement 🔑35

There was no fatal variance between allegation of indictment for grand theft of cigarettes that they were property of retailer, by whom defendant was employed, and proof claimed to show that they were wholesaler's property, where evidence showed without conflict that defendant misappropriated them after they were delivered to, and became property of, retailer.

9. Constitutional law 🔑265
Indictment and information 🔑57

The statute providing that criminal charge stating substantially that accused committed public offense therein specified is sufficient, that such statement may be made in ordinary concise language without technical averments or allegations of matter not essential to be proved, and that it may be in words of statute describing offense or any words sufficient to give accused notice of offense charged, is not unconstitutional as depriving any one of liberty without due process of law. Pen.Code, § 952.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Hyman Richard Wiezel was convicted of grand theft, and he appeals.

Reversed in part, and affirmed in part.

Hearing denied; CARTER, J., dissenting.

William F. Herron and John Herron, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary and Dennis Hession, Deputy Attys. Gen., for respondent.

KNIGHT, Justice.

Defendant was charged in an indictment with five counts of grand theft and a prior conviction of burglary. He admitted the prior conviction, and pleaded not guilty to each count of the indictment. Subsequently, on motion of the district attorney, the fourth and fifth counts were dismissed; and upon a second trial the defendant was found guilty by a jury on each of the first three counts. He was sentenced to imprisonment in the penitentiary, the sentences on all three counts to run concurrently. From the judgment of conviction and the order denying a new trial, he appeals.

Count one of the indictment charged appellant with having on June 17, 1938, unlawfully taken cigarettes belonging to Morris Benatar and Tessie Benatar, copartners doing business under the name of Benatar's Cut Rate Drug Store, of the value of about $374.75; count two, with having on December 19, 1938, unlawfully taken cigarettes from Benatar's of the value of about $214.25; and count three, with having on December 21, 1938, unlawfully taken cigarettes from Benatar's of the value of $239.95.

It was the prosecution's claim that appellant, an employee of Benatar's without the knowledge and consent of his employers and without their authority, ordered certain quantities of cigarettes from a wholesale house, in addition to the cigarettes regularly ordered by Benatar's which, including the cigarettes regularly ordered, were delivered to appellant in his capacity of stockroom clerk, and that he appropriated the additional cigarettes to his own use, delivering to the store only those regularly ordered.

[1, 2] Insufficiency of the evidence is urged as first ground for reversal. In support of its claim the prosecution produced evidence establishing the following facts: Benatar's maintains two retail stores in San Francisco, one at 807 Market street, and the other in the Crystal Palace market. Both stores have stock rooms, the one for the Crystal Palace store being on Stevenson street, a blind alley which runs into the store from Seventh street. Appellant was the brother-in-law of the manager of the Crystal Palace store, and was through the latter placed in the sole and exclusive charge of the stock room. His employment began on February 24, 1936, and ended on January 27, 1939, when he was discharged for intoxication.

Subsequent to February, 1938, the procedure followed in ordering cigarettes for the Crystal Palace store was as follows: The manager of the tobacco department, on Tuesdays, Thursdays and Saturdays, wrote out an order for the number of cigarettes which would be needed for that department of that store for the next two days. The order was made in duplicate. The copy was kept at the Crystal Palace store, and after the store closed the manager took the original of this order to the store at 807 Market street, which was the main store where the books and accounts were kept for both stores. The following morning, before 9 a. m., the order was picked up by the assistant storeroom clerk of the 807 Market street store, and he checked any orders for tobacco or other merchandise which he could fill from the storeroom of that store, but he did not fill any orders for cigarettes from that storeroom. All cigarettes were ordered directly from the wholesale house. He then put a cross opposite any orders he could not fill from his storeroom, and took the order to the tobacco buyer, who, if he approved the order for cigarettes, authorized the assistant storeroom clerk to phone to the wholesale house for the cigarettes. The latter phoned the order so authorized about 9 or 9:15 in the morning, and the clerk at the wholesale house wrote down the order, and then an invoice was made out in triplicate—an original or white copy, a yellow copy, and a pink copy. The cigarettes were then delivered by the wholesale house sometime before noon, together with the white and yellow copies of the invoice, directly to appellant at the storeroom of the Crystal Palace store, and he signed both copies of the invoice, returning the yellow copy to the driver for the wholesale house, and retaining the white copy, which was later sent to the 807 Market street store. The pink copy of the invoice was retained by the wholesale house. It was then the duty of appellant to deliver the cigarettes to the manager of the tobacco department of the Crystal Palace store as soon as the noon rush hour was over. Thereupon the manager of the tobacco department checked the cigarettes so delivered with the copy of the order he had made out, which he had retained, and later sent that copy of the order to the 807 Market street store. However, the invoices were never checked at the main office with the orders it had received from the manager of the tobacco department of the Crystal Palace store, and the orders were kept for only a couple of months and then destroyed. Payment for the cigarettes was made according to the invoices, which were kept.

Prior to February, 1938, it had been the custom for the wholesale house to deliver the cigarettes directly to the tobacco department of the Crystal Palace store, but the deliveries were usually made at a busy hour, so that the procedure was changed and thereafter the cigarettes were delivered to appellant at the storeroom, and were by him then delivered to the tobacco department when the rush hour was over.

On numerous occasions after this change in the procedure went into effect in February, 1938, additional orders were phoned in to the wholesale house for increased quantities of cigarettes and they were added to the quantity originally ordered, and delivered therewith to appellant at the Crystal Palace storeroom, and the invoices therefor were signed by him. The order clerks from the wholesale house who took the orders over the phone testified that in each instance the voice giving the "add to" order was different from the one that had given the original order, and that the phone calls for the "add to" quantities were received approximately half an hour after the original order was received by phone. The manager of the tobacco department of the Crystal Palace store, the assistant storeroom clerk and the tobacco buyer of the 807 Market street store, all testified that they had never at any time ordered, been authorized to order, or authorized anyone else to order, any additional cigarettes after the original order had been made out or phoned in. Furthermore, the evidence shows that none of these "add to" orders was phoned in prior to February, 1938, when the system of delivering the cigarettes to the store itself was discontinued, nor after January of 1939, when appellant was discharged. It also shows that although the "add to" orders had been phoned in two or three times a week during that period, no such orders were phoned in during the week appellant was on vacation. Many of the invoices were introduced in evidence, but as stated the original and the duplicate order blanks made out by the manager of the tobacco department of the Crystal Palace store with which he checked the quantity of cigarettes delivered to him and which were returned to the 807 Market street store were kept only a couple of months and then destroyed. However, the original order blanks made out by Benatar's covering the orders for cigarettes for December 19 and December 21, 1938 (involved in counts two and three), together with the orders for those days as they were written down by the clerk at the wholesale house, and the two copies of the invoices for those dates signed by appellant upon the receipt of the cigarettes, were not destroyed and were introduced in evidence and brought up as part of the record on appeal. The original order of December 19, 1938, was made out by the manager of the tobacco department of the Crystal Palace store, and called for some 53,200 cigarettes of various brands (in the ordinary packages). The order written down by the clerk of the wholesale house shows this same order, but on a separate sheet there is written an order for some 40,000 more cigarettes, and this is marked "add to". The invoices which appellant signed lists the original order for 53,200 cigarettes, and separately lists the 40,000 called for by the "add to" order. The same situation appears with regard to the December 21st order, except that the original order calls for some 125,000 cigarettes, and the "add to" order is again for 40,000, and appellant signed for the receipt of the total number. The manager of the tobacco department of the Crystal Palace store testified, however, that he never received more cigarettes than he himself had originally ordered. Continuing, the evidence shows that a number of "add to" phone orders were made after December 21, 1938, and prior to the discharge of appellant; and that the day after he was discharged an inventory was made of the tobaccos in the storeroom of which he had sole and exclusive charge, and about 34,000 cigarettes were found in the drug department in the storeroom, notwithstanding that it was appellant's duty to deliver to the tobacco department of the store all cigarettes as soon as the busy hour was over—always the same day after their delivery by the wholesale house. No cigarettes were supposed to be kept in the storeroom. Shortly afterwards a complete inventory was taken of the storeroom, but no more cigarettes were found therein.

It further appears from the evidence that appellant's salary was $100 a month, and his brother-in-law, the manager of the Crystal Palace store, with whom he lived, testified that appellant had no other visible means of support; that he worked all day six days a week and was usually home in bed before 9 o'clock each evening. But the prosecution proved that from March, 1938, which as will be noted was a month after the change in the system of delivery, to January, 1939, when he was discharged, appellant deposited in his personal bank account approximately $3,500, which was greatly in excess of the amount actually received by him as salary during that period.

Evidence was introduced also showing that appellant was negotiating for the sale of cigarettes. In this respect the prosecution produced a witness named Williams, who ran a cleaning and pressing establishment where appellant took his clothes to be cleaned and pressed; and Williams testified that on the night before appellant left on his vacation appellant invited him to have a drink, and that he told Williams at that time that he was "making money" and he exhibited a roll of bills which Williams estimated as being about $300, including one $100 bill; and he told Williams that he was going to give Williams a chance to make some money; that he would sell him cigarettes for $35 a case; whereas the wholesale price of cigarettes at that time was $62.50 a case.

When the prosecution closed its case appellant offered no evidence in his defense, nor did he testify as a witness in his own behalf.

In view of the fact that the orders made out by the manager of the tobacco department of the Crystal Palace store for the delivery of the quantity of cigarettes on June 17, 1938, had been destroyed, the manager was unable to testify positively as to the quantity of cigarettes that were delivered to him by appellant as a result oft hat order. It would appear, therefore, that the conviction on the first count cannot be sustained.

We are satisfied, however, that the evidence is legally sufficient to sustain the convictions as to counts two and three. The main features thereof may be summarized as follows: All employees of Benatar's stores, except appellant, having anything to do with the transactions relating to the purchase and disposal of cigarettes, positively denied ever having phoned in any of the "add to" orders; and appellant failed to deny that he had done so. As a result of the "add to" orders appellant personally received and receipted for all extra cigarettes delivered in pursuance of those orders, and all extra cigarettes so received by him were paid for by his employer; but no portion thereof was delivered by appellant to the manager of the tobacco department of the store; and while the extra cigarettes were in his possession as sole and exclusive custodian of the storeroom they disappeared; the phoning of the "add to" orders began as soon as deliveries of the cigarettes began to be made to appellant rather than to the store; they ended when he was discharged, and none was phoned while he was on vacation; during the period the cigarettes were being thus obtained by the "add to" orders appellant was trying to sell cigarettes at half the wholesale price; he received but $100 a month salary, and had no other source of income, and during the period of time these "add to" transactions were going on he was able to bank in his own name some $3,500. As provided by the Constitution (art. I, sec. 13), in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be considered by the jury. Here, as stated, the appellant made no attempt, by his own testimony or otherwise, to contradict, explain or deny any of the incriminating circumstances established against him; therefore the jury was entitled to consider that circumstance also in determining his guilt. People v. Schneider, 36 Cal.App.2d 292, 98 P.2d 215; People v. Waller, 14 Cal.2d 693, 96 P.2d 344. From the foregoing it will be seen that there could be no justification for holding as a matter of law that the verdicts of the jury on counts two and three lack evidentiary support.

[3-6] Appellant makes the point that the corpus delicti was not proved, and that therefore the testimony of the witness Williams was incompetent because, so appellant argues, it involved an "extra-judicial admission, statement or confession" of the appellant. It seems that appellant made no objection to this testimony when it was introduced. However,

regardless of his failure to object, there is no merit in the point, for while it is doubtless the law, as he contends, that the corpus delicti must be proved by evidence outside of declarations or admissions of a defendant, it is well settled that the prosecution is not required to establish it by proof to the same degree of certainty as is required to establish the fact of guilt. Slight or prima facie proof is all that is necessary; it may be proved by circumstances shown in evidence, or by inferences reasonably drawn therefrom; direct or positive evidence is not essential; nor is it necessary that such evidence in itself connect the defendant with the perpetration of the offense. People v. Hudson, 139 Cal.App. 543, 34 P.2d 741. Obviously the facts and circumstances above narrated are amply sufficient to meet the requirements of the foregoing rule.

[7-9] Nor is there any merit in appellant's contention that proof of a demand for the property was essential to a conviction, for the reason that the evidence affirmatively shows that there was a fraudulent appropriation thereof. See People v. Hill, 2 Cal.App.2d 141, 37 P.2d 849, and case cited therein. It is also urged that there is a fatal variance between the allegations of the indictment and the proof, the argument made in this behalf being that the extra cigarettes which it is claimed were misappropriated were the property of the wholesaler and not of Benatar's. The facts already set forth serve as a complete answer to appellant's argument, for they show without conflict that the misappropriation took place after the cigarettes were delivered to and became the property of Benatar's. Furthermore, the evidence was sufficient to prove an unlawful misappropriation, without the Benatars having testified personally to that effect; and it appears that the question of the constitutionality of section 952 of the Penal Code, which appellant urges, has heretofore been decided adversely to appellant's contention. People v. Berg, 96 Cal.App. 430, 274 P. 433. The remaining points urged in furtherance of the appeal are not, in our opinion, of sufficient importance to require special mention.

In accordance with the views herein expressed, the judgment of conviction as to the first count is reversed; and the judgment of conviction as to the second and third counts, as well as the order denying the motion for new trial, are and each of them is affirmed.

We concur: PETERS, P. J.; WARD, J.

40 Cal.App.2d 41

ESTES v. CHIMES et al.

Civ. 12586.

District Court of Appeal, Second District, Division 1, California.

July 8, 1940.

As Modified on Denial of Rehearing July 22, 1940.

Hearing Denied Sept. 4, 1940.

1. Appeal and error 🔑356

The statute limiting the time in which an appeal may be taken is jurisdictional and "mandatory." Code Civ.Proc. § 939.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Appeal and error 🔑348(1)

Service of notice of entry of judgment is not necessary to start the time running within which an appeal may be taken. Code Civ.Proc. § 939.

3. Appeal and error 🔑426

The statute providing that service of notice by mail shall be complete upon deposit of notice in post office is inapplicable to lodgment of notices of appeal with county clerk, and has to do only with service of process and other papers upon opposing counsel and parties. Code Civ.Proc. §§ 940, 1013.

4. Appeal and error 🔑357(1)

The reviewing court may not relieve a party against default in the taking of appeal within time allowed by law, under statute authorizing relief from proceeding taken through mistake, inadvertence, surprise, or excusable neglect, since the statutory requirement is mandatory and jurisdictional. Code Civ.Proc. §§ 473, 939, 940.

5. Appeal and error 🔑356

Where judgment was filed, entered, and docketed August 2, and notice of appeal was deposited in mail October 2, appeal must

be dismissed under statute requiring appeal within 60 days after entry of judgment or order. Code Civ.Proc. §§ 939, 940, 1013.

◆

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by George Estes, executor of the estate of William Calvin Harvey, deceased, against John J. Chimes and others, to quiet title to lands. From an adverse judgment, defendants appeal. On motion to dismiss the appeal.

Appeal dismissed.

C. S. Mauk, of Los Angeles, for appellants.

Frank C. Shoemaker, of Los Angeles, for respondent.

PER CURIAM.

Motion to dismiss an appeal. This action was brought by plaintiff to quiet title to certain lands in Ventura county. The certificate of the county clerk of said county reveals that in such action judgment was filed, entered and docketed August 2, 1939, and that a notice of appeal from said judgment was filed in the office of such county clerk on October 10, 1939.

[1, 2] The provisions of section 939 of the Code of Civil Procedure require that an appeal, to be timely, must be taken within sixty days after entry of the judgment or order which it is sought to have reviewed. In Lawson v. Guild, 215 Cal. 378, at page 380, 10 P.2d 459, the Supreme Court uses this decisive language: "The statute limiting the time in which an appeal may be taken is jurisdictional and mandatory. If the appeal is not taken within the time allowed by law, an appellate court has no power to entertain it." Citing Bley v. Board of Dental Examiners, 101 Cal.App. 666, 668, 282 P. 19. In Lawson v. Guild, supra, it was also settled that service of notice of entry of judgment is not necessary to start the time running within which an appeal may be taken, citing Schainman v. Kierce, 199 Cal. 249, 251, 248 P. 905.

[3] Section 940 of the Code of Civil Procedure declares that an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same or some specific part thereof. In opposition to the motion to dismiss this appeal appellants have filed affidavits that the notice of appeal was deposited in the United States mails on October 2, 1939, and contend that under the provisions of section 1013 of the Code of Civil Procedure the filing was complete upon such mailing. The section last cited has no application to the lodgment of notices of appeal with the county clerk. It has only to do with the service of process and other papers upon opposing counsel and parties litigant.

[4] The taking of an appeal within the time allowed by law being mandatory and jurisdictional, we are without power to relieve a party against default therein under the provisions of section 473 of the Code of Civil Procedure.

[5] It follows of necessity that the appeal from the judgment herein must be dismissed, and it is so ordered.

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39 Cal.App.2d 565

LABARTHE v. McRAE et al.

Civ. 11393.

District Court of Appeal, First District, Division 2, California.

June 20, 1940.

Rehearing Denied July 20, 1940.

Hearing Denied Aug. 19, 1940.

1. Evidence 🔑5(2)

The court will take judicial notice of common knowledge that when two vehicles approach an intersection at approximately same speed, each following its direct lane of traffic, and the one coming from the right strikes the one coming from its left on the side or rear of the latter, it is physically impossible that vehicle coming from right entered intersection before the other, or at approximately the same time.

2. Automobiles 🔑171(4), 208

In action involving intersectional automobile collision, the primary issues of defendant's negligence and plaintiff's contributory negligence must rest upon acts of the parties at the particular moment the accident occurred, irrespective of provisions of right of way statute. Vehicle Code, § 550 (b), St.1935, p. 186.

3. Appeal and error ⚷**1064(1)**

Instruction that if two vehicles approach intersection at approximately same time, vehicle approaching from right shall have right of way if it is traveling at lawful rate of speed, which was erroneous in view of statute declaring that driver on right should have right of way only when two vehicles enter intersection at same time, was not prejudicial to defendant motorist, where evidence established that as motorist approached intersection he slowed down and came to a stop, and continued to look to the left, and that motorist's actions led plaintiff motorist to believe that motorist was yielding right of way to plaintiff. Vehicle Code, § 550(b), St.1935, p. 186.

4. Damages ⚷**216(10)**

Instruction that recovery permitted for personal injuries included mental suffering incident to physical injuries, whether permanent or temporary, disfiguring or humiliating, and that mental worry, distress, grief, and mortification, where they are shown to exist, are competent evidence of that mental suffering, was not objectionable as encouraging jury to indulge in speculation upon plaintiff's humiliation and mortification, where verdict obtained by plaintiff was not excessive.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Maria Labarthe against Connell C. McRae and another for injuries sustained in an automobile collision. From an adverse judgment, the defendants appeal.

Affirmed.

Thomas J. Straub, John J. Briare, and William B. Kuder, all of San Francisco, for appellants.

Wayne R. Millington, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In a suit for personal injuries arising from a collision of automobiles in a street intersection the plaintiff had a verdict and judgment. The defendants' appeal is limited to an attack upon three instructions.

There is no substantial conflict in the evidence which the appellants concede is sufficient to support the judgment. The defendant McRae, driving a car in the business of his employer and co-defendant, approached the intersection from the north. The plaintiff approached from the west, and to McRae's right. The two streets intersected at right angles and the intersection was clear and unobstructed. As McRae approached the intersecting line, he slowed down to a speed of about twelve miles an hour. The plaintiff was traveling a little faster—approximately at fifteen miles an hour. Though the view was clear and unobstructed, McRae testified that he did not see plaintiff's car approaching the intersection. Witnesses testified that he had his head turned to the left and was looking east, that he slowed down at the intersection, continued to look to the east, and gave the impression that he was stopping at the line. Because of this conduct the plaintiff testified that she assumed that McRae was yielding the right of way to her, and she accordingly drove forward, striking defendant's car about the middle of the right hand door. The blow was with such force that the entire front of plaintiff's car was badly injured.

The first criticised instruction contained the expression "if two vehicles approach an intersection of public highways, at approximately the same time, or at the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful rate of speed". Respondent concedes the error of the instruction in view of the provision of section 550(b) of the Vehicle Code, St.1935, p. 186, as it read at the time of the collision. It is there declared that the driver on the right shall have the right of way only when the two vehicles "enter" the intersection "at the same time". This section of the Vehicle Code, and the statutes preceding it, went through many legislative changes from 1923 to 1935 in a determined effort of the legislature to impress upon the courts that judicial interpretation of the legislation was not in accord with the legislative intent.

[1] The admitted error in the instruction would become a material and important factor in the ordinary case of collisions at street intersections where one party, relying upon the old statute of 1923, St.1923, p. 517, arbitrarily insists that he is entitled to the right of way because he has approached the intersection first, thus disre-

garding the equally important element of the relative rate of speed of the two vehicles. If the criticised instruction were given in relation to evidence which showed these facts only—that the two vehicles approached the intersection at approximately the same time—the prejudice to the defendants would be apparent because the undisputed evidence is that plaintiff's car was traveling at a slightly greater speed than defendants'. It should be a matter of which a court would take judicial notice, because it is of common knowledge among laymen, that when two vehicles approach an intersection at approximately the same speed, each following its direct lane of traffic, and the one coming from the right, strikes the one coming from its left on the side or rear of the latter, it is physically impossible that the vehicle coming from the right entered the intersection before the other, or at approximately the same time.

[2, 3] Since this is a matter well known to every juror, it is still a matter of doubt whether an instruction such as that complained of would be prejudicial. But there is an additional element present here which would seem to remove any claim of prejudice—that is that the question of right of way, which is made an issue in the instructions and the briefs, is really not an issue under the admitted facts of the case. The primary issues of defendant's negligence and plaintiff's contributory negligence both must rest upon the acts of the parties at the particular moment irrespective of the provisions of the statute. The evidence is that, as McRae approached the intersection he "slowed down and he came to a stop", continued to look to his left, apparently seeking a street number. The plaintiff testified that all the actions of McRae led her to believe that he was stopping to let her go through, and was thus yielding to her the right. This evidence, which of course the defendants could not controvert, removes from the instruction any possible prejudice which there might be in the portion objected to.

The criticism of the portion of the instruction relating to the right of a driver entering an intersection at an improper rate of speed does not present a substantial question on this appeal because under the evidence it was more favorable to defendants than to the plaintiff. There was some testimony that after McRae came to an apparent stop he "shot" forward, but there was no testimony tending to show that at any time he was traveling more than twelve miles an hour, which was well within the proper limits.

The third and final question raised by appellants concerns the instruction that the recovery permitted in cases of this character included mental suffering incident to the physical injuries "whether permanent or temporary, disfiguring or humiliating"; and that "Mental worry, distress, grief, mortification, where they are shown to exist, are proper competent evidence of that mental suffering for which the law entitles the injured person to redress in monetary damages."

[4] Appellants' argument is that the instruction encouraged the jury to indulge in "speculation and conjecture upon plaintiff's humiliation and mortification". But this is merely speculation and conjecture on appellants' part. The verdict was for $2,000. Appellants do not claim it was excessive. As far as appears it was a reasonable amount covering the actual physical injuries and the special damages. We can not conjecture that there was prejudicial error in the instruction.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

39 Cal.App.2d 706

ARGO et al. v. SOUTHERN PAC. CO. et al.

Civ. 11909.

District Court of Appeal, Second District, Division 1, California.

June 29, 1940.

Rehearing Denied July 22, 1940.

Hearing Denied Aug. 26, 1940.

1. Trial 🔑165

On motion for nonsuit, function of trial court is similar to and practically the same as that of a reviewing court in determining on appeal whether there is evidence in the record of sufficient substantiality to support a verdict for plaintiff.

2. Railroads 🔑346(5)

In action for death of motorist who was struck by train at street crossing, presumption that motorist used due care for his own safety was inapplicable where all the evidence was to the contrary.

3. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit, evidence will be reviewed in light most favorable to plaintiffs.

4. Railroads 🔑327(2, 11), 333(1)

A motorist, who was familiar with railroad crossing, who if he looked would have seen the fast-approaching train, who was familiar with chuck-holes in the crossing, who on previous occasions had stopped to let the train pass, and who slowed down to "almost one mile an hour" when struck by train when rear wheel of automobile was about to clear the outer rail, was contributorily negligent as matter of law.

5. Railroads 🔑324(1)

The railroad track of a steam railway must itself be regarded as a sign of danger to approaching motorists.

6. Negligence 🔑83

In order that "last clear chance" doctrine may apply, it must appear that plaintiff has been negligent and is in a position of danger from which he cannot escape by exercise of ordinary care, which includes cases where he is totally unaware of his danger, that defendant has knowledge of plaintiff's peril and knows, or in exercise of ordinary care should know, that plaintiff cannot escape from such situation, that defendant has last clear chance to avoid accident by exercising ordinary care, and that he fails to exercise such care and accident results thereby, and plaintiff is injured as proximate result of such failure.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

7. Railroads 🔑350(33)

In action for death of motorist who was struck by train at street crossing where automobile could be seen for a mile, whether fireman on train had a "last clear chance" to avoid injuring motorist and negligently failed to do so was for jury.

8. Railroads 🔑350(33)

In action for death of motorist who was struck by train at street crossing, whether motorist was guilty of "continued negligence," and, if so, whether such negligence was proximate or only remote cause of his death, were for jury.

9. Appeal and error 🔑927(3, 7)

Where appeal is taken from judgment following directed verdict or nonsuit, evidence must be taken by the appellate tribunal in the most favorable light to losing party in the court below.

◆

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Ena I. Argo and others, minors, by Ena I. Argo, their guardian ad litem, against the Southern Pacific Company and others, to recover for the death of plaintiffs' husband and father, who was killed when his automobile was struck by defendants' train. From a judgment for defendants, and from an order denying a motion for new trial, plaintiffs appeal.

Appeal from order denying motion for new trial dismissed, and judgment reversed and remanded.

Hearing denied; CARTER, J., not participating.

Wendell W. McCanles, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

WHITE, Justice.

In this action by a wife and children for the death of their husband and father, the court at the completion of plaintiffs' case granted a nonsuit. From the judgment entered thereon and from the order denying a motion for a new trial this appeal is prosecuted.

For a correct understanding of the questions involved on this appeal the facts of the case may be thus briefly narrated. On the morning of September 29, 1936, at about the hour of 7:40 o'clock, the deceased, while driving his automobile in a westerly direction on Arvilla avenue, a public highway in Los Angeles county, across the Southern Pacific Railroad tracks, was struck and killed by a south-bound passenger train of defendant railroad company, the engine of which was operated by defendants Gibson and Rainey. At the point where it crosses Arvilla avenue the railroad track runs generally north and south. Decedent was traveling from his home, located a few blocks north and west of the crossing, and was alone in the automobile which he was driving. At the crossing he was required to make a right-hand turn. The train was to his back and on his right side. Except for a line of telegraph poles there was nothing to obscure the view of either the automobile driver or defendant fireman situated on the east side of the engine cab, for a distance of approximately a mile. The train was coasting down-grade to the crossing at a rate of speed estimated as being between fifty and sixty miles per hour. It struck the automobile on the right rear wheel. At the Arvilla crossing it appears that on either side of the east rail there were chuck-holes from six to eight inches deep and one to two feet wide. It was testified that about the moment the automobile reached the crossing, just east of the first rail, it slowed down to about a mile an hour and started "bouncing around from the holes there"; that "the car was just coming over the rail and then it (the train) hit the car's back wheels. * * *" At the trial it was conceded that the decedent was very familiar with the railroad crossing in question, had driven over it many times and had on numerous occasions halted his automobile to permit the train to pass.

[1] The familiar rules governing the power of the court in granting a nonsuit need not here be discussed. It is sufficient to say that on a motion for a nonsuit the function of the trial court is similar to and practically the same as that of a reviewing court in determining on appeal whether there is evidence in the record of sufficient substantiality to support a verdict for plaintiff.

[2-4] Appellants first contend that defendant railroad company was guilty of negligence, both in the manner in which the train was operated and by reason of the allegedly dangerous and defective condition of the crossing due to the chuck-holes therein. The claim of negligent operation of the train is based upon the speed at which it was running and the failure of the fireman, with an unobstructed view for a mile, to see the decedent approach and go upon the tracks until the engine was within 250 feet of the crossing. Even though we concede the claimed negligence of the defendant railroad company, we are confronted with the conduct of the deceased and the question of whether the same amounted to contributory negligence upon his part which proximately contributed to his death. The presumption that the deceased used due care for his own safety is not applicable here because, as we shall point out, all the evidence was to the contrary. Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059. There is direct evidence that at a point approximately 28 feet before he drove upon the track decedent slowed his automobile to a speed of between five and six miles per hour; that this speed was decreased until the automobile came upon the east track, when, as heretofore stated, "it started bouncing around" and slowed down to "almost one mile an hour". If we were to presume that deceased looked before his automobile came upon the track, we must also presume that he saw the fast approaching train, for the undisputed evidence is that he would have had a clear view for a mile, and under the uncontradicted evidence the train must have been within that distance during the time he must be presumed to have looked, if any such presumption is resorted to. Decedent had driven over this crossing many times; he was familiar with the presence of chuck-holes therein. On his way to work on previous occasions he had stopped to let the southbound passenger train pass. Nevertheless he drove upon the tracks and was struck at the time his rear wheel was about to clear the west rail. Under this state of facts can it be said that different conclusions might reasonably be drawn as to the prudence of decedent in attempting to cross the railroad track? We think not. Therefore it must be held, reviewing the evidence in the light most favorable to appellants, that a reasonably prudent person would not have undertaken to cross this railroad track under the existing conditions, and consequently, under established rules of law, contributory negligence upon the part of decedent is established as a matter of law. Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788; Hoffman v. Southern Pacific Co., 101 Cal.App. 218, 281 P. 681, and cases therein cited.

[5] It has frequently been said in the decisions that the railroad track of a steam railway must itself be regarded as a sign of danger. The slow rate of speed at which decedent was traveling enabled him to avoid the accident up to the time when he was within a few feet of the railroad track. The negligence of the unfortunate man was therefore continuous up to the time he was practically upon the rails. With the picture presented by the facts of this case it would be idle to attempt to show ordinary care or prudence upon the part of the de-

ceased. In fact, to justify the conduct of decedent, we would be required to do violence to practically every railroad crossing case in the state of California.

[6-8] Appellants assert that even if the deceased was guilty of contributory negligence, the doctrine of last clear chance applies, and that the matter should have been submitted to the jury on that question. The necessary elements of the doctrine of last clear chance are thus set forth in Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917: "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." The question presented to us is whether the jury should have been permitted to determine whether defendant fireman had a last clear chance, without injury to others, to avoid injuring decedent and negligently failed to do so. The facts of the instant case in this regard present a debatable question upon the determination of which reasonable minds might disagree. It is true the fireman testified he did not see decedent upon the tracks until the engine was within forty or fifty feet of him, at which time he saw only "the back end of the car". However, the fireman testified it was his duty to watch for automobiles that might come upon the track and that he was so watching, but nevertheless did not see decedent's automobile until all but the rear end thereof had passed over the east track and beyond his vision from the engine cab window on the east side. The jury might have but was not required to believe that if he was looking he did not see the automobile until the train was within forty or fifty feet of it. The jury might have found that an application of the brakes on the train when decedent was in this position of peril would have saved the latter's life, because without any application of brakes the swiftly moving train struck the rear of the moving automobile. The jury might reasonably have found that had the arrival of the train at the crossing been arrested by a brake application for a second or two, decedent would have cleared the tracks. A quotation from volume 2, California Jurisprudence Ten-Year Supplement, page 189, is here pertinent: "* * * where it appears that the victim was in the path of the vehicle and plainly visible to the driver, the trier of facts may properly conclude that the driver 'must have seen' him. Hence, the jury may be instructed as to the doctrine of last clear chance although there is no direct evidence that the defendant actually knew of the victim's presence in the roadway, and indeed, although he may have testified that he did not see the victim in time to avert the collision."

The evidence in the record before us would support a finding by the jury that the fireman was, as he testified, looking toward the crossing for any approaching vehicular or pedestrian traffic; that his view being unobstructed he did see the decedent in a position of peril when he came upon the track, moving forward at about one mile per hour, and was "bouncing around". The jury might have found that when he was apprised of decedent's perilous position the fireman could have prevented the collision had he slowed down the speed of the train by directing an application of the emergency brakes, and the jury could have further found that, having such opportunity, he negligently failed to take advantage thereof until too late to avoid the collision. Such facts, if found, would justify an application of the doctrine of last clear chance. Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918; Girdner v. Union Oil Co., supra; Hellman v. Bradley, 13 Cal.App.2d 159, 56 P.2d 607; Smith v. Los Angeles Ry., 105 Cal.App. 657, 288 P. 690; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 522, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85. Also, the question of whether decedent was guilty of "continued negligence", and if so, whether under the evidence here present such negligence was the proximate or only the remote cause of his death, was one for the triers of fact. Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68.

[9] It should be understood that throughout this opinion we have followed the rule applicable to cases wherein the appeal is taken from the judgment follow-

ing a directed verdict or nonsuit, which rule requires that evidence shall be taken by the appellate tribunal in the most favorable light to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity.

The attempted appeal from the order denying plaintiffs' motion for a new trial is dismissed, and for the reasons herein stated the judgment from which this appeal is taken is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

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39 Cal.App.2d 623

DEN et al. v. SPALDING et al.

Civ. 11294.

District Court of Appeal, First District, Division 1, California.

June 24, 1940.

As Amended on Denial of Rehearing July 24, 1940.

Hearing Denied Aug. 22, 1940.

1. Quieting title 🔑47(2)

In action to quiet title, trial court's finding that defendants were owners of beach land in question, subject to lease of oil company, without specifically finding whether defendants had record title or title based on adverse possession, was sufficient.

2. Navigable waters 🔑37(7)

A "meander line" is described by courses and distances, and the line is thus fixed by reason of difficulty of surveying a course following the sinuosities of the shore, and the impracticability of establishing a fixed boundary along shifting sands of the ocean.

See Words and Phrases, Permanent Edition, for all other definitions of "Meander Line".

3. Navigable waters 🔑37(7)

Generally, a "meander line" does not constitute a "boundary", but the grant extends to the high tide line.

See Words and Phrases, Permanent Edition, for all other definitions of "Boundary".

4. Navigable waters 🔑37(7)

Where one through whom both plaintiffs and defendants claimed admittedly owned rancho to high tide line of ocean, and decree in proceedings subsequent to owner's death vested in defendants' predecessors title to a portion of rancho, the south line of the description of the land in the decree would be construed as a "meander line" rather than a true "boundary", so as to carry title to high tide line, though description did not refer to south line as a meander line, where such construction effectuated the declared purpose of the parties and the court in the proceedings.

5. Navigable waters 🔑37(7)

Where evidence showed only that it was common practice to use beach land of rancho, which extended to high tide line of ocean, for road purposes, and failed to establish a defined roadway, such evidence had little weight in determining, in quiet title action, whether beach land was included in a subsequent allotment of portion of rancho on principle that grant of upland carries title to high tide line.

6. Navigable waters 🔑37(7)

Proof that conveyance of one parcel of rancho, which extended to high tide line of ocean, expressly included in addition to metes and bounds description prepared from survey a provision purporting to convey additional strip of land to low tide line, and that in conveyance of another parcel the metes and bounds description of the parcel extended far enough to reach high tide line, was for consideration of trial court in determining whether south line of parcel in question as given in description prepared from survey was a true "boundary" or a "meander line", and did not establish as matter of law that south line was a true "boundary", so as not to carry title to high tide line.

7. Navigable waters 🔑37(7)

Proof that decree vesting title of portion of rancho, which extended to high tide line of ocean, in defendants' predecessors, concluded with phrase "containing 941.16 acres of land", and that such was the exact acreage embraced within metes and bounds description contained in decree, did not establish that south line of description was intended to be a true "boundary" and not a "meander line", as regards issue whether decree carried title to high tide line.

8. Navigable waters ⚷37(7)

That defendants upon acquiring property long after proceedings vesting title in defendants' predecessors in addition to obtaining a grant deed following description given in decree took a quitclaim deed of all land lying between southerly boundary as described in grant deed and line of ordinary high tide, did not establish that defendants took cognizance of fact that description in grant deed did not extend to line of high tide.

◆

Appeal from Superior Court, Santa Barbara County; F. M. Jamison, Judge.

Action by Alfonso L. Den, Ysabel A. Den and others against S. M. Spalding, Caroline C. Spalding, the Pacific Western Oil Company, a corporation, and others to quiet title to realty. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Jerome H. Kann, H. E. Gleason, John F. Poole, and Hill, Morgan & Bledsoe, all of Los Angeles, for appellants.

Heaney, Price, Postel & Parma, of Santa Barbara, and Loeb, Walker & Loeb and Wm. W. Lovett, Jr., all of Los Angeles, for respondents.

KNIGHT, Justice.

Plaintiffs appeal from a judgment quieting title in defendants to land in Santa Barbara county.

The property consists of a strip of beach land fronting on the Pacific ocean above the line of high tide. It contains about twenty-one acres and has become valuable by reason of production of oil on said lands and on lower tidelands since 1929. Defendants S. M. Spalding and Caroline C. Spalding, his wife, own the uplands, and defendant Pacific Western Oil Company holds a lease from them. The defendants also have oil rights in state tidelands adjoining the beach land under permit from the state. The strip affords access to the tidelands and is traversed by pipe lines from tideland wells.

The question herein is as to the boundary of the Spalding upland tract. The defendants contend that their record title extends to the high tide line, thereby including the land which is the subject of this action, and, further, that in any event they have title by adverse possession. We are of the view that their record title extends to the line of high tide.

Nicholas A. Den, through whom both plaintiffs and defendants claim, admittedly owned to the high tide line under patent from the United States government in confirmation of a Mexican land grant. The land as patented contained more than 15,000 acres, and was known as the Rancho Los Dos Pueblos. Plaintiffs are certain heirs of Den, two administrators with the will annexed of his estate, and the trustee of a trust created by him in his lifetime for the benefit of his children. (A decree reopening the estate of Nicholas A. Den by appointing two administrators with the will annexed was affirmed in Estate of Den, 3 Cal.2d 638, 45 P.2d 963.) They contend that proceedings concluded in 1890, following the death of Den, which vested title to a portion of the Rancho in defendants' predecessors, did not include the strip of beach land here involved. The solution of this question depends on whether the south line of the Spalding parcel as described in the instruments through which they claim is a meander line or a true boundary.

[1] The court found that defendants Spalding were the owners of the beach land, subject to the lease to defendant Pacific Western Oil Company, without specifically finding whether they had record title or title based on adverse possession. Such findings are sufficient. Adams v. Crawford, 116 Cal. 495, 48 P. 488; Cooley v. Miller & Lux, 156 Cal. 510, 523, 105 P. 981.

The complaint contains a second count by which plaintiffs sought an accounting of oil produced in large quantity since 1929 on the beach land and on the tidelands in which the Spaldings have rights derived from state permits, on the theory that production on said lands drained oil from the strip of land plaintiffs claim for which defendants should pay them. The trial of this issue was postponed pending decision on the question of title, with result that trial has not been had on the second count.

During his lifetime Nicholas A. Den conveyed an undivided half interest in the Rancho to himself and Richard S. Den, in trust to convey equal undivided interests therein to the children of Nicholas upon their coming of age. He died in 1862. By his will he bequeathed the other half interest to his three executors as trustees, upon a like trust. During administration the executors, without authorization or confirmation of the probate court, made sales of portions of the Rancho, including a sale to Thomas R. Hayes and Daniel E. Hayes of the property which the Spaldings now own. This parcel came to be known as the Tecolote Ranch. It contains more than 900 acres.

A decree of final distribution was entered in the estate of Den in 1875, distributing the Rancho Los Dos Pueblos to the executors as trustees for the children of Den. In 1876 the trustees brought an action for termination of the trust and for other relief, in which they sought confirmation of the above sales. Purchasers were made parties, as were the children of Den, who were the beneficiaries of both trusts, and Richard S. Den, surviving trustee of the trust created by the decedent in his lifetime.

Judgment upholding the validity of the sales was reversed on appeal. Hill v. Den, 54 Cal. 6. The court held that the executors were without right to act in respect to the half interest which Nicholas A. Den had conveyed upon trust in his lifetime, and that they were without authority to sell the half interest constituting part of the estate of Den except in compliance with the procedure prescribed for probate sales. The proper course, the court indicated, was to make partition between the estate or testamentary trustees on the one hand, and the trustee of the trust created by Den in his lifetime, on the other. Only then would the testamentary trustees be in a position to make division among the children as they came of age.

Subsequent proceedings were had under the name of Huse v. Den, trustee Hill having refused to act further as a plaintiff. A decree dividing all property which was the subject of the action among the persons entitled thereto was affirmed in 1890. Huse v. Den, 85 Cal. 390, 24 P. 790, 20 Am.St.Rep. 232. It does not appear that a partition ever took place between the testamentary trustees on the one hand, and the trustee of the trust created by Den in his lifetime on the other. The decree in Huse v. Den, which is included in the record herein, divides the Rancho by providing for conveyances to named persons of segregated parcels. It does not merely deal with an undivided half interest in the property. It is to be inferred that this course was followed with the consent of all parties, amended pleadings having been filed according to the opinion in Huse v. Den, supra.

Pending the above litigation the children of Nicholas A. Den had transferred to Oliver P. Evans, Thomas B. Bishop and Catherine M. Bell their interest in the portions of the Rancho Los Dos Pueblos which were the subject of the unauthorized sales by the executors, including the parcel which defendants Spalding now own. Accordingly, upon invalidating the sales and making division of the Rancho in Huse v. Den, this property was awarded to these transferees. Other portions of the Rancho were allotted to the children of Nicholas A. Den, or to persons who had succeeded to their interests.

Defendants Spalding claim title through Evans, Bishop and Bell under this decree to that portion of the land which had been the subject of the unauthorized sale to the Hayes. Plaintiffs likewise recognize this decree, but contend that it excluded the strip of beach land which is the subject of the present action.

[2] The south line in the patent to Nicholas Den is admittedly a meander line. Such a line is described by courses and distances, being a straight line between fixed points or monuments, or a series of connecting straight lines. The line is thus fixed by reason of the difficulty of surveying a course following the sinuosities of the shore; and the impracticability of establishing a fixed boundary along the shifting sands of the ocean. De Watson v. San Pedro, etc., R. R. Co., 169 Cal. 520, 147 P. 140; McLeod v. Reyes, 4 Cal.App.2d 143, 40 P.2d 839; Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 P. 496. The result may be, as in the instant case, that an irregular strip of land will lie outside the meander line.

[3] The rule is, as recognized by appellant, that such lines generally do not constitute a boundary, but the grant extends to the high tide line. It is on this theory that plaintiffs herein claim title through the patentee, Nicholas A. Den, to the strip of land, extending to the line of high tide, which is the subject of the present action. When the executors made the unauthorized conveyance to the Hayes they employed a description prepared from a survey of the parcel then made by one Barker. This description was adopted

when the children of Den conveyed to Evans, Bishop and Bell their right to attack said transfer and also in the decree in Huse v. Den, invalidating the deed to the Hayes. The contention of plaintiffs is that the south line of the Barker survey is controlling, and that it is not a meander line, but a true boundary.

[4] The description prepared from the Barker survey does not describe the parcel as bounded by the ocean, nor does it refer to the south line as a meander line. In respondents' analysis, appellants conceded in the trial that the south line of the Barker survey for this parcel followed the meander line of the government patent. The appellants do not deny this. Their contention is that the matter is of no importance, that in any event the Barker line has been adopted as a true boundary, rather than a meander line. We are in accord with the statement that whether the Barker line and the line of the patent are identical is not of controlling importance, but in our view the Barker south line is a meander line.

In Stillwell v. Jackson, 5 Cal.2d 165, 53 P.2d 752, a large tract of land bounded by the ocean was conveyed by the town of Santa Barbara to several grantees as tenants in common. In a partition suit commenced in 1891 a decree was entered which made allotment of parcels without describing the lots as lying on the ocean nor designating the boundary as a meander line. In an action brought many years later, after the property bordering the ocean had become valuable for beach cottage purposes, the plaintiffs contended that the court had failed to partition the land lying between the boundary as described and the high tide line. In affirming judgment for defendants based on the theory that the line was a meander line, the court emphasized the fact that it appeared from the pleadings and throughout the trial that the action related to the entire tract, and that if the decree was given the construction for which plaintiffs contended, the court would have inadvertently omitted the property in question. McLeod v. Reyes, supra, is to the same effect.

The above decisions afford strong authority for a similar construction of the decree in Huse v. Den. That the litigation conducted first under the name of Hill v. Den, and later as Huse v. Den, related to all portions of the Rancho except a 2,700 acre tract as to which Den had executed a deed to one Hill, appears clearly from the pleadings, findings and decree in that proceeding. The deed to Hill covering 2,700 acres on the easterly side of the Rancho was executed by Den after he had created the trust for his children in an undivided half interest in the entire Rancho, with the result that the deed to Hill passed only an undivided half interest in the 2,700 acres. This fact is noted in the decision in Hill v. Den, supra. But it is stated in respondents' brief on the present appeal that after the conveyance to Hill none of the parties ever treated the 2,700 acre parcel as part of the Rancho, and that this condition was recognized in the trial of the present action. It is agreed herein that the decree in Huse v. Den makes no disposition of the 2,700 acre tract. But that it was intended to dispose of all other portions of the Rancho, not excluding the strip of beach land which is the subject of the present action, is too plain to admit of doubt.

In the cross-complaint filed by the children of Nicholas A. Den to the complaint of the executors, they averred that wherever the word Rancho was used, it referred to all said Rancho except the 2,700 acres sold to Hill. The property is similarly described in the cross-complaints of Hollister and Sturges, claimants under the unauthorized deeds of the executors of Nicholas A. Den, in which cross-complaints the land is also described as bounded on the south by the line of the United States patent survey, admittedly a meander line, and by the ocean. In amendments to the complaint filed while the action was pending under the title Hill v. Den, the parcel conveyed to the Hayes, to which defendants have succeeded, is described as following the line of the official survey, which, as has been noted, was a meander line.

Several notices of action filed also described the proceedings as relating to the Rancho Los Dos Pueblos, with no exclusions. Upon the trial of Huse v. Den, exhibit C, a map showing the outline of the Rancho and delineating the boundaries of the several parcels as to which conveyances had been made by the executors, was treated by the parties as showing the land to which the action related. On said map all parcels run to the ocean.

Finding 46 in Huse v. Den expressly declares the intent of the court to make disposition of "all the lands which are the subject of this litigation". Number 25 of the conclusions of law provides that the legal title of the Rancho should be conveyed to the persons beneficially entitled thereto and that the trust should be extinguished. It would have been improper to extinguish the trust if the trustees continued to retain title to a portion of the Rancho. The decree likewise provides that "the trust estate shall be extinguished, terminated and ended".

That construction should be given the description of specific parcels in the decree which will effectuate, rather than defeat, the declared purpose of the parties and the court. To construe the Barker south line as a meander line, rather than a true boundary, will accomplish this end.

We do not overlook the fact that the parcels awarded to defendants' predecessors by the decree in Huse v. Den were those which had been the subject of the unauthorized conveyances by the executors. Since the basis of the award of this property in Huse v. Den was the transfer by the children of Den to Evans, Bishop and Bell of their interest in the property which the executors were without right to convey, it may be conceded that the court did not intend to award to such transferees, nor the children to grant to them, rights in any property other than that to which the abortive grants of the executors related. The metes and bounds description in the decree and in the attempted transfers by the executors are the same. The extent of the property to which the invalid deeds related was a question to be determined in Huse v. Den. If, as held above, the decree in Huse v. Den may be construed as carrying title to the line of high tide, it incidentally determines as a necessary incident that the descriptions as used in the deeds extended thereto.

[5] Appellants suggest as a reason for omission from the executors' deed to respondents' predecessors of the strip of beach land between the south line of the Barker survey and the high tide line, that it was common practice to use beach lands for road purposes. The evidence falls far short of establishing a defined roadway. While the beach may have been used at times as a convenient passage across the hilly Rancho throughout its distance, the use was not such as to cause the heirs or other claimants in Huse v. Den to seek its protection either in that proceeding or in the long period of years which elapsed from affirmance of the decree in 1890 until discovery of oil in 1929. In the circumstances the evidence relied on in the present proceeding in this connection can have little weight in determining the construction of the decree in Huse v. Den.

[6] Appellants also emphasize that the provision of the decree in Huse v. Den referring to another parcel which had been the subject of an unauthorized conveyance by the executors expressly includes in addition to property embraced within the metes and bounds description prepared from the Barker survey the following: "Also all that strip of land which lies between the southerly boundary of the above described tract and the line of low tide of the beach of the Pacific Ocean projecting the east and west lines of the tract above described due south to low water mark." The omission of such a provision as to the parcel to which defendants herein have succeeded indicates to appellants an intent that rights therein should not extend beyond the south line as described.

In another instance, say appellants, where it was intended by the decree to carry title to the ocean, the distance given in the metes and bounds description extends far enough to reach the high tide line. These factors were for the consideration of the trial court. They do not as a matter of law establish appellants' contention that the line of the Barker description was a true boundary and not a meander line. The express reference to an additional strip of land in the Cooper parcel may be explained by the purpose manifested to carry title to the line of low tide. A meander line description does not extend it beyond the line of high tide. By what right persons claiming through Nicholas A. Den assert ownership beyond the high tide line does not appear, nor is the court concerned with it in the present proceeding.

[7] Another circumstance strongly relied on by appellants is that the Barker description as used in the invalid deed of the executors and thereafter in the decree in Huse v. Den concludes with the phrase "containing 941.16 acres of land". According to appellants, this is the exact acreage embraced within the metes and bounds description, but if the parcel is held to include the strip of beach land the acreage is erroneous by 20.83 acres. Ap-

pellants cite Hostetter v. Los Angeles T. Ry. Co., 108 Cal. 38, 41 P. 330, for the proposition that while a statement of acreage in a deed is not controlling, it may be a valuable aid in fixing a doubtful boundary. In the case herein the statement as to acreage is as to the land within the metes and bounds description. As pointed out in McLeod v. Reyes, supra, in computing the acreage for which the grantee under a government patent shall pay, the area within the meander line only is considered, with the result that the statement of total acreage relates only to such land. It would not be surprising then to find a survey prepared for a private purpose following a similar procedure.

[8] Appellants also note that when the Spaldings acquired the property in 1926, long after the proceedings in Huse v. Den and after several intervening conveyances, they took cognizance of the fact that the Barker south line as described did not extend to the line of high tide by obtaining in addition to a grant deed following the Barker description, a quitclaim of all land lying between the southerly boundary as described in the grant deed and the line of ordinary high tide along the seashore. This indicates only that the attorney who represented them acted in an abundance of caution following his observation that the line as described did not extend to high tide.

Appellants lay special stress on their further contention that the trial court based its judgment on an erroneous assumption, without consideration of the real issue in the case. The brief opinion of the court includes the following: "The court is of the opinion that the boundary line as described in Thompson's survey [the patent survey] along the southern border of the Tecolote Ranch is a meander line and that the true boundary of said tract upon the south is the ocean. Having arrived at this conclusion it is deemed unnecessary to pass upon other questions raised."

The question in this case is not, appellants state, whether the Thompson line was a meander line, but whether the Barker line, used in the instruments through which defendants claim, is such a line, or is a true boundary, as appellants contend. The briefs of the parties contain argument as to the use which may be made of the opinion of a trial court, which is no part of the record on appeal, to invalidate a judgment. It is unnecessary to enter upon a discussion of this question for the reason that it cannot be said from the opinion that the trial court overlooked this major issue in the case. The implication of the courts' opinion, which did not attempt a detailed analysis, is that if the Thompson line was a meander line, concerning which there was no dispute, all subsequent dealings of the parties and the decree in Huse v. Den indicate that the line of the Barker survey, prepared to provide a description for a segregated portion of the Rancho, was likewise a meander line.

As a further ground supporting the judgment, respondents rely on section 830, Civil Code. It provides: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

Appellants contend that said section does not apply where the line of the property on the side of the ocean is described by metes and bounds and such line does not extend to the high tide line. In such event, appellants contend, the land cannot be said "to border on tide water". In appellants' analysis, the section would have application where land is described by some such phrase as bordering the ocean, or along the line of the ocean. In McLeod v. Reyes, supra, at page 151 of 4 Cal.App.2d, 40 P.2d 839 et seq., the district court of appeal for the third appellate district relied on the section as an additional reason for holding that title extended to the line of high tide notwithstanding the line as described was slightly shoreward of the tide line. It is unnecessary in the present appeal to discuss the section further, in view of our conclusion that without reference thereto the south line of the Barker survey is a meander line which carries title to the line of high tide.

It is also not necessary to discuss respondents' further contention that if they do not have record title to the strip of beach land, they have title by adverse possession, nor the further contention that plaintiffs and appellants herein have not shown that at the present time they have such an interest in the land, in the event defendants have not established title, as to permit them to sue.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

39 Cal.App.2d 698

KEY et ux. v. CALDWELL et al.

Civ. 12492.

District Court of Appeal, Second District, Division 2, California.

June 28, 1940.

Rehearing Denied July 23, 1940.
Hearing Denied Aug. 26, 1940.

1. Dismissal and nonsuit 🔑24

A voluntary dismissal as to one defendant will not operate as a release of a codefendant unless it appears that the defendants are joint tort-feasors and that plaintiff has received some satisfaction for such dismissal.

2. Dismissal and nonsuit 🔑29

The dismissal with prejudice of malpractice action as to surgeon's codefendant did not amount to a "retraxit" releasing surgeon as a joint tort-feasor from further liability, where there was no evidence that plaintiffs received any satisfaction for dismissal, codefendant was not a physician and did not participate in operation, and record did not show any master and servant relationship between codefendant and surgeon, since the doctrine of respondeat superior was not applicable, and there was no showing of concert of action required to render surgeon and codefendant liable as "joint tort-feasors".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tort-Feasors" and "Retraxit".

3. Dismissal and nonsuit 🔑29

There can be no retraxit unless some satisfaction has been received by plaintiff for the dismissal.

4. Dismissal and nonsuit 🔑26

The mere dismissal of an action as to one tort-feasor without satisfaction having been given does not operate as a release of other joint tort-feasors, but it is the fact of compensation for the alleged injury that operates as a release of other joint tort-feasors.

5. Dismissal and nonsuit 🔑26

The bare fact of dismissal of malpractice action with prejudice as against surgeon's codefendant could not be construed as a satisfaction of plaintiffs' claims and a release of surgeon as a joint tort-feasor, where it did not appear that plaintiffs received any compensation from codefendant, and it could not be successfully urged that dismissal of codefendant's cross complaint constituted satisfaction for dismissal of plaintiffs' action as against codefendant.

6. Negligence 🔑121(2)

The doctrine of "res ipsa loquitur" applies where a thing is shown to be under the management of the defendant or his servants, and an accident is such as in the ordinary course of things does not happen if those who have the management use proper care and it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

7. Physicians and surgeons 🔑18(8)

Evidence supported trial court's finding that surgeon was negligent in failing to remove a sponge from operating field before closing incision made in a Caesarean operation.

8. Physicians and surgeons 🔑18(6)

The testimony of a surgeon that he followed the usual and ordinary practice in performing a Caesarean operation did not compel a finding that the inference of negligence arising from the fact that he failed to remove one of the sponges was rebutted.

9. Appeal and error 🔑1008(1)

Whether the inference of negligence arising from the fact that an operating surgeon failed to remove one of the sponges from the operating field has been rebutted is ordinarily for the determination of the trial court.

10. Physicians and surgeons 🔑18(8)

The finding that a surgeon did not use reasonable care and skill in removing all sponges from operating field before closing incision made in a Caesarean operation was not rendered ineffective by proof that he followed the practice and methods ordinarily used by surgeons in the same locality and relied on nurses' sponge count in accordance with ordinary practice.

11. Physicians and surgeons ⚷**15**

A surgeon under whose immediate supervision and direction a Caesarean operation was performed was charged with the responsibility of determining that all sponges were removed from the operating field before the incision was closed.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Malpractice action by Ray T. Key and Sue M. Key, his wife, against William Caldwell, R. B. Jenkins, and others, wherein defendant Caldwell filed a cross-complaint. Defendant Caldwell dismissed his cross-complaint with prejudice, and before trial the action was dismissed as to him with prejudice. From a judgment for plaintiffs against defendant Jenkins alone, defendant Jenkins appeals.

Affirmed.

Hearing denied; EDMONDS and HOUSER, JJ., dissenting.

Noel B. Martin, of Los Angeles, for appellant.

Reynolds & Painter, Thomas Reynolds, Grant G. Calhoun, and Ray H. Kinnison, all of Los Angeles, for respondents.

WOOD, Justice.

This action was commenced by plaintiffs, who are husband and wife, for the purpose of recovering damages for injuries to Mrs. Key resulting from the negligence of appellant, a physician and surgeon, in performing a Caesarean operation upon Mrs. Key. Several defendants were named in the complaint but the action proceeded to judgment against appellant alone. The appeal is from a judgment in favor of plaintiffs.

Plaintiffs were members of the Better Health Foundation, a group health organization, which in consideration of monthly dues agreed to furnish them with necessary surgical and obstetrical services in connection with the anticipated birth of Mrs. Key's child. Plaintiffs were referred by the foundation to a clinic and hospital headed by appellant for prenatal and obstetrical services. On August 31, 1938, after labor had started, Mrs. Key went to the hospital, where she was examined by appellant. Because of complications resulting from her poor physical condition appellant decided that Mrs. Key would be unable to have a normal delivery and that a Caesarean operation was necessary. Appellant commenced the operation and as it progressed it became apparent that the patient was a poor surgical or anaesthetic risk and that it was essential that the operation be completed in the shortest possible time. Appellant therefore completed the operation as rapidly as possible. In the course of the operation many laparotomy sponges were used for the purpose of walling off various organs of the patient's body from the operating field. The nurses assisting him made two sponge counts at his request and announced them to be correct, thus indicating to appellant that all sponges used in the operation had been removed from the patient's body. This conclusion was found to be erroneous when, approximately five weeks later, it was discovered that one of the sponges used in the operation had not been removed from Mrs. Key's body and that as a result she had suffered certain injuries. This interring of a laparotomy sponge in Mrs. Key's abdomen constitutes the alleged negligent act out of which the present action arose.

[1, 2] William Caldwell was originally named as a defendant and an alleged partner of appellant but prior to trial the action was dismissed as to him with prejudice. Caldwell, who had filed a cross-complaint against plaintiffs based upon their failure to pay dues to the Foundation, dismissed his cross-complaint with prejudice. Following the dismissal of the action as to Caldwell appellant made a motion for permission to file a supplemental defense in the nature of a retraxit, which was denied. During the course of the trial the motion for leave to interpose the supplemental defense was renewed and again denied. It is now contended by appellant that the court abused its discretion in refusing to permit him to interpose such defense. In support of his position it is urged by appellant that the dismissal with prejudice as to defendant Caldwell amounted to a retraxit, the result of which was to release appellant as a joint tort-feasor from further liability to plaintiffs. It is settled that before a voluntary dismissal as to one defendant will operate as a release of a codefendant it must appear that the defendants are joint tort-feasors and that plaintiff has received some satisfaction for such dismissal. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Commercial Transfer Inc. v. Daigh & Stewart, 33 Cal.

App.2d 370, 91 P.2d 951; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 558, 90 P.2d 371.

Appellant's contention cannot be sustained for the reason that there is no evidence that appellant and Caldwell were joint tort-feasors and for the further reason that there is no evidence that plaintiffs received any satisfaction for the dismissal of the action. Although it is true that appellant and defendant Caldwell were alleged to be partners this allegation was denied by appellant in his answer. In connection with his claim of retraxit appellant offered to prove that defendant Caldwell, who operated the Better Health Foundation, had an agreement with appellant under which the latter was obligated to furnish obstetrical and surgical services to members of the Foundation. In making such offer of proof the attorney for appellant stated: "I will say as a prelude that I do not understand that relationship to be either a partnership nor a joint venture." Caldwell was not a physician and did not participate in any manner in the actual operation which was performed by appellant. The record is silent as to any master and servant relationship between Caldwell and appellant, so that the doctrine of respondeat superior is not applicable. The situation thus presented falls far short of showing any such concert of action as would be required to render appellant and Caldwell liable as joint tort-feasors. Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25.

[3-5] The record fails even to suggest that plaintiffs received any satisfaction for the dismissal. Clearly, unless some satisfaction has been received there can be no retraxit. Bee v. Cooper, 217 Cal. 96, 17 P.2d 740. It is urged by appellant that the dismissal of Caldwell's cross-complaint constituted the satisfaction for the dismissal of plaintiffs' action as to Caldwell. It must be remembered, however, that it is the fact of compensation for the alleged injury that operates as a release of other joint tort-feasors, not merely the dismissal of the action as to one of them without satisfaction having been given. Commercial Transfer, Inc. v. Daigh & Stewart, supra. Since it does not appear that plaintiffs received any compensation from Caldwell, the bare fact of the dismissal cannot be construed as a satisfaction of plaintiffs' claims. If we were to hold otherwise the result would be that a plaintiff in an action against several alleged joint tort-feasors could not dismiss the action against one of the defendants who was innocent of any wrong without forfeiting his right to recover from the remaining defendants. In Commercial Transfer Inc. v. Daigh & Stewart, supra, 33 Cal.App.2d at page 373, 91 P.2d at page 953, it is said: "To hold that, where an action is brought against several defendants alleging a joint tort-feasance * * * it is necessary for the plaintiff to continue to prosecute his action falso clamore against an innocent defendant after it appears from the evidence that he is not liable, in order that the guilty wrongdoer may not escape, would indeed be to sanctify form at the sacrifice of substance."

[6] It is contended by appellant that there is no evidence to support the finding that he was negligent. It is conceded by both parties that the doctrine of res ipsa loquitur, "where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care", is applicable to the present case. Ales v. Ryan, 8 Cal.2d 82, 95, 64 P.2d 409, 415. Appellant urges, however, that the inference of negligence arising from the doctrine was overcome by positive and uncontroverted proof. From the evidence introduced by appellant it appears that after the commencement of the operation it developed that the patient "did not take a good anaesthetic and she started to go bad" so that in appellant's opinion she became a poor surgical risk. Recognizing that speed was imperative if the lives of the mother and child were to be saved appellant proceeded with the operation as swiftly as possible, and when suturing the incision made in the uterus he directed the nurses to make a count of the sponges which he had removed from the operating field. Upon being informed by the nurses that the sponge count was correct, appellant completed the operation by closing the incision which had been made in the abdomen and at this time again demanded a sponge count and was again informed that such count was correct. All of the sponges which were used to wall off the operating field were personally placed by appellant and were removed by him. Appellant tes-

tified that the sponge which he failed to remove was one which he had used for the purpose of preventing the transverse colon from sagging into the operating field. He further stated that it was essential in every Caesarean operation to use a similar sponge for this purpose. Appellant testified that he was familiar with the usual and ordinary practice of surgeons in performing Caesarean operations in the same locality and that in performing this operation he did not depart from such usual and ordinary practice. He also testified that under all the circumstances it was the usual and ordinary practice of physicians to rely upon the sponge count of the nurses.

[7-9] Appellant's argument is that since there was no evidence to establish a departure from approved medical practice and, on the contrary, it was established by his own testimony that he did follow the usual and ordinary practice in performing this operation the inference of negligence raised by the doctrine of res ipsa loquitur was definitely rebutted. It is further urged that what is or is not proper medical practice can only be established by expert testimony which, when not conflicting, is conclusive. Although appellant relies upon rules which are applicable in many cases of malpractice, it must be held that the finding of the trial court that defendant was negligent, in view of the facts of the present case, is supported by the evidence. It has been held that "* * * the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of materia medica or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. * * * General negligence cannot be excused on the ground that others in the same locality practice the same kind of negligence." Ales v. Ryan, supra. Appellant's testimony that he followed the usual and ordinary practice in performing the operation does not compel a finding that the inference of negligence arising from the fact that he failed to remove one of the sponges was rebutted. The question whether such inference has been rebutted is ordinarily for the determination of the trial court.

[10] The question before us for determination is whether the record discloses support for the finding that appellant did not use reasonable care and skill. Such finding is not rendered ineffective by proof that appellant followed the practice and methods ordinarily used by surgeons in the same locality. In Ales v. Ryan, supra, 8 Cal.2d at page 103, 64 P.2d at page 419, the court quotes with approval from Davis v. Kerr, 239 Pa. 351, 86 A. 1007, 46 L.R.A., N.S., 611: "* * * Here the surgeon had reached the conclusion that he had removed all the sponges—a mistaken conclusion, but verified by the nurses' count. In reaching his conclusion, did he exercise ordinary skill? We see nothing in the evidence to warrant the inference that he did not; but, on the other hand, we find nothing to warrant the inference that he did, which is far more important, since the burden of showing care was upon him. Why was a foreign substance left in the parts, which the operating surgeon should have removed? It was for him to acquit himself of negligence with respect to it. The sponge escaped his observation. Why? Was it so hidden and concealed that reasonable care on his part would not have disclosed it, or were conditions such that, in his professional judgment, further exploration by him for sponges would have endangered the safety of the patient? In a word, did he do all that reasonable care and skill would require? Except as one or the other of these questions can be answered affirmatively from the evidence, the law will presume to the contrary, and attribute the unfortunate consequences to his contributing negligence." In the case now before us there is no evidence that appellant made any attempt to verify by exploration in the patient's abdominal cavity the sponge count which the nurses had announced as being correct, nor was it shown that such exploration, if made, would have endangered the patient's safety. It does not appear that the sponge was so concealed that reasonable care on his part would not have disclosed it. On the contrary, appellant's own testimony lends strength to the inference of negligence arising from the application of the doctrine of res ipsa loquitur. His testimony was that the sponge which had been interred in the patient's abdomen was of the type used by him in every Caesarean operation and was one which was used in every such operation for the same purpose and placed in the same position in the abdominal cavity. It thus appears that the sponge in question was of the or-

dinary type, routinely placed in the same position in every operation and no compelling explanation is offered for his failure to remove it. The trial court was justified in drawing the inference from the facts proved that appellant did not do all that reasonable care and skill would require.

[11] Appellant rests his case entirely upon the testimony that in completing the operation as speedily as possible and in relying upon the sponge count by the nurses he was following the usual and ordinary practice of other physicians in the same locality. It has been held that a surgeon cannot relieve himself of liability by proof of a custom or practice among surgeons requiring the nurses to count the sponges used in an operation. In Ales v. Ryan, supra, 8 Cal.2d page 105, 64 P.2d page 420, the court quotes with approval the rule set forth in 21 Ruling Case Law 338, to the effect that "surgeons cannot relieve themselves from liability for injury to a patient caused by leaving sponges in a wound after an operation, by the adoption of a rule requiring the attendant nurse to count the sponges used and removed, and relying on that rule as conclusive that all sponges have been accounted for". Since the operation was performed under the immediate supervision and direction of appellant he was charged with the responsibility of determining that all sponges were removed from the operating field before the incision was closed.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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39 Cal.App.2d 753

HOLLINGER v. MEDINA et al.

Civ. 2361.

District Court of Appeal, Fourth District, California.

July 1, 1940.

Hearing Denied Aug. 29, 1940.

Seamen ⚷29(5)

In action for injuries sustained by engineer on fishing boat who was burned by escaping ammonia when hose used to drain oil trap attached to ammonia receiver burst, whether hose contrivance was furnished as part of boat equipment, whether other materials were on board from which engineer might have made a suitable and safe device for draining oil trap, and whether engineer breached his contract with boat owners by failing to construct and use such a safe piece of equipment, were for jury under conflicting evidence.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Edward P. Hollinger against Joseph M. Medina and others, copartners doing business under the fictitious name and style of Campbell Machine Company, for personal injuries. From a judgment for plaintiff and from an order denying their motion for a judgment notwithstanding the verdict, defendants appeal.

Affirmed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Carroll Single, of San Francisco, and Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action against the owners of the tuna clipper "Cabrillo" based upon injuries received by the plaintiff while on the high seas, the action having been brought and tried on the theory that certain equipment was unseaworthy.

The plaintiff was injured while on his first trip as engineer on this boat. One of his duties as engineer was to care for the refrigerating system. In this connection it was necessary at times to drain an oil trap attached to an ammonia receiver. The plaintiff attempted to do this, using a piece of equipment which was at hand and which consisted of a short piece of hose to which was attached a nipple threaded to fit the spout of a valve attached to the ammonia tank. Having attached this hose the plaintiff opened the valve for the purpose of allowing the ammonia, which was under a high pressure, to blow the refuse out of the oil trap. The resulting pressure in the hose caused it to burst and the plaintiff was severely burned by the escaping ammonia.

Under familiar rules applicable in such cases, and under appropriate instructions by the court, the jury applied the doctrine of comparative negligence finding that the plaintiff was 90 per cent negligent and that the defendant owners were 10 per cent negligent. Having found that the plaintiff had been damaged to the amount of $10,000, the jury rendered a verdict against the defendants for $1,000, and judgment was entered accordingly. The defendants have appealed from the judgment and from an order denying their motion for a judgment notwithstanding the verdict.

The sole point raised on this appeal is that the court erred in refusing to order a judgment for the appellants notwithstanding the verdict. In support of this position it is argued that the evidence conclusively shows that the hose contrivance which the respondent used was not furnished as a part of the equipment for the boat; that other materials were on board from which the respondent might have made a suitable and safe device for draining the oil trap; and that the respondent breached his contract with the appellants by failing to construct and use such a safe piece of equipment.

There is no dispute as to the general rules of law applicable in such a case. It is admitted that negligence on either side is not controlling and the appellants concede the general rule that a ship owner is under the duty of seeing that his ship and equipment are seaworthy, and that this duty cannot be delegated to another. In brief, their contention is that this general rule is not here applicable for the reason that the respondent was hired as chief engineer; that it was his duty as such engineer to see that this part of the boat's equipment was seaworthy and safe; and that it must be held, as a matter of law, that he failed to perform that duty.

While the right of a ship owner to rely upon an expert employed for a particular purpose, as an exception to the general rule, might be an interesting subject for consideration, it can have no controlling effect under the evidence in this case. This was a small boat which was built by two of the appellants, who also operate a shipyard in San Diego. The boat was tied up at the dock at this ship building yard for a time before it sailed on the trip on which the respondent was injured. The accident occurred on the respondent's first trip as engineer on this boat. He was not a licensed engineer and he received the same pay as other members of the crew. He had made two previous trips on this boat as a fisherman and as assistant engineer, during which time he had been instructed in the use of the equipment by the former engineer. This former engineer testified that he always used the hose attachment in question and that he kept it for the purpose of draining the oil trap. He testified that during the previous two trips he had been "breaking in" the respondent. One of the appellants, who was one of the ship builders, testified that he never instructed the respondent how to handle the equipment which injured him. Another appellant, who was the regular captain on this boat, testified that he did not tell the respondent what his duties were when he employed him as chief engineer. He further testified that this rubber hose was used for that purpose during the time the former engineer was in charge, and a part of his testimony justifies the inference that the hose had been provided for that purpose. The same inference may be drawn from a part of the testimony of another one of the appellants, who was the acting captain at the time the respondent was injured.

While the evidence is conflicting, it is sufficient to show that a hose was unsafe and dangerous for the use here in question; that this hose had been so used over a considerable period; that at least some of the owners of the boat knew this fact and knew that this fixture was kept at hand for that purpose; that others of the appellants, who had built the boat, had an opportunity to know that fact; that the respondent was not employed as an expert on such matters but was merely "broken in" to a new job with which he was not too familiar; and that his instructions, incomplete at best, did not cover the manner of draining this oil trap or the kind of equipment best adapted to that purpose. In view of the evidence the controlling question presented was one of fact for the jury. Under such circumstances the court was justified in refusing to set aside the verdict. Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; GRIFFIN, J.

40 Cal.App.2d 1

HANSEN et al. v. STEELE et al.

Civ. 11928.

District Court of Appeal, Second District, Division 1, California.

July 2, 1940.

Hearing Denied Aug. 29, 1940.

1. Automobiles ⚷160(4)

The statute prohibiting vehicles from overtaking and passing a vehicle which has stopped at crosswalk to permit pedestrian to cross was inapplicable where pedestrian was crossing boulevard at a point outside the unmarked crosswalk. Vehicle Code, § 560(b), St.1935, p. 188.

2. Automobiles ⚷217(9)

A pedestrian, crossing boulevard outside the crosswalk area in the face of approaching traffic, who was unable to see beyond automobile which stopped or slowed down for her to pass, was bound to exercise precaution before proceeding, and to ascertain whether she could continue her course across third traffic lane upon which other automobile was approaching.

3. Negligence ⚷136(9)

The question of contributory negligence is ordinarily for jury, but becomes a question of law when the court is impelled to say that evidence is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, pointing unerringly to or against contributory negligence.

4. Automobiles ⚷244(50)

Evidence *held* to establish that pedestrian, who was struck by automobile while walking rapidly across boulevard outside crosswalk area after crossing in front of automobile which had stopped or slowed down for her to pass, was contributorily negligent and could not recover.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Chris Hansen and another against John Steele and others, for injuries suffered in an automobile accident. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellants.

Kenneth J. Murphy, of Los Angeles, for respondents.

YORK, Presiding Justice.

This appeal from a judgment in favor of the respondents is presented to this court upon a bill of exceptions, from which it appears that appellants seek damages for injuries sustained by Elvera Hansen when she collided with a truck owned by respondent corporations, which was being operated by respondent Steele. The accident occurred at 5:45 o'clock in the afternoon of October 31, 1936, near the northeast corner of the intersection of Atlantic boulevard and Sixtieth street in the county of Los Angeles. Said boulevard is a public highway seventy feet in width running in a general northerly and southerly direction, the easterly half thereof being divided into three traffic lanes.

At the time in question, one Ray Mailhiot was driving his car south on Atlantic boulevard and at its intersection with Sixtieth street he made a "U" turn into the second lane of traffic on the east side of Atlantic and proceeded to the north. When the rear of his automobile was "about to leave" the northerly edge of an unmarked crosswalk on the northeast corner of the intersection, he saw Mrs. Hansen step into the street, whereupon he "hesitated" and brought his car "to practically a dead stop", allowing her to pass in front of him at a distance of about four feet, and then continued on his way.

In the meanwhile, respondent Steele, driving respondents' truck at a speed of from 20 to 25 miles per hour, was approaching the said intersection from the south in the first lane of traffic on the right or extreme east side of Atlantic boulevard. Just before reaching 60th street, he slowed down to 10 or 15 miles per hour to allow another car to pass him. (Presumably this was the car driven by Ray Mailhiot which was completing its "U" turn into the boulevard.) Respondent Steele proceeded into the intersection and swerved his truck to the northwest into the third lane of traffic, passing to the left of the Mailhiot car which was traveling in the second or middle lane. The car and truck moved along together for a moment, and as the truck came abreast of the said car, respondent Steele observed Mrs. Hansen for the first time when she was about two feet away from the right side of his truck. Said Steele testified that Mrs. Hansen came from in front of the Mailhiot car; that she was "going plenty fast", and was struck by the right front fender of his truck; that the accident occurred about 35 feet north of the north sidewalk line of Sixtieth street.

The witness Kime, who was driving northerly in the first traffic lane on the east side of Atlantic south of its intersection with Sixtieth street, testified that he saw Mrs. Hansen start to cross the boulevard from east to west at a point about twenty feet north of the northerly curb line of Sixtieth street; that the truck was traveling in the third lane of traffic near the center of the boulevard, and the Mailhiot car was in the second or middle lane; that the car and the truck traveled abreast for about fifteen feet, with a space of three or four feet intervening between the truck and the place where Mrs. Hansen passed in front of the Mailhiot car which had "stopped or hesitated, I wouldn't say which". He testified that Mrs. Hansen fell down in the spot where she was hit by the truck; that she was not dragged, and that he helped to pick her up at a point fifteen or twenty feet north of the north curb line of Sixtieth street.

Mrs. Hansen testified that she was walking south on Atlantic and when she came to Sixtieth street she stopped and saw an automobile make a "U" turn; that this automobile stopped when it was about three feet south and twenty feet west of her; that she stepped off the curb and started to cross Atlantic from east to west in front of said automobile at a point just north of the unmarked crosswalk on the north side of the intersection; that as she stepped off the curbing she saw the lights of another car about seventy-five feet to the south of her which was traveling close to the east curb of Atlantic boulevard. Immediately after passing the stopped car she again looked to the south but "didn't see anything", and also looked to the north; that she took "maybe two steps" when something hit her; that she was then in the "lane next to the middle of the street" on the east side of Atlantic. She sustained a broken right leg, a lacerated nose and other painful injuries.

At the conclusion of the trial which was heard by the court sitting without a jury, it was found, among other things, as follows:

"Said defendant, John Steele, at said time and place drove the said truck from a point south of the intersection of 60th Street and Atlantic Boulevard, passing a car parked near the eastern curb of Atlantic Boulevard a few feet south of 60th Street, into a position parallel with, and just west of, an automobile stopped in said intersection, said truck moving northerly at about 15 to 20 miles per hour in the third traffic lane of said boulevard westerly from the said eastern curb, without stopping his automobile at said stopped car, not anticipating the presence of a pedestrian crossing from the front of said stopped car. Said stopped car had come south on Atlantic Boulevard and had completed a U turn in the intersection just before the truck came alongside it. The movement of plaintiff from behind the stopped car was so rapid and her distance from the truck so short at that time that the truck could not be stopped by the exercise of reasonable care in time to prevent the collision.

"Plaintiff, Elvera Hansen, walked rapidly from the easterly side of Atlantic Boulevard westerly, crossing Atlantic Boulevard from a point north of said sidewalk area and crosswalk of 60th Street and Atlantic Boulevard, until she was struck near the northerly line of the crosswalk area by said truck, which she did not observe as she passed in front of and to the west of the car which had stopped for her to pass. * * *

"The court further finds that the sole and proximate cause of the happening of the accident and damages aforesaid was by reason of the negligence of the plaintiff, Elvera Hansen, in moving from a place of safety on the sidewalk and in rapidly walking directly into the path of approaching traffic without using reasonable care for her own safety, and in failing to maintain a proper lookout for the approaching traffic; that the collision would not have occurred but for the negligence of the plaintiff herself to the exclusion of any negligence on the part of the defendants."

Appellants made a motion for a new trial, the minute order denying the same reading as follows: "Said motion is argued, submitted and is denied. Plaintiff left her safe position on the east walk north of the crosswalk and passed in front of a slowly moving car knowing there were two other cars near without accounting for them, although she testified that she looked after passing the car but did not see the truck or other approaching car."

Appellants urge that respondent Steele was negligent per se in moving his truck from one traffic lane to another without first ascertaining that such movement could be done with safety (sec. 526, Vehicle Code, St.1935, p. 181); and that he violated section 560 of the Vehicle Code, St.1935, p. 188, to-wit: "(b) Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." And that such violation constituted negligence per se which was the proximate cause of the accident.

[1] In this connection, it is indicated by both the evidence and the findings herein that Mrs. Hansen crossed Atlantic boulevard at a point outside the unmarked crosswalk, i. e., approximately fifteen feet north of the sidewalk area of Sixtieth street, consequently, the provisions of the cited code section could not properly be applied to the facts as they apparently exist in the instant case.

[2] So far as the actions of appellant Elvera Hansen are concerned, there is no conflict: she walked rapidly across Atlantic boulevard outside the crosswalk area in the face of approaching traffic. As she walked in front of the Mailhiot car, she was obscured from the view of respondent Steele, who therefore had no knowledge of her dangerous position until she collided with the right front fender of his truck. Likewise, appellant was unable to see beyond the Mailhiot car which either stopped or slowed down for her to pass; therefore, it was incumbent upon her to exercise precaution before proceeding, and to ascertain whether or not she could continue her course across the third traffic lane upon which respondent Steele was approaching.

[3] The question of the contributory negligence of a plaintiff is ordinarily one for the jury. 8 Cal.Jur.Sup. 396, and numerous authorities there cited. "Contributory negligence, like defendant's negligence, becomes a question of law, however, when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, namely, an inference pointing unerringly to or against contributory negligence upon the part of the plaintiff." 19 Cal.Jur. 736; 8 Cal.Jur.Sup. 400, and authorities there cited.

[4] Upon the material issues the evidence herein is not in conflict and presents a factual situation from which reasonable men can draw but one inference, i. e., that the appellant Elvera Hansen was guilty of contributory negligence which was the proximate cause of the accident.

For the reasons stated, the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

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39 Cal.App.2d 718

LARAWAY v. FIRST NAT. BANK OF LA VERNE et al.

Civ. 11935.

District Court of Appeal, Second District, Division 1, California.

July 1, 1940.

1. Appeal and error ⇨927(3)

On appeal from judgment of nonsuit, every inference of fact and intendment of law was required to be liberally construed in favor of sustaining the case made by plaintiff.

2. Principal and agent ⇨48

Agents undertaking to purchase securities for principal for investment were bound to exercise the utmost good faith to make the best bargain fairly obtainable for their principal.

3. Limitation of actions ⇨100(11)

A defrauded party will be charged with discovery of the fraud in advance of actual knowledge so as to allow running of limitations only where the defrauded party should plainly have discovered the fraud except for his own inexcusable inattention. Code Civ.Proc. § 338, subd. 4.

4. Limitation of actions ⇨13

Where interest on corporate securities was defaulted and plaintiff knew of reorganization of defaulting corporations, but defendants who originally induced plaintiff to purchase the securities by fraudulent misrepresentations thereafter continued to conceal true facts and by their conduct caused plaintiff's delay in discovering fraud and commencing action, such conduct created "equitable estoppel" against defendant's asserting statute of limitations, on ground that plaintiff was put on inquiry. Code Civ. Proc. § 338, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

5. Estoppel 🔑52

Where the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, the promisor may not take advantage of the act or omission of the promisee, on ground of "equitable estoppel."

6. Limitation of actions 🔑13

Where delay in commencing action was induced by conduct of the offending party, such party is estopped from taking advantage of the statute of limitations as a defense.

7. Estoppel 🔑53

An "estoppel" may arise although there is no designed fraud on the part of the person sought to be estopped.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

8. Estoppel 🔑95

An "estoppel" may arise from silence as well as words.

9. Estoppel 🔑52

To create an "equitable estoppel," it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power by which he might have retrieved his position and saved himself from loss.

10. Limitation of actions 🔑100(13)

The fact that means of knowledge of fraud are open to a party does not necessarily start running of limitations, and it is only when the circumstances are such that inquiry becomes a duty that the failure to make inquiry becomes a negligent omission for which discovery of fraud is chargeable in advance of actual knowledge. Code Civ. Proc. § 338, subd. 4.

11. Fraud 🔑11(1)

Expressions of opinion not subject to an action for deceit or fraud should be of an opinion honestly entertained, and whether representations are of a fact or matters of opinion depends largely on the circumstances.

12. Appeal and error 🔑997(2)

On appeal from judgment of nonsuit on ground that action for fraud was barred by 3-year statute of limitations, District Court of Appeal could not say as a matter of law that no reasonable conclusion or inference could be drawn from the evidence except that plaintiff had knowledge of facts which should have put her on inquiry before three years had elapsed, or that plaintiff's evidence was so incredible or lacking in support that a judgment in her favor would be required to be reversed, hence the judgment of nonsuit could not be affirmed. Code Civ.Proc. § 338, subd. 4.

13. Appeal and error 🔑105, 870(2)

An appeal from an order granting a nonsuit was not authorized and the order would be reviewed on the appeal from the judgment entered upon the nonsuit.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Chonita P. Laraway against the First National Bank of La Verne, a corporation, and another for damages, exemplary damages, and interest resulting from the alleged fraud of defendants in the sale of securities to plaintiff. From a judgment of nonsuit on ground that action was barred by limitations, plaintiff appeals.

Judgment reversed, and cause remanded for a new trial.

Frank D. Healy, of Claremont, for appellant.

Nichols, Cooper & Hickson and A. L. Hickson, all of Pomona, for respondent First Nat. Bank of La Verne.

Allard, Whyte & Brownsberger, of Pomona, for respondent E. H. Boly.

WHITE, Justice.

This action was begun by the appellant on the ninth day of June, 1937, and thereafter an amended complaint was filed on September 15 of the same year, for the purpose of recovering damages, exemplary damages and interest, resulting from the alleged fraud of respondents in the sale by them to appellant of certain securities, the purchase of which, it is alleged, was induced by fraudulent misrepresentations made by respondent bank acting by and through its cashier, respondent E. H. Boly.

Epitomizing the facts as disclosed by the record, it appears that appellant had resided at La Verne in the county of Los Angeles all her life, was married in 1920, of which marriage one son was born in 1921. Appellant's husband died October 24, 1930. During her married life appellant's only occupation was that of housewife; since 1934 she has been employed by a pump company as Spanish translator and stenographer. According to her testimony, she was inexperienced in business and financial matters. Appellant became acquainted with respondent Boly in the latter's capacity as cashier of respondent bank in 1923. Continuously from January, 1929, to 1936, appellant had maintained a savings account with respondent bank. On December 15, 1930, shortly after the death of her husband, appellant received from the United States Government the proceeds of her husband's insurance policy in the sum of approximately $10,073. On the day she received the government insurance money appellant repaired to respondent bank to deposit the same in her savings account. At the bank appellant encountered respondent Boly, and what then transpired is thus narrated in her testimony: "Mr. Boly was at the window and I gave it to him. He took it and I told him that was all I had. I also told him I had to invest that money in order to have an income for my boy and myself. He then said to me, 'Would you like to buy some bonds, invest it in bonds?' And I said, 'Yes, I would if you could get me some good, safe bonds,' and he said he thought he could and that he would let me know whenever he got the bonds for me. I thanked him and left the bank then. After he entered the amount in my savings bank book I took it and left and he told me he would let me know whenever the bonds came in."

Two days later respondent Boly telephoned appellant that he had procured the bonds for her and requested her to call at the bank, with which request she complied, when, according to appellant's testimony, the following occurred: "He brought these bonds out to me and he told me they were American Natural Gas Corporation and American Commonwealth Power Corporation. He gave me the per cent of each one—one was 6½ and the other 5½—and then he pulled out a blank check to use to draw my savings, to draw the amount out of my savings account, and I signed it for the amount of $10,105.42. I again asked him if they were good bonds and he said yes, that they were safe bonds, so I took them. He handed me the bonds and I took them and he told me to place them in my safe deposit box, which I did at the time he mentioned it. Just as he gave me the bonds and I was going away from the window he said, 'Now, at any time you want to get your money back, Mrs. Laraway, the bank will be glad to take the bonds back.'"

The amended complaint sets forth in three causes of action the various transactions had with respondents. The first cause of action alleges that on December 17, 1930, the appellant purchased from the bank certain debentures of American Commonwealth Power Corporation of the face value of $5,000 and paid therefor the sum of $5,000 and accrued interest of $35.91, aggregating $5,035.91 (these debentures at that time had a ready "over-the-counter" market of 68 cents on the dollar, or $3,400). The second cause of action charges that on the same date and at the same time appellant purchased from the bank certain debentures of the American Natural Gas Corporation of the like face value of $5,000 and paid therefor the sum of $5,000 and accrued interest of $69.51, aggregating $5,069.51 (these debentures had at that time a ready market on the New York Curb Exchange of 28 cents on the dollar, or $1,400). The third cause of action sets forth that on July 30, 1931, appellant purchased from respondent bank a leasehold bond of the Alexandria Hotel Realty Corporation of the face value of $1,000 and paid therefor the sum of $1,000, the market value of this leasehold bond at the time of purchase being 71 cents on the dollar, or $710.

It thus appears from the allegations of the amended complaint that the total price paid for the three securities was $11,000 exclusive of $105.42 accrued interest, while the true total market value of such securities was only $5,510, or an average discount of 50 cents on the dollar. The basis for recovery of damages therefore sounds in fraud and misrepresentation, the character of which misrepresentation and concealment of respondent bank, acting through the medium of its cashier, respondent Boly, is thus set forth by appellant:

"1. That the securities sold to the appellant (except the Alexandria Hotel Realty Corporation leasehold bond) had been purchased by the bank for the appellant, when in fact the securities had been owned by the bank for two and one-half years.

"2. That the securities sold were bonds, when in fact the securities (except the Alexandria Hotel Realty Corporation leasehold bond) were debentures and were 'simply a note'.

"3. That the securities were 'good, safe bonds'; were selling at par on the market; that the fair, reasonable and actual value was par; and that the securities met the requirements and needs of the appellant as a proper investment for her under her circumstances, when in fact the securities were selling at sixty-eight, twenty-eight and seventy-one cents on the dollar as the defendants well knew.

"4. That it was the best advice and counsel of respondents that the appellant should purchase the securities, when in fact the bank was intentionally unloading unsafe securities on an unsuspecting purchaser."

It is disclosed by the record that the above-mentioned American Natural Gas Corporation, following the payment of interest on its debentures due April 1, 1931, defaulted in the payment of the interest due October 1, 1931. The American Commonwealth Power Corporation, following payment of interest on its debentures due May 1, 1931, and November 1, 1931, defaulted in the payment of interest due May 1, 1932. Both corporations were subsequently reorganized, and in November, 1932, the appellant, after consultation with respondent Boly and by reason of his advice exchanged the American Natural Gas Corporation debentures for other securities pursuant to the plan of reorganization, and in September, 1934, according to appellant's testimony, after consultation with respondent Boly and acting upon his advice, she exchanged the American Commonwealth Power Corporation debentures for other securities pursuant to a plan of reorganization. It is not contended, nor does the record indicate, that appellant had any actual knowledge that any of the securities were not selling at par at the time she purchased them, and she did not obtain such information until the summer of 1936.

Trial was commenced before the court sitting with a jury, but when appellant had concluded the presentation of testimony a nonsuit was granted solely and alone on the ground that the action was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure, in the course of which decision the trial court said: "The evidence as to fraud in this case is that the bank sold bonds—Mr. Boly as cashier of the bank sold bonds to the plaintiff at par and concealed from her the fact that they were worth less than par, and that she went to Mr. Boly as her confidential adviser. That is the real meat of this action, the concealment of the market value of the bonds, rather than the misrepresentations as to the par value. If a confidential relationship existed, that concealment is sufficient to constitute fraud, *and for the purpose of this motion I am perfectly willing to hold that it does constitute fraud and there was fraud on the part of Mr. Boly.* However, that took place in 1930, and there is a three-year statute of limitations on an action for damages for fraud. The three years, however, would not begin to run until the plaintiff had notice of some fact or circumstance which would put her on inquiry or arouse her suspicion. In 1931 the evidence shows, the fall of 1931, there was a default in the payment of interest on these bonds; subsequently the company was reorganized. There is no doubt that the failure of a company to pay interest on these bonds and the subsequent reorganization of the company is sufficient to cause suspicion, to arouse the suspicions of any one as to the value of those bonds. * * * In so far as three years has expired since that time the statute has run and the action is barred, because it was not filed until June of 1937. * * *"

However, the evidence in this case discloses that upon the failure of the two corporations to pay the interest on their debentures, as well as upon the occasion of their subsequent reorganization, appellant throughout consulted with respondents and by them was advised, and according to her testimony she believed such advice, which was to the effect that the defaults and reorganizations were due to the depression; that her situation was no different from that of other investors who had suffered losses through the universal economic conditions then existing; and further, that the reorganizations in question did not necessarily mean that appellant would suffer any loss. Indicative of the type of advice and counsel appellant was receiving from respondents is the following letter addressed to the former by respondent Boly, written upon respondent bank's stationery and dated May 11, 1932, some two years following appellant's original transaction with the bank:

"Dear Mrs. Laraway:

"The other day you were in and clipped the coupons from your American Commonwealth Power Corporation bonds amounting to $137.50, which has been returned to us with the notation: 'No Funds'. This came back to us through our corresponding bank in Los Angeles from the New York Trust Company in New York. *From the information we have been able to gather from the bond house through which we purchased these bonds for you,* the Company's earnings have fallen off and they are not paying their interest at this time to safeguard their business. In as much as world wide business conditions have been so depressed, all the companies, the big companies all over the world as well as the smaller ones, have felt the depression and have had to take some action to safeguard their interest. Then, too, they are required to set up a certain reserve for depression and any other contingency that might arise so that they can continue in business and not be forced into bankruptcy.

"We have asked for a complete report in this connection and will keep you informed as to the plans the company is working under. It is the general opinion that the next ninety days should show quite an improvement in business conditions in general over that of the first ninety days of this year. A great many companies and the entire world have been following the action taken by our government relative to the balancing of the budget for the expenditures of our own government. By reason of this uncertainty that has prevailed due to the work of the politicians of Washington, D. C., it has thrown a damper on all business, and as I mentioned previously, has had a very drastic, depressing effect on all business. Nevertheless, the only sane thing to do is to assist in any way possible and hope for the best because the world has never gone through such a condition as now prevails. And too, there is no one exempt from this depression. It has effected all, both large and small. We are enclosing the coupons with your bonds so they will not be misplaced and so that you might know just where they are when we receive word to send them in."

We might here pause to say that the statement contained in this letter advising appellant that "from the information we have been able to gather from the bond house through which we purchased these bonds for you" was a bare falsehood and deception, because it is an admitted fact in this case that respondent bank was itself the owner of the securities sold to appellant, did not obtain them from any bond house for her, and respondent bank had as a matter of fact owned the securities for approximately two and one-half years previously.

[1, 2] It is conceded that the sole and only question presented to us for decision on this appeal is whether the appellant as a matter of law was chargeable with a "discovery" * * * of the facts constituting the fraud * * *" more than three years prior to the filing of the action. Code Civ.Proc., sec. 338, subd. 4. Respondents contend that appellant was in possession of knowledge of sufficient facts which, if she had used ordinary care or prudence, or had made even casual inquiry, would have led to discovery of the alleged frauds prior to the passing of three years from the time of the transactions between the parties in 1930. In the main, this claim is based upon the fact that in her original complaint appellant admitted knowledge of the receivership proceedings in connection with the defaulting corporations and consented thereto in the latter part of 1931; that, as respondent argues, "she knew something was wrong, or at least she must of necessity have concluded that the value of the bonds were in question when they defaulted in payment of interest on May 1, 1932". With these claims of respondent we cannot agree. This being an appeal from a judgment of nonsuit, we must examine the trial court's ruling in the light of the uniform decisions of this state, too numerous to warrant a pause for citation, all of which hold, in effect, that every inference of fact and intendment of law must be liberally construed in favor of sustaining the case made by plaintiff, to the end that causes may be determined upon their merits. That respondents were guilty of false and fraudulent representations cannot be denied. They were acting as agents of appellant to obtain for her

what they characterized as "good, safe bonds", and instead they sold her securities which were principally unsecured debentures owned by them and charged her the par value thereof when they knew that the securities were selling at about half their par value. As agents of appellant the respondents were bound to exercise the utmost good faith to make the best bargain fairly obtainable for their principal. In this obligation which they owed to appellant respondents failed miserably.

[3] Let us now review the course of conduct on the part of appellant to determine whether it supplied evidence of imprudence and negligence upon her part so conclusive that reasonable minds could not differ as to the existence thereof. Following the death of her husband and the receipt of his insurance money, she went to respondent bank, where she and her husband had done business. She went there for the purpose of investing the insurance money that she had received. She trusted respondent Boly, the cashier of the bank, whom she had known over a period of years, to advise and assist her in making the desired investments so that, as she said, she and her son might have some income upon which to live. Subsequently, when the investments defaulted in payment of interest, she went back to the bank to inquire the reason therefor. While the occurrence of such defaults might prompt her to question the soundness of respondent Boly's judgment, surely it was no ground for her to question the integrity of the same. She inquired the reason for the defaults in the payment of interest, and respondents, still concealing from her the fact that they had sold her bonds at par when the same were upon the market at prices much less than par, informed her both in conversations and by letter that the failure of the corporation did not necessarily mean she would lose her money, and that these reorganization plans were due entirely to the business depression. That appellant relied upon respondents' representations and believed in the integrity thereof is indicated by the fact that she continued to apply to respondent Boly for advice and continued to keep her account in the bank until in 1936 she met the witness Robert P. Gibson, who was engaged in the investment security and industrial loan business, and who had many years' experience in buying, selling and dealing in stocks, bonds and securities. To Mr. Gibson appellant imparted the information concerning her purchase of the securities from respondent bank, and the former told her he would make an investigation concerning the same. A short time later Mr. Gibson contacted appellant and advised her that at the time respondents sold her the American Commonwealth Power Corporation securities at par the same were selling at 68 cents on the dollar; that American Natural Gas Corporation debentures sold by respondents to appellant at par were selling at that time for 28 cents on the dollar, and that the Alexandria Hotel Realty Corporation bond, which respondents had sold appellant at par, was at the time of such purchase selling at a price less than par. Approximately one year thereafter appellant filed this action. May it not reasonably be inferred from the foregoing that by respondents' conduct toward her, appellant was lulled into a sense of security in the belief that by following the advice of her banker she would probably recoup her losses? Pertinent indeed to the facts of this case is the language found in Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243, 249, as follows: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. The present case is not of that character."

Courts will not put their imprimatur upon a possible but antiquated authority that a person must assume that everyone with whom he has a business transaction is a rogue and act accordingly, but rather will hold that one can act upon the presumption that there exists no intention to cheat or defraud him (Tidewater Southern Ry. Co. v. Harney, 32 Cal.App. 253, 260, 162 P. 664); or as was said in Tracy v. Smith, 175 Cal. 161, 165, 165 P. 535, 537, "the fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity"; and again, in Togni v. Taminelli, 11 Cal.App. 7, 14, 103 P. 899, 902, we find the following: "No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated."

[4-9] We hold that the evidence in this case is reasonably susceptible of the conclusion that there existed a continuing confidential and fiduciary relationship between the parties commencing with the time in 1929 when appellant first purchased securities through the respondent bank up to the discovery of the misrepresentations in 1936. We are satisfied from the evidence before us that the delay upon appellant's part about which respondents complain was induced by their own representations to her, and that by reason thereof, even though we concede that the statute of limitations commenced to run as contended for by respondents, they were estopped from taking advantage of the statute. In Calistoga Nat. Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 72, 46 P.2d 246, 249, it is said: "It is a well-established rule of law that when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promisor is estopped from taking advantage of the act or omission of the promisee. The violation of such a promise amounts to fraud and estops the promisor from repudiating the agreement on the doctrine of equitable estoppel." Respondents not only falsely represented that they had procured the securities "from a bond house", when in fact respondent bank had owned them for two and one-half years; they not only falsely represented that the securities were bonds, when in fact, with the exception of the Alexandria Hotel Realty Corporation bond, they were merely unsecured corporation debentures; not only impliedly represented by reason of their confidential relationship with appellant that such securities were selling at par on the market, when in fact, as known to respondents, they were selling at 68, 28 and 71 cents on the dollar; not only represented that the securities met the requirements and needs of appellant under her circumstances—but after default in the payment of interest on the securities, respondents continued to advise and counsel appellant to exchange her securities for reorganization stocks and to tell her that the drop in prices on her securities was due to the depression, when in fact such securities had been selling below par at the time respondents sold them to her. This course of conduct on the part of respondents created an equitable estoppel, for it is the rule that when a defendant electing to set up the statute of limitations has previously by deception or any violation of duty toward the plaintiff caused the latter to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the courts will not allow him to hold. 37 Cor. Jur. 725, 726. Where, as here, the delay in commencing action was induced by the conduct of the offending party, it cannot be availed of by the latter as a defense. Mitchell v. J. H. Roth & Co., 124 Cal.App. 96, 99, 12 P.2d 91. The rule is thus stated in Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 683, 93 P. 1021: "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. * * * An estoppel may arise also from silence as well as words." To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." 2 Pom.Eq.Juris., 4th Ed., sec. 812, p. 1671.

[10, 11] The fact, as urged by respondents, that means of knowledge were open to appellant, does not necessarily debar her from relief. It is only when the circumstances are such that inquiry becomes a duty that the failure to make it becomes a negligent omission. Denson v. Pressey, 13 Cal.App.2d 472, 476, 477, 57 P.2d 522. We find nothing in the evidence here that would excite the suspicions of an ordinarily prudent person situated as appellant was or that would put him on inquiry. Even if we concede that some of the representations made by respondents related more or less to matters of opinion, nevertheless expressions of opinion, to avoid an action for deceit or fraud, should be of an opinion honestly entertained by the person making the same (MacDonald v. De Fremery, 168 Cal. 189, 142 P. 73; Phelps v. Grady, 168 Cal. 73, 141 P. 926; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125); and whether representations are of a fact or matters of opinion depends largely on the circumstances. Hall v. Mitchell, 59 Cal.App. 743, 211 P. 853; Hodgkins v. Dunham, 10 Cal.App. 690, 103 P. 351. As was said in Zwart v. Landfield, 93 Cal.App. 328, 333, 269 P. 740, 742: "* * * Moreover, the expression of opinion may amount to fraud where it

is accompanied by active misrepresentations or concealment, or where it relates to a subject as to which the parties have no knowledge or means of ascertaining the truth. * * * The general rule is that one has a right to rely on statements of material facts essentially connected with the substance of the transaction where one of the parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is also aware that reliance is being placed on his representations, and that the facts are not, and cannot be expected to be, within the first party's knowledge (12 Cal.Jur. 754, and cases cited): and, if one material statement be false, it is sufficient ground for rescission. Beeman v. Richardson, 185 Cal. 280, 196 P. 774). * * *"

[12] Under the familiar rules governing the power of the court in passing upon a motion for a nonsuit, such motion should have been denied in the instant case. Before we can affirm the judgment in this case we must say as a matter of law that no reasonable conclusion or inference can be drawn from the evidence except that appellant had ample knowledge of facts which should have put her on inquiry before three years had elapsed from the time of the transactions in 1930, or we must say that the evidence adduced in favor of appellant is so incredible or so lacking in support that if appellant had recovered a judgment we would be compelled to reverse it on appeal. The facts of this case as outlined do not permit us to say either the one or the other, and would not permit us to do the latter.

We find no error in the rulings of the trial court on the admission of evidence as to other and similar transactions upon the part of respondents, sought to be shown on the theory that they were admissible to prove the fraud alleged in connection with the transaction under investigation.

It should be understood that this opinion is written in the light of the rule applicable to cases where the appeal is taken from a judgment following a directed verdict or nonsuit, and by which rule the appellate tribunal is required to take the evidence in the most favorable light to the losing party in the court below. As to the weight of the evidence or its truth or falsity, we are expressing no opinion.

[13] The attempted appeal from the order granting the nonsuit is dismissed for the reason that such appeal is not authorized and the order is reviewed on the appeal from the judgment entered upon said nonsuit.

For the reasons herein stated, the judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

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39 Cal.App.2d 732

YOUNG et al. v. VENTURA COUNTY.

Civ. 12552.

District Court of Appeal, Second District,
Division 2, California.

July 1, 1940.

Hearing Denied Aug. 29, 1940.

1. Counties 🔑213

The statute providing that claim against county for damage to property resulting from dangerous condition of public works, must be filed with county clerk within 90 days after accident, is "mandatory," and action to recover such damage cannot be maintained unless claim was so filed. Gen. Laws 1931, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Counties 🔑210

The right to sue county for damage to property resulting from dangerous condition of public works is conferred by statute, and procedure set forth therein must be followed. Gen.Laws 1931, Act 5149, § 1.

3. Counties 🔑213

The statutory requirement that claim must be filed with county clerk before a party may maintain an action for damage against county cannot be waived by county officials. Gen.Laws 1931, Act 5149, § 1.

4. Eminent domain 🔑72

Compliance with statutory requirement that claim against county for damage to property resulting from dangerous condition of public works must be filed with county clerk within 90 days after accident is not violative of property owner's constitutional right to compensation for property taken or damaged for public use. Gen.Laws 1931, Act 5149, § 1; Const. art. 1, § 14.

5. Counties ⚷213

The word "accident" in statute providing that claim against county for property damage or personal injury resulting from dangerous condition of public works must be filed with county clerk within 90 days after "accident" includes the word "injury". Gen.Laws 1931, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Accident".

6. Counties ⚷213

Compliance with statutory requirement that claim against county for damage to property resulting from dangerous condition of public works must be filed with county clerk within 90 days after accident, is prerequisite to maintenance of property owner's action against county for such damage. Gen. Laws 1931, Act 5149, § 1.

7. Counties ⚷209

The enactment of statute establishing procedure necessary for enforcement of property owner's claim against county for damage to property resulting from dangerous condition of public works was within province of legislature. Gen.Laws 1931, Act 5149.

8. Eminent domain ⚷71

Where State Constitution does not provide the mode for the taking or for the payment of private property, the mode of procedure can be provided by either statutory or charter provisions.

9. Counties ⚷213

Landowners not complying with procedure established by legislature for enforcing their claims against county for damage to property resulting from dangerous condition of public works would be deemed to have "waived" their right to enforce the claim. Gen.Laws 1931, Act 5149.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

10. Counties ⚷213

The 90-day period provided in statute requiring that claim against county for damage to property resulting from dangerous condition of public works must be filed with county clerk within 90 days after accident, began to run from date of accident and not from date that property owners ascertained extent of damage. Gen.Laws 1931, Act 5149, § 1.

11. Counties ⚷213

The purpose of statute providing that claim against county for damage to property resulting from dangerous condition of public works must be filed with county clerk within 90 days after accident, was to give county notice that county would be called upon to make payment, and to enable county to investigate circumstances at such time as facts could be ascertained and thereby negotiate a settlement or prepare a defense. Gen.Laws 1931, Act 5149, § 1.

12. Constitutional law ⚷309(1)

Compliance with statutory requirement that claim against county for damage to property resulting from dangerous condition of public works must be filed with county clerk within 90 days after occurrence of accident, would not deprive property owners of "due process of law". Gen.Laws 1931, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

13. Counties ⚷213

A storm ditch constructed and maintained by county to carry off storm waters was a "public work" within statute providing that claim against county for damage to property resulting from dangerous condition of public works must be filed with county clerk within 90 days after occurrence of accident, whether constructed on public property or on private property or over property on which county may have had only an easement. Gen.Laws 1931, Act 5149, § 1; Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Work".

14. Counties ⚷204(1), 209

The provision in statute imposing liability on counties for injuries to property resulting from dangerous condition of public works, permitting counties to insure against such liability, did not invalidate statute by delegating power of county officials to insurance companies, where statute specifically authorized county officials to reject claims in accordance with their judgment and to defend actions in court on behalf of the county. Gen.Laws 1931, Act 5149, § 3; Act 5619, § 2.

Appeal from Superior Court, Ventura County; Raymond McIntosh, Judge.

Action by Milton K. Young and another against Ventura County, a body politic and corporate, and a political subdivision of the State of California, to recover damages alleged to have been suffered when plaintiffs' real property was injured by flood water. From the judgment the plaintiffs appeal.

Affirmed.

Robert M. Clarke, of Los Angeles (Milton K. Young, of Los Angeles, of Counsel), for appellants.

M. Arthur Waite, Dist. Atty., and Julien G. Hathaway, Deputy Dist. Atty., both of Ventura, for respondent.

WOOD, Justice.

Plaintiffs commenced this action to recover damages alleged to have been suffered when their real property was injured by flood water. A demurrer was sustained without leave to amend and the appeal is prosecuted from the judgment thereafter entered. In sustaining the demurrer the superior court based its ruling upon the failure of plaintiffs to file with the clerk of defendant county a verified claim in writing within 90 days after the storm which caused the damages. On this appeal plaintiffs argue that the ruling of the lower court results in a denial of their right to compensation for property taken or damaged for public use as guaranteed by section 14 of article I of the Constitution of California; also that their property has been taken without due process of law; and that the period of 90 days within which they were required to file a claim did not commence to run until they could ascertain the amount of their damages.

In their complaint plaintiffs allege that they are the owners of certain orchard land in the county of Ventura near the town of Piru; that for many years prior to March 2, 1938, defendant county "assumed the management and control" of storm waters flowing down and from Nigger canyon, during which time plaintiffs maintained an embankment along their property adjacent to Nigger canyon to protect it from the waters of the canyon; that during the years preceding 1938 defendant deepened and widened the storm ditch in the canyon and constructed a steel and wire revetment, thereby diverting storm waters from their natural channel; that the natural channel was abandoned by defendant; that notwithstanding the repeated written request of plaintiffs to defendant to discontinue the use of the new channel defendant failed to do so; that on March 2, 1938, torrential rains fell in the area, and the ditch of which complaint is made carried the heavy run-off with force and violence from Nigger canyon against plaintiffs' embankment, flooding plaintiffs' land to their serious damage; that the new channel constructed by defendant was upon privately owned property.

[1-3] The provision requiring the filing of a written claim for damages is found in act 5149, Deering's General Laws of California, Statutes of 1931, page 2562, § 1, and is as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." It is alleged in the complaint that plaintiffs' claim was filed with the county auditor of defendant county on or about December 28, 1938, clearly a date much later than ninety days after the storm of March 2, 1938. Compliance with the ninety-day provision contained in act 5149 is mandatory and no action of the kind under review can be maintained unless it be established that the claim was filed as provided in the statute. Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29. The right to sue the county in actions such as the present one is conferred by statute and the procedure set forth in the statute giving them the right to sue must be followed. Plaintiffs' cause of action rests upon the provisions of act 5619, Deering's General Laws, Statutes of 1923, page 675, section 2, from which we quote: "Counties, municipalities and school districts shall be liable for injur-

ies to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition [etc.] and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition * * *." Act 5149 establishes the procedure which must be followed before the court can entertain an action by plaintiffs to enforce their rights. The requirement that claims must be filed with clerks of legislative bodies before a party may maintain an action for damages against a political subdivision of the state government has been upheld in a number of decisions by California reviewing courts. Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028; Myers v. Hopland U. E. School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Thompson v. County of Los Angeles, 140 Cal.App. 73, 75, 35 P. 2d 185. The statutory requirement may not be waived by the officials of the county. Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035.

[4, 5] Plaintiffs' point that compliance with the ninety-day period for filing their claim is violative of their constitutional rights was passed upon adversely to their contention in Yonker v. City of San Gabriel, supra, where the facts presented a situation very similar to that now before us. In the Yonker case surfacing material impregnated with oil was placed by the defendant city on an abutment of a municipally-owned bridge. Storm waters washed the surfacing material over plaintiff's land, causing damage. In reversing a judgment in favor of the plaintiff the appellate court reviewed the law and authorities on the subject, pointed out that at the time the material was dumped by the agents of the city of San Gabriel upon the abutments of the bridge no property of plaintiff was either taken or damaged, and ruled that the plaintiff's constitutional right was not violated. It was also there held that the word "accident" used in the statute should be construed as including the word "injury". We are in accord with the reasoning and ruling of the Yonker case. At the time the acts complained of were performed by defendant county no property of plaintiffs was taken or damaged.

[6-9] Even if it be assumed that defendant's action resulted in the "taking or damaging of private property for public use" in violation of the constitutional provision, we would still be compelled to hold that the requirement of the filing of the claim within the period fixed by the legislature would be prerequisite to the maintenance of an action by plaintiffs. The constitution declares the right but does not provide the procedure by which the right may be enforced, and the legislature acted within its province in establishing the procedure necessary for the enforcement of the right. "When a state Constitution such as ours provides neither the mode for the taking or for the payment of private property, the mode of procedure may be provided by either statutory or charter provisions." Crescent Wharf, etc. Co. v. City of Los Angeles, supra [207 Cal. 430, 278 P. 1030]. By failing to comply with the procedure established by the legislature plaintiffs are deemed to have waived their right to enforce payment. Musto-Keenan v. City of Los Angeles, 139 Cal.App. 506, 511, 34 P.2d 506; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; Yonker v. City of San Gabriel supra.

[10-12] The contention of plaintiffs that the law should be so interpreted that the ninety-day period commences to run after they had ascertained the extent of the damages cannot be sustained. The statute, which is free from ambiguity, makes no exception whatever to the requirement that the claim must be filed within 90 days. It has been held that a minor is bound by its provisions. Phillips v. County of Los Angeles, 140 Cal. App. 78, 35 P.2d 187. In Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580, it was held that the physical disability of an injured person did not furnish an excuse for failure to comply with the statutory requirement for filing a claim. The purpose of the law requiring an early filing of a claim is to give the county notice that it will be called upon to make payment and to enable it to investigate the circumstances at such time as the facts can be ascertained and thereby negotiate a settlement or prepare its de-

fense. This is a reasonable provision on behalf of the county and it causes no hardship upon the claimants. Plaintiffs were not called upon to file more than a general statement of their claim, which could doubtless be prepared within a period of ninety days. If their claim could not be settled by negotiation with the authorities of defendant county, accurate and complete proof of the extent of the damages could be prepared for an action in court. In this regard they are in no different position from that of most of the claimants for damages for personal injuries, who as a general rule cannot determine the exact amounts of their damages within ninety days from the dates of the accidents. Plaintiffs cannot successfully argue that by the statutory requirement of filing a claim they were deprived of due process of law. The legislature has furnished due process to them but they did not avail themselves of it.

[13] The storm ditch constructed and maintained by defendant county unquestionably comes within the classification of "public works" as this term is used in the statutes giving plaintiffs a right of action and prescribing the procedure for their action. It was designed to subserve a purpose of public use and convenience in carrying off storm waters in the area in which it was constructed. It was not necessary that it be constructed upon public property, but it could be constructed and maintained by the county upon private property. Kahrs v. County of Los Angeles, supra. The ditch having been constructed by the county did not become other than a public work by reason of its construction over property upon which the county may have had only an easement. The statutes in question do not provide that the public works be constructed upon property owned by the political subdivisions referred to therein.

[14] Plaintiffs present the argument that Act 5149 should be declared void and against public policy because of its insurance provisions. In section 3 of the act it is provided that "counties, cities and counties, or school districts, may insure against any liability, other than [certain exceptions] for injuries or damages arising from the dangerous or defective condition of public streets, highways [etc.] either by self-insurance, or in any insurance company authorized to transact the business of such insurance in the state of California; and the premium for such insurance shall be a proper charge against the public treasury of such municipality, county, city and county, or school district, as the case may be". In an ingenious and somewhat enlightening argument counsel for plaintiffs assert that it is the common practice in the courts for an insurance company attorney to take charge of the defense of a negligence action. From this they argue "that the result of such insurance provision is to take out of the hands of the Board of Supervisors of a county the right and power of decision as to the payment of claims arising under the Act in question, an unconstitutional delegation of powers which should make the insurance provisions of the Act null and void". They further argue that the claimant, instead of dealing with the board of supervisors, is in fact dealing with the insurance company, which "most likely is giving directions to the Board and to the District Attorney of the county as to what shall be done, all of which the innocent claimant is wholly unaware". We are not called upon to pass upon the propriety of such conduct on the part of boards of supervisors and district attorneys if in fact such practice generally prevails. Suffice it to say that we find nothing in the law by which any power of the constituted authorities is delegated to an insurance company. Regardless of the insurance provisions of the statute, the board of supervisors is authorized to reject claims in accordance with its judgment and to defend actions in court on behalf of the county.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

NEIL v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 11958.

District Court of Appeal, Second District, Division 1, California.

July 8, 1940.

Hearing Granted Sept. 4, 1940.

1. Negligence ⚷134(7)

A bank's customer could not recover for injuries resulting from fall by slipping on wet linoleum on floor of banking room after it had been raining, where there was no evidence that bank had actual or constructive notice of presence of wet and muddy footprints on the floor.

2. Negligence ⚷125

In action for injuries to bank's customer who fell on wet floor of banking room, evidence that witness had slipped on floor involved some 11 months prior to accident was improperly admitted in absence of showing that former accident occurred under substantially the same circumstances.

◆

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Elsie V. Neil against the Bank of America National Trust & Savings Association and others, to recover for injuries sustained by plaintiff who fell on the floor of named defendant's banking room. From a judgment for plaintiff, and from an order denying named defendant's motion for judgment notwithstanding verdict, or in the alternative for a new trial, named defendant appeals.

Reversed.

Sidney A. Moss, of Los Angeles, for appellant.

Henderson & Churchill, of Santa Paula, and Roland Thompson and James L. Davis, both of Santa Ana, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment entered pursuant to the verdict of a jury awarding respondent damages in the sum of $3,000 for injuries sustained when she fell on the floor of appellant's banking room at Camarillo, California, and also an appeal from the order denying appellant's "motion for judgment notwithstanding the verdict or in the alternative for a new trial".

It is revealed by the record that on December 1, 1937, respondent, an employee of the Camarillo State Hospital, left that institution shortly before two o'clock in the afternoon during a drizzling rain and was transported by Bert O. Brown in his automobile to appellant's bank where she was accustomed to do business, in order that she might cash a check.

She entered the bank and had advanced "three to five steps", about "four feet" away from the front door, when she slipped and fell, sustaining a Colles' fracture of the left arm just above the wrist. Respondent testified that she did not notice the condition of the floor when she went into the bank, but after she fell she observed that it was "wet and muddy", and that the heel of her shoe had left a skid mark six to eight inches long; that she examined her shoes and found mud on the upper outside portion of her right shoe; that at the point where she fell it "looked more as if it was a number of foot prints like a number of people had been in and tracked over this" for a space of about two feet; that "it was pretty wet, and made a kind of solid kind of a film"; that she finished her business with the bank and sought medical attention. The physician who attended her testified that the said fracture was reduced under anesthetic and the arm kept in a plaster cast for four weeks, after which it was put in splints, followed by treatments. Respondent was unable to return to her work for a period of three months.

The local manager of the bank, Harold G. Moody, testified when called by respondent under section 2055 of the Code of Civil Procedure, that the dark green composition linoleum had been on the floor of the banking room since 1934; that in order to keep it clean the janitor used each day a sweeping compound composed of an oily substance and sawdust; that on rainy days a small amount of water would be tracked in; and he had observed at those times "more or less of a footprint of mud" on the linoleum; that the said linoleum had been waxed from time to time, although in relation to the day of the accident, he did not recall when it had last been done. He also stated that his location in the banking room commanded a full view of the front entrance and of the floor in general, and that the front door, which was approximately five feet in width, remained open to the weather on the day in question. When called by appellant, this witness qualified said statements by testifying that he had never seen the floor cleaned during the year 1937, and did not know, and in fact only presumed, that the sweeping compound contained an oily substance; that he opened the bank at 9:30 o'clock in the morning on December 1, 1937, at which time there was neither mud nor footprints, or other foreign substance on the floor; that in the half hour previous to the accident probably but six persons had entered the bank; that Mr. Sawtelle entered only a few moments before respondent, and although he (Moody) had occasion to look toward the door during a period of fifteen minutes prior to Mr. Sawtelle's arrival at the bank, he saw no footprints, mud or other foreign substance on the floor.

The witness Sawtelle testified that he was in the bank at the time of the accident and was standing talking to Mr. Moody; that he helped to pick respondent from the floor after she fell; that although it had rained earlier in the day, it was not raining at that time, and he noticed that respondent had mud on her shoes; that there was mud on the floor where she was standing and "where she had tracked it"; that the rest of the floor was clean; that when he went into the bank "the floor was clean. There weren't any mud prints on the floor, and when I went to the window I didn't notice whether there were any mud prints at the window. But when I picked her up I noticed there was mud on her shoes and mud where she was standing on the floor."

The witness Brown testified that he called with his automobile at the state hospital on December 1, 1937; that it was raining, and respondent walked on a rough brick walk from the nurses' quarters to his car, and that he drove her to the bank, where she left his car and walked on a cement walk to the door of the bank.

Over the objection of appellant, on the ground of remoteness and that it did not tend to prove or disprove any of the issues of the case, the witness Salsman was permitted to testify that in January, 1937 (eleven months prior to the time the accident herein occurred) he entered the bank early in the morning after it had rained the night before and slipped on the floor which "was tracked all over with foot prints from the wetness of the weather at that time".

Appellant contends that the judgment is not supported by the evidence, and assigns as error the admission in evidence of a prior accident; the denial of its motions for directed verdict and for judgment notwithstanding the verdict or to alternatively move for a new trial.

In connection with its contention with respect to the insufficiency of the evidence, it urges that in order for respondent to recover damages for the alleged negligence of the bank, she must show (1) that the bank had actual or constructive notice of the presence of wet and muddy footprints on the floor of its premises; and (2) "the length of time during which the substance which caused the slipping was on the floor".

[1] This latter contention of appellant must be sustained, because of the complete lack of any evidence that the bank had notice of the presence of such footprints on the floor of its banking room. For all that appears, respondent tracked into the banking room the mud and water which caused her to slip and fall upon the linoleum.

In the case of Crawford v. Pacific States S. & L. Co., 22 Cal.App.2d 448, 449, 71 P.2d 333, it was stated, quoting from Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 66, 44 P.2d 405:

" 'The proprietor of buildings who directly or by implication invites others to go therein owes to such persons who thus enter a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils. He is not an insurer of such persons, nor does the mere occurrence of injury on such premises to such invitee create any presumption of negligence on the part of the proprietor. His responsibility is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. The true ground of liability rests on the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to invitees, over that of the invitee. Where such danger is obvious, or is as well known to the injured invitee as to the owner or occupant, there is no liability.' Citing numerous cases.

"The general rule is stated in 45 Corpus Juris, 837, § 245: 'In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises the condition must have been known to the owner or occupant or have existed for such time that it was the duty of the owner or occupant to know of it.' Citing the California case, Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793."

In the circumstances presented by the facts herein, the conclusion is irresistible that the danger incident to stepping upon linoleum on a rainy day, either with wet and muddy shoes or after the floor had been tracked by previous customers with wet and muddy shoes, was as obvious to respondent as it was to the manager of the bank.

"While it is true that evidence as to previous accidents is admissible upon the general proposition that testimony of previous accidents tends to show the dangerous character of the place, tends to disclose the cause of the later accident, and bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place, yet the inquiry as to previous accidents must refer to accidents similar to the one in question, occurring under substantially the same circumstances that surrounded the subsequent accident." (Citing cases.) Thompson v. Buffums', Inc., 17 Cal.App.2d 401, 404, 62 P.2d 171, 172.

[2] Viewed in the light of the rule enunciated by the cited case, it was error to allow Mr. Salsman to testify that he had slipped on the floor in question some eleven months prior to the instant accident, in the absence of a showing that it occurred under substantially the same circumstances.

The judgment and order appealed from are, and each of them is, reversed.

We concur: DORAN, J.; WHITE, J.

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40 Cal.App.2d 18

PEOPLE v. FULLER.

Cr. Nos. 1725–1728.

District Court of Appeal, Third District, California.

July 3, 1940.

1. False pretenses ⇨49(3)

Evidence of handwriting expert that four checks were in the same handwriting and that they were all written by the same person who signed affidavit, which was admittedly signed by defendant, and positive identification of defendant as the person who cashed two of the checks, warranted conviction for issuing all four checks without sufficient funds with intent to defraud.

2. Criminal law ⇨720(6)

A prosecuting attorney, in considering the effect or weight of evidence, should avoid expressing his opinion as a fact.

3. Criminal law ⇨722(2)

A prosecuting attorney's statements that defendant had thoroughly convinced him that there were people who were just born to get by on their own ingenuity and that that was the reason that defendant did not want an attorney, were not prejudicial.

4. Criminal law ⇨589(1)

The refusal to grant defendant a continuance was not error, where defendant insisted on acting as his own attorney contrary to advice of trial court, and trial court informed defendant prior to trial that no continuances could be granted, and defendant stated on day of trial that the defense was ready, and defendant stated at conclusion of people's case, after naming certain witnesses which he wanted present and which were made available to him, that he had no other witnesses and no other evidence to offer.

5. Criminal law ⇨939(1)

The refusal to grant defendant a new trial on ground of newly discovered evidence was not abuse of discretion, where no showing of diligence was made and defendant stated that he was ready for trial and at end of his case made no request for continuance or stated he desired to prove an alibi or was unable to obtain evidence to establish such fact.

6. Criminal law ⇨814(3)

The refusal of proffered instruction based on statute relating to effect of evidence was not error, where record did not contain any evidence justifying such an instruction. Code Civ.Proc. § 2061.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Frank Fuller was convicted for issuing bank checks without sufficient funds with intent to defraud, and he appeals.

Affirmed.

Frank Fuller, in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Four indictments were brought against defendant and were consolidated for trial. Upon each of these indictments defendant was found guilty, and prosecutes this appeal from the several judgments and from orders denying motions for a new trial.

Each indictment charged a separate offense of issuing a bank check without sufficient funds with intent to defraud, each check having been presented to and cashed by a different place of business. These checks were dated in March, 1937. The defendant was indicted in May, 1939, and the trial was held in January, 1940.

Appellant presents five points upon which he relies for reversal.

The first point is that the evidence was insufficient to support the verdict. There is no contention that the checks were not fictitious or that there were funds in the bank upon which they were drawn to pay upon presentation. Witnesses identified defendant as the man who presented the checks and received the money thereon, at two of the places of business. In another the identification was somewhat uncertain, and in the fourth place no one could identify appellant as the one who presented the check.

[1] Mr. Charles Stone, handwriting expert of the state bureau of criminal identification, testified definitely that the handwriting upon all of the checks was the same, and that they were all written by the same person who signed "Frank Fuller" to an affidavit, which was admittedly signed by appellant. The several checks were introduced at the trial and examined by the jury. In view of the positive identification by at least two of the people who cashed the checks, the testimony that the checks were all in the same handwriting, is ample to support the verdicts of guilty.

It is next claimed the prosecuting attorney was guilty of misconduct. This asserted misconduct is in statements to the jury by the district attorney, referring to appellant: "I have never seen one who so thoroughly convinced me that there are people who are just born to get by on their own ingenuity. Now, that is the reason that the man didn't want an attorney," and others of similar import.

[2, 3] In the first place there was no objection made to the remarks of the district attorney nor citation of misconduct, and furthermore the remarks were not of such a degree of impropriety as to justify a reversal. A prosecuting attorney, in considering the effect or weight of evidence, should avoid expressing his opinion as a fact, but it cannot be held to have here seriously prejudiced the right of appellant.

[4] Complaint is made of the order refusing to grant appellant a continuance, but no proper showing was made for such continuance. Appellant, contrary to the advice of the court, insisted upon acting as his own attorney, and on more than one occasion prior to the trial, the trial judge told him no continuances could be granted and on the day of the trial the defendant, in answer to the question of the court, answered: "The defense is ready." At the conclusion of the People's case the defendant, after naming certain witnesses he wanted present—who were made available to him—stated he had no other witnesses, and no other evidence to offer.

[5] Complaint is made also of the order refusing to grant a new trial on the ground of newly discovered evidence. No showing of diligence was made; appellant stated he was ready for trial, and at the end of his case made no request for a continuance or stated he desired to prove an alibi, or was unable to obtain evidence to establish such fact. No abuse of discretion was shown in denying the motion for a new trial.

[6] Also no error was made in refusing a proffered instruction based upon section 2061 of the Code of Civil Procedure. The record does not contain any evidence justifying such an instruction.

Appellant was fairly tried and properly convicted. He was offered the aid of counsel but elected to conduct his own defense, which he did with considerable skill. The court was always fair and considerate of his rights, extending to him every privilege possible, and at times guiding the examination along channels of inquiry that appellant was apparently unable to bring out by himself.

The evidence fully justifies the verdict of the jury. The judgments and orders are affirmed.

FORBES v. BOARD OF MISSIONS OF METHODIST EPISCOPAL CHURCH, SOUTH, et al. *

Civ. 6384.

District Court of Appeal, Third District, California.

July 1, 1940.

Hearing Granted Aug. 29, 1940.

1. Joint tenancy 🔑1

A "joint tenancy" is an estate held by two or more persons jointly which on the death of one vests in the survivor or survivors until there is but one survivor, whereupon it vests in such sole survivor absolutely.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

2. Joint tenancy 🔑6

Where one of the parties to a "joint tenancy" dies, he merely drops out of the title and his interest ceases, and the title remaining vests in the survivor under the original deed, since the theory of survivorship is that the fee title as a whole is vested in each of the tenants subject to the life estate of the others, and not that any title is derived by the survivor from his deceased cotenant.

3. Husband and wife 🔑14(3)

Where realty was owned in joint tenancy by husband and wife, title was exclusively in wife on death of husband.

4. Husband and wife 🔑14(3)

Where husband and wife conveyed realty owned in joint tenancy to church mission board reserving a life estate to themselves or the survivor, and also executed an agreement referring to themselves as "parties of the second part" requiring board, among other things, to educate their nephew for the ministry should they die before his education was completed, in absence of an exclusive joint obligation in the agreement, the presumption was that it was a "joint and several obligation" binding on wife after husband's death even though not accepted until after husband's death. Civ. Code, § 1659.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint and Several Obligation".

5. Husband and wife 🔑14(3)

An agreement executed by husband and wife who conveyed realty owned in joint tenancy to church mission board reserving a life estate to themselves or the survivor requiring board, among other things, to educate their nephew for the ministry should they die before his education was completed, was not revoked by board's failure to accept agreement until after six months had elapsed, where husband and wife knew that board had its place of business in Tennessee, preliminary negotiations had been unhurried, and it was necessary for board's representative to come to California, appraise realty, and report back to board.

6. Husband and wife 🔑14(3)

Where husband and wife conveyed realty owned in joint tenancy to a church mission board reserving a life estate to themselves or the survivor, even if agreement requiring board, among other things, to educate their nephew for the ministry should they die before his education was completed, was a joint offer, it survived husband's death and was binding on wife when accepted by board after husband's death. Civ.Code, § 1543.

7. Fraud 🔑10, 11(1)

A representation constituting a misrepresentation concerning a matter of law and the mere opinion of the defendants would not be actionable.

8. Husband and wife 🔑14(3)

Even if agreement executed by husband and wife who conveyed realty owned in joint tenancy to church mission board reserving a life estate to themselves or survivor requiring board, among other things, to educate their nephew for the ministry should they die before his education was completed, was an offer which was revoked by husband's death or by an unreasonable delay in acceptance, the agreement became binding on wife, where she accepted it and signed a receipt when agreement was returned executed by board.

◆

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Charles Forbes, as executor of the will of Erolinda Moreno Zapata, deceased, against the Board of Missions of the Methodist Episcopal Church, South, and another, to cancel a deed and an agreement. From a judgment for plaintiff, defendants appeal.

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* Subsequent opinion 110 P.2d 3.

Reversed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellants.

Bachtell & Clanton, Constance Leitch, and S. N. Bachtell, all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

This is an appeal from a judgment quieting title to certain real property, and canceling a deed and contract covering the property and directing a reconveyance to the heirs at law of Erolinda Moreno Zapata, the grantor.

On April 23, 1932, Apolonio Bailon Zapata and Erolinda Moreno Zapata, his wife, owned, as joint tenants, the several parcels of improved and income producing real property described in the complaint. They had no children, their nearest relatives being nephews and nieces, with whom they were not particularly cordial. Mr. and Mrs. Zapata were of Spanish descent. Mr. Zapata could speak English and was a teacher of Spanish carrying on his work up to within a month of his death. Mrs. Zapata could not speak English very well, although she could understand the language. They were interested in, and members of, the Homer Toberman Mission in Los Angeles, a religious activity under the jurisdiction of the Methodist Episcopal Church, South, and for many years Mr. Zapata had been president of its local governing board, and as such had the supervision of its business affairs. Mr. and Mrs. Zapata had often expressed a desire to do something in a financial way for the church with which the mission was affiliated, and in April, 1932, a grant deed was prepared conveying the property in question to the board of missions of the Methodist Episcopal Church, South, hereinafter referred to as the board, reserving, however, a life estate therein to the grantors or the survivor of them. At the same time an agreement was drawn up, providing, among other things, that the board would, in case of necessity, join with the grantors or their survivor in quitclaiming such portions of the property as might be necessary to be sold for actual necessities, should the occasion require. It also required that the board should educate for the ministry, Antonio Alberto Zapata, a nephew of the grantors, if he should so desire.

These two documents were prepared, and on May 14, 1932, were read to the grantors, and were also translated into the Spanish language for their better understanding. After some corrections the instruments as above outlined were signed by Mr. and Mrs. Zapata and given to a Mr. Fitzgerald, who was, in writing, authorized to deliver the deed and agreement to the board, which was a foreign corporation, having its principal place of business in Tennessee. On July 7, 1932, Mr. Zapata died.

On December 31, 1932, the deed duly executed, was returned by the board to Mr. Fitzgerald, and he was directed to record the same, which he did. A few days later the agreement was also returned, signed by the board and given to Mrs. Zapata, the receipt of which she acknowledged in writing. On November 14, 1935, Mrs. Zapata died, and shortly thereafter this action was brought to cancel the deed and agreement.

It is the contention of the executor, the respondent herein, that the Zapatas made a joint offer or proposal which was intended to be accepted during their joint lives, and no action having been taken by the board until after the death of Mr. Zapata, a revocation occurred, and the subsequent attempt to accept and record the deed was a nullity. This was also the theory adopted by the trial court, for it found in effect that on the 14th day of May, 1932, Mr. and Mrs. Zapata made a joint offer or proposal in writing to the defendant board, and that it was the intent of the Zapatas that the proposal should not remain open longer than the joint lives of Mr. Zapata and his wife.

[1, 2] We do not believe the record supports this finding. The real property involved was owned in joint tenancy by the husband and wife. Such a tenancy is an estate held by two or more persons jointly, which, upon the death of one, vests in the survivor or survivors until there is but one survivor, whereupon it vests in such sole survivor absolutely. If one of the parties dies, he merely drops out of the title and his interest ceases, the title remaining, vesting in the survivor under the original deed, since the theory of survivorship is that the fee title as a whole is vested in each of the tenants, subject to the life estate of the others, and not that any title is derived by the survivor from his deceased co-tenant.

[3] Accordingly, on the death of Mr. Zapata on July 7, 1932, the title to the real property was exclusively in Mrs. Zapata. On January 3, 1933, the local representatives of the church corporation called upon Mrs. Zapata and delivered to her the agreement which she and her husband had previously signed, duly executed by the church corporation, taking her receipt therefor. This agreement she retained for approximately two years, or until her death in November, 1935.

[4] No exclusive joint obligation appears in the contract, and the presumption must be that it was a joint and several obligation. Section 1659 of the Civil Code provides that "where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

This code section is considered in Gummer v. Mairs, 140 Cal. 535, 74 P. 26, 27, where an action was brought against one or two obligors to a contract for the purchase of land. It was contended the contract was a joint obligation and that both purchasers were necessary parties. The court held otherwise, stating: "It is quite true that, notwithstanding the consideration money to each was the same, the contract might have been made a joint contract by an express statement or agreement to that effect, but, in the absence of evidence showing a contrary intention, the presumption stated in said section 1659 [of the Civil Code] must control."

To the same effect is Webb v. Casassa, 82 Cal.App. 307, 255 P. 541, and County of Los Angeles v. Luscher, 58 Cal.App. 632, 209 P. 899.

The agreement itself refutes the claim the agreement was joint, and not joint and several. Therein Mr. and Mrs. Zapata are referred to as "parties of the second part", indicating both parties were affected. It is also provided that the survivor of the parties of the second part shall be liable during his or her life for the support of the nephew Alberto; also the parties of the second part, or the survivor of them, may sell the property under certain conditions, indicating a continuance of rights or obligations in one of the parties after the death of the other.

One of the considerations is thus stated in the agreement: "Whereas, the parties of the second part desire that Antonio Alberto Zapata * * * shall be properly educated for the ministry * * *" and that the board shall supervise such education, bringing it within the requirement of section 1659 of the Civil Code quoted above.

[5] It is next claimed by respondents that the board was dilatory in accepting or acting upon the offer and that the same was revoked by the expiration of a reasonable time. It is true over six months elapsed between the offer and acceptance, but we can see no injury to anyone by reason of the delay. The Zapatas knew the board was a foreign corporation with its place of business in Tennessee. It was necessary for a representative of the board to come to California and appraise the property and to report back to the board. This was not a case involving a sale of a fluctuating commodity. It was not even a sale contemplating a money profit to the grantors. The preliminary negotiations had been unhurried, and we can see no detriment suffered by the delay between the offer and acceptance. In fact, the board was not called upon to do anything of its own initiative until after the death of the grantors, the agreement providing, "Whereas the parties of the second part desire the party of the first part to supervise said education in the event they should die before said education shall have been completed."

[6] If, however, we assume the agreement was a joint offer, it would still survive the death of Mr. Zapata and be binding upon Mrs. Zapata when accepted by the board. Section 1543 of the Civil Code so provides, and the following cases so hold: Bee v. Cooper, 217 Cal. 96, 17 P.2d 740; Elizalde v. Murphy, 146 Cal. 168, 79 P. 866.

The complaint alleges that Mr. and Mrs. Zapata were induced to sign and deliver the deed and agreement and the instructions to Fitzgerald by the fraud and misrepresentations of defendants, but no findings are made to that effect, and we can disregard such allegations except to say perhaps that no evidence was presented that would support any such finding.

As to certain acts subsequent to the death of Mrs. Zapata the court found that the defendants "did designedly deceive and mislead her concerning her rights in connection with said transaction and the meaning of the language in said purported agreement and on the effect on said transaction of the death of Mr. Zapata and on the lapse of time intervening between said offer and attempted acceptance thereof". What these misrepresentations were, does not appear nor does it appear they were known by defendants to have been untrue, nor were made for the purpose of deceiving Mrs. Zapata, nor that she relied thereon, to her damage.

There is no finding to the contrary and it is established that the deed and agreement were originally executed and delivered without fraud or deceit of any kind, so Mrs. Zapata must have understood the language of those documents when drafted and delivered to Fitzgerald.

[7] If the court intended to find that defendants made some misrepresentation as to the legal effect of the revocation of the agreement, which revocation the court found was by operation of law, and not by any act of the parties, then it was necessary for the court to have found what the misrepresentation was, that defendants knew it was untrue and that it was made for the purpose of deceiving Mrs. Zapata. There is no evidence, however, supporting such a finding if such had been made. Furthermore, such representation constituting a misrepresentation as to a matter of law, the mere opinion of the defendants would not be actionable. Haviland v. Southern Cal. Edison Co., 172 Cal. 601, 158 P. 328; Rheingans v. Smith, 161 Cal. 362, 119 P. 494, Ann.Cas.1913B, 1140.

The court found that defendants' agents prepared the deed and contract. The evidence is that an attorney recommended to Mr. Zapata by a Mr. Reynolds, a member of the Methodist Episcopal Church, South, called upon Mr. and Mrs. Zapata, and was acceptable to them as such counsellor and attorney. Neither Mr. Reynolds nor the attorney, Mr. Newby, represented the church nor its board.

The court also found that the deed was delivered by Fitzgerald, knowing he had no right so to do because the alleged offer had, by the death of Mr. Zapata, been revoked. Our attention is called to no evidence in the record, and we can find none, that either Fitzgerald or the church, or the board, knew that the death of Zapata automatically revoked the alleged offer or terminated the right of Fitzgerald to record the deed; in fact, the evidence is to the contrary. Fitzgerald testified he believed that upon the death of Mr. Zapata the property vested in Mrs. Zapata, and that she had the control thereof, and that he was justified in acting as he did.

The court also found that after the death of Mr. Zapata, Mrs. Zapata demanded the return of the deed and agreement and information as to her rights in the matter, but defendant refused to return the papers or tell her what her rights were.

It is a fact not questioned that when the deed and agreement were executed and delivered to Fitzgerald, Mr. and Mrs. Zapata each understood the import and meaning of each of the instruments involved. Some five months before the death of Mrs. Zapata, a friend of hers had someone look over the papers for Mrs. Zapata, but apparently nothing was done and Mrs. Zapata expressed her satisfaction with the arrangements. In September, about two months before her death, Mrs. Zapata demanded the papers of Mr. Fitzgerald and he gave her the instructions signed by Mr. and Mrs. Zapata, being the only document he had, as the deed had been recorded and returned to the board, and the agreement had been delivered to Mrs. Zapata in January, 1933, and a receipt taken from her therefor. In fact, it appears the agreement was found among her effects after her death.

Neither is there evidence to support the finding that Fitzgerald prevented Mrs. Zapata from consulting any other persons about the deed and agreement. Mrs. Zapata was not confined to her bed. She attended church and associated with many people, and frequently met and talked with the pastor of the church but apparently made no complaint to anyone of the disposition of her property.

[8] Should it be admitted that the agreement was an offer which was revoked by the death of Zapata or revoked by an unreasonable delay in acceptance, nevertheless, Mrs. Zapata having accepted the agreement duly executed by the board, and a compliance with the instructions, the transaction became an executed one. When the executed agreement was returned by the board she accepted the agreement, signing a receipt to the effect she had received an agreement relative to the "conveying of two parcels of real estate located in the County of Los Angeles, State of California, by Apolonio Bailon Zapata and Erolinda Moreno Zapata, to the Board of Missions of the Methodist Episcopal Church, South". This evidenced the fact that Mrs. Zapata

had agreed, without objections, to the terms of the agreement after the death of her husband, and after the lapse of some six months. The agreement having been executed by the board and accepted by Mrs. Zapata, became a binding agreement.

Other objections are urged by appellant, but enough has been said to warrant a reversal of the judgment. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

40 Cal.App.2d 43

BOUVETT v. LAYER.

Civ. 12012.

District Court of Appeal, Second District, Division 1, California.

July 8, 1940.

Rehearing Denied Aug. 1, 1940.

Hearing Denied Sept. 4, 1940.

1. Executors and administrators 🔑453(1)

In action by administrator on notes in favor of deceased, complaint alleging that plaintiff was appointed administrator, that administrator was authorized to enter into an agreement extending time for payment of notes, and that extension agreement was thereafter made, stated cause of action and conferred jurisdiction on trial court to enter default judgment against maker, notwithstanding failure to allege representative capacity of administrator, particularly in view of fact that maker had obtained sanction of probate court in matter of the extension.

2. Judgment 🔑153(1)

A motion to vacate default judgment after lapse of two years, on ground that it was void on its face for lack of jurisdiction in that complaint, did not state facts sufficient to constitute a cause of action, was not timely. Code Civ.Proc. § 473.

3. Motions 🔑59(1)

Motion to vacate order setting aside default judgment on ground of surprise, inadvertence, and excusable neglect, in that counsel through mistake entered on his daily calendar the wrong date of hearing on motion to vacate default judgment, and hence did not appear, was properly granted. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb and Robert W. Kenny, Judges.

Action by Charles O. Bouvett, as administrator of the estate of Mary Belle Bouvett, sometimes known as Mary Belle Phelps and also as Belle Phelps, against Adam Layer on four promissory notes. A default judgment was entered against defendant. From an order granting plaintiff's motion to vacate order setting aside the default judgment, and from order denying defendant's motion to set aside default judgment, defendant appeals

Affirmed.

H. L. Duckett, Jr., of Los Angeles, for appellant.

Stanley A. Phipps, of Los Angeles (Elmer H. V. Hoffman, of Los Angeles, of counsel), for respondents.

YORK, Presiding Justice.

On September 17, 1935, action was instituted by respondent, as administrator of the estate of Mary Belle Bouvett, also known as Mary Belle Phelps, deceased, to collect four promissory notes executed at various times theretofore by appellant in favor of said deceased. On November 13, 1935, judgment by default for the sum of $8,120.43, together with attorneys' fees, interest and costs of suit, was entered against appellant.

On or about June 8, 1937, appellant filed and served his notice of motion to vacate the default judgment of November 13, 1935, on the ground that it was "void on its face for the reason that the complaint upon which the same was rendered did not state facts sufficient to constitute a cause of action, or confer jurisdiction upon the court to render said or any judgment in this action".

On June 15, 1937, said motion was granted after a hearing in department 35 of the superior court of Los Angeles county at which no appearance was made on behalf of said respondent.

Thereafter, to-wit, on June 18, 1937, respondent administrator served notice of motion to vacate said order of June 15 setting aside the default judgment, on the grounds of surprise, inadvertence and excusable neglect under section 473 of the Code of Civil Procedure. This motion was granted on June 21, 1937, at which time the said court "without any further notice or proceedings * * * proceeded to and did deny the original motion of defendant, heard and granted on the 15th day of June, 1937, to vacate said (default) judgment".

This appeal is prosecuted from the order of June 21, 1937, granting the motion of respondent to vacate the order of June 15th setting aside the default judgment; and also from the order of June 21, denying appellant's motion to set aside the default judgment, which had originally been heard and granted on June 15.

Appellant urges (1) that the trial court "was guilty of an absolute abuse of discretion in granting the motion setting aside the order vacating the default judgment in this case, as there was absolutely no showing made of any legal inadvertence or excusable neglect upon which to base" such order; "the only showing being made was of bare negligence on the part of respondent's attorney in not being present at the June 15, 1937, hearing"; (2) that the complaint in the original action did not state a cause of action or confer jurisdiction upon the court, therefore, the default judgment was void on its face.

It appears from the affidavit of respondent's counsel made in support of the motion which was heard and granted on June 21, 1937, that the notice of motion to vacate the default judgment specified the date of said hearing as June 15, 1937, in department 17 of the superior court; that said hearing was actually held on said day in department 35; that counsel for respondent failed to make an appearance for the reason that in reading the notice served upon him by appellant's attorney, he mistook the number of the department for the date of the hearing and noted "June 17th at 9:30 a. m." on his daily calendar; that said mistake was discovered by him on June 16th at which time he asked appellant's counsel to stipulate to set aside the order vacating the default judgment so that it might be argued; that appellant's counsel refused to so stipulate, and that respondent's counsel thereupon made his motion to vacate the order of June 15th which was heard and granted on June 21, 1937, after argument and citations of authorities were made and presented by both attorneys.

Appellant's motion heard and granted on June 15, 1937, to vacate the default judgment of November 13, 1935, was made on the ground that said default judgment was void for the reason that the complaint on which it was based did not state facts sufficient to constitute a cause of action in that it did not contain allegations showing how, when and by what court respondent was appointed administrator of said estate; that it did not show that Belle Phelps had died; when or where such death occurred, and if dead, whether or not said deceased died intestate. Further, that there was no showing that the notes sued upon ever became assets of said alleged estate and that the allegation "defendants made executed and delivered to the plaintiff's decedent their promissory notes" is an insufficient allegation of the delivery required by section 573 of the Probate Code, before respondent as administrator could maintain the action.

Turning to the complaint herein, it is alleged therein as follows:

"II. That on or about the 12th day of June, 1933, Charles O. Bouvett was duly appointed administrator of the estate of Mary Belle Bouvett, sometimes known as Mary Belle Phelps and also as Belle Phelps, deceased; and that on or about said date letters of administration were duly issued out of the honorable above entitled court appointing the said Charles O. Bouvett administrator of said estate and that such letters have not been revoked. * * *

"IV. That on or about the 30th day of April, 1934, an order was made and entered in the matter of the estate of Mary Belle Bouvett, Los Angeles Superior Court No. 415386 which, among other things, authorized plaintiff as said administrator to enter into an agreement with the said Adam Layer extending the time of payment of said promissory note (referring to note for $1,000 dated May 28, 1927, in favor of decedent) for a period of approximately one year.

"V. That, in accordance with the order of the above entitled court heretofore mentioned, and on or about the 30th day of April, 1934, and for a valuable consideration, the plaintiff and the defendants made, executed and entered into a certain agreement in writing wherein and whereby, among other things, it was provided that the maturity date of said promissory note should be extended to the 30th day of April, 1935, and that all other terms and conditions and obligations of said promissory note should remain as before."

Similar allegations were pleaded in each cause of action based upon the four promissory notes sued upon.

[1, 2] While the complaint may not be a model pleading, as is conceded by respondent, the allegations contained therein are sufficient to state a cause of action against appellant, and to confer jurisdiction upon the trial court. The objection made by appellant that the complaint was defective because it failed to allege the representative capacity of respondent does not impress this court, for the reason that it appears from the complaint that appellant sought and obtained with the sanction of the probate court extensions of the very notes here sued upon. Moreover, appellant waited almost two years before he made his motion to vacate the default judgment upon the ground that it was void on its face for lack of jurisdiction. If appellant believed such error existed, it could have been corrected upon appeal from the judgment, or upon a proper showing by motion, if made within the time limited by section 473 of the Code of Civil Procedure, but it is now too late to do so by motion. Blondeau v. Snyder, 95 Cal. 521, 523, 31 P. 591; Christerson v. French, 180 Cal. 523, 525, 182 P. 27.

It therefore appears that the motion of appellant which was granted on June 15, 1937, was entirely lacking in merit, and that the court did not abuse its discretion when it vacated the order entered pursuant thereto at the instance of respondent's motion which was granted on June 21st.

[3] Respondent's motion of June 18th, which was granted on June 21st, was made pursuant to the provisions of section 473 of the Code of Civil Procedure on the grounds of inadvertence and excusable neglect. It was directed against an order made three days before, to-wit, on June 15th, and owing to the fact that respondent's counsel through mistake entered on his daily calendar the wrong date of the hearing on the motion to vacate the default judgment. Respondent's counsel read the notice of motion but confused the date and trial department therein specified; he was actually guilty of no neglect, but of a mistake which inadvertently caused him to enter the department number for the date, and thus he did not appear at the hearing of appellant's motion on June 15th.

In the circumstances, there was no abuse of discretion on the part of the trial court in granting the motion of respondent vacating the order setting aside the default judgment, and in denying the motion of appellant to set aside the default judgment which had originally been heard and granted on June 15th.

The orders appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.

40 Cal.App.2d 21

In re MARTIN'S ESTATE.

PEEL-DAVIS v. MARTIN et al.

Civ. 12613.

District Court of Appeal, Second District,
Division 2, California.

July 5, 1940.

Hearing Denied Aug. 31, 1940.

1. Appeal and error 🔑907(2)

Presumptively, the evidence is sufficient to sustain the trial court's findings, in absence of the evidence in the record.

2. Wills 🔑477

Where husband's will directed that executors therein named carry out terms of wife's will, and wife's will disposed of her own property only and made specific reference to fact that some of property was held in partnership with husband, distribution of property then standing in wife's name and one-half of joint tenancy property was properly distributed as directed in wife's will, and the other one-half of the joint tenancy property was property regarded as intestate property of husband.

3. Wills 🔑392

Judgment affirming order admitting will to probate and directly deciding that will of wife was incorporated in husband's will could not, after judgment became final, be upset by reference to evidence received by trial court at a later hearing for purpose of making a decree of distribution.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Proceeding in the matter of the estate of Patrick S. Martin, deceased, by Mrs. George Peel-Davis against William Martin and others, involving distribution of the estate. From the judgment of distribution plaintiff appeals, and defendants cross-appeal.

Affirmed.

Catlin & Catlin, Frank D. Catlin, and Wm. E. Woodroof, all of Los Angeles, for appellant Mrs. George Peel-Davis.

Faries & McDowell, McIntyre Faries, and Samuel Schwartz, all of Los Angeles, for cross-appellants.

WOOD, Acting Presiding Justice.

Patrick S. Martin died on January 29, 1938, leaving the following will, which was admitted to probate:

"11776 Chenault Str
"Brentwood Hts L A
"November 9th 35

"In case of my death I want my Brother in Law George C. McMullan & Sister in Law his wife Edith McMullan to be executors of the Estate I leave. Real & personal & to carry out the terms of the will left by my wife May Martin

"Signed
"Patrick S. Martin"

At the time of presenting Patrick Martin's will the executors named therein presented two unprobated wills of May Martin, who died on November 11, 1935, both made on July 19, 1935, one being marked exhibit 1 and the other exhibit 2. After a hearing on the petition for probate the trial court found that the will marked exhibit 2 was made later than the will marked exhibit 1 and should be received and incorporated into the will of Patrick S. Martin as a part thereof. That will is as follows:

"19th July. 1935
"11776 Chenault St
"Brentwood Hgts
"Los Angeles Cal.

"My Will & Testament

"I bequeath money in bank $1150.51 to my sister Mrs. George Peele Davis at once. All property in my own name & property in partnership with P. S. Martin to be sold & proceeds to be given to sister Mrs. Geo Peel Davis & $500 dollars each to my brother Robert Pollock's two daughters Edith and Peggy. The Revenue from these properties to go to P. S. Martin during his lifetime. If he marries again all my property & my half in partnership with him to be sold at once & given to above mentioned heirs. I have worked to keep him and myself ever since I met him and even in death will be doing the same. My Sister Mrs. George McMullen and her Husband I appoint executors of my estate and I hope will have no trouble with P. S. Martin. He entered this Country with me as a Canadian without one dollar of his own. He has since become an American citizen & has not given me one dollar or contributed to my support, so there is no such thing as Community property with us. But I think he will be satisfied as long as he is provided for as long as he lives. In case my sister should die (Mrs. G. P. Davis) her share before P. S. Martin my estate to be divided equally among her four children.

"May Martin."

An appeal was taken from the decree admitting the will of Patrick S. Martin to probate and this court affirmed the order of the superior court. Estate of Martin, (Martin v. McMullan), 31 Cal.App.2d 501, 88 P.2d 234, 237. On that appeal no attempt was made to interpret the will but it was expressly stated that it was "our duty only to determine of what the will consists".

When the petition for distribution came on for hearing the sister of Mrs. Martin who had been named as beneficiary in the latter's will, Mrs. George Peel Davis, asked that all of the property be distributed to her with the exception of the bequests of $500 each to Edith and Peggy Pollock. The brothers and sisters of Patrick Martin asked that all of the property be distributed to them in accordance with the laws of succession of this state. The court received evidence surrounding the circumstances of the making of the wills of Patrick and May Martin and thereafter found that "all the property of the Patrick S. Martin estate" was originally derived from the earnings and sale of a hotel in Canada owned by Patrick S. Martin as his sole and separate property, and from gifts of money received by him from his mother; that at the time May Martin made her will, July 19, 1935, there was standing in her name the portion of said estate listed in exhibit "A" attached to the court's findings, and that at that time there was standing in the names of Patrick and May Martin, as joint tenants, that portion of said estate which was listed in exhibit "B"; that on July 29, 1935, May Martin transferred to Patrick Martin all the property described in exhibit "A" and one-half of the joint tenancy property listed in exhibit "B"; that after said transfer Patrick Martin made his will and therein "adopted the intention of May Martin to dispose of the property which stood in her name, towit, the property listed in Exhibit 'A', and one-half of the joint tenancy property, towit, one-half of the property listed in Exhibit 'B', to the heirs which she named in her will". The court concluded that Patrick Martin died intestate as to the undivided one-half of the property listed in exhibit "B" and as to all of the property listed in exhibit "C", property standing in his own name. In effect Mrs. Davis received 62/100 of the entire property and the brothers and sisters of Mr. Martin received 38/100 of the property.

[1, 2] Under the rule that evidence of the circumstances surrounding the making of a will may be received for the purpose of explaining its language (Estate of Donnellan, 164 Cal. 14, 19, 127 P. 166), the trial court admitted evidence concerning the situation of the parties and the facts in connection with the making of the wills of Patrick and May Martin. The record now before us does not contain the evidence received by the court and therefore under well-established principles it must be presumed that the evidence is sufficient to support the findings of the court. We see nothing in the record to compel a view different from that expressed by the trial court in its finding "that Patrick S. Martin adopted the intention of May Martin to dispose of the property which stood in her name" at the time she made her will. The will of Patrick Martin merely appoints executors and directs that the terms of the will of May Martin be carried out. If the view of the heirs at law of Patrick Martin be adopted no significance whatever could be given to the direction to carry out the terms of May Martin's will. May Martin transferred all of her property to Patrick Martin ten days after she made her will, and according to the argument presented there would be no property upon which the sole disposing provision of the will could operate. It is apparent that Patrick Martin intended that the provision for carrying out the terms of his wife's will should be effective. Neither can the view of the sister of Mrs. Martin be upheld. To construe the provision of Patrick Martin's will that the terms of his wife's will be carried out, we must turn to the will of May Martin. We there find that she disposed of her own property only and made specific reference to the fact that some of the property was held in partnership with her husband. Of the partnership property she disposed of "my half of the same". We are satisfied that the court did not err in determining to whom distribution should be made.

[3] The brothers and sisters of Patrick Martin argue that the will of May Martin was not incorporated in the will of Patrick Martin. On the former appeal it was directly decided that Patrick Martin did in fact incorporate in his will the will of May Martin which has been set forth above. That decision has become final and may not be upset by reference to evidence received by the trial court at a later hearing for the purpose of making a decree of distribution.

The judgment is affirmed. Neither party is to recover costs on appeal.

I concur: McCOMB, J.

40 Cal.App.2d 6

PEOPLE v. DUNN.

Cr. 1723.

District Court of Appeal, Third District, California.

July 2, 1940.

Rehearing Denied July 17, 1940.

Hearing Denied July 31, 1940.

1. Criminal law ⟾1159(4)

Appellate court justices should not substitute their judgment for jury's and trial judge's conclusions and reverse judgment of conviction on ground that prosecuting witness' testimony is inherently improbable, unless it is so clearly false and unbelievable that reasonable minds may not differ.

2. Criminal law ⟾1159(4)

To justify reversal of judgment on verdict of conviction on ground that prosecuting witness' testimony was inherently improbable, it should clearly appear that verdict was result of passion and prejudice.

3. Criminal law 🔑742(1)
Witnesses 🔑345(1)

That prosecuting witness had been convicted of a felony was a proper ground for impeachment, but it was for jury to decide whether or not they would, in spite of his criminal record, believe such witness. Code Civ.Proc. § 2051.

4. Criminal law 🔑742(1)

The credibility of prosecuting witness was for jury.

5. Criminal law 🔑1159(2)

If there is any substantial evidence to support a verdict of conviction, it will not be disturbed by an appellate court.

6. Embezzlement 🔑47

Accused's guilt of grand theft was for jury, as against contention that testimony of prosecuting witness was so inherently improbable that it should have been rejected as matter of law. Pen.Code, § 484; Code Civ.Proc. § 2051.

7. Indictment and Information 🔑191(5)

Under information charging that accused on certain dates took and carried away certain sums of money, if evidence showed accused to have committed any or all of the three included offenses of larceny, obtaining money, labor, or property by false pretenses, and embezzlement, accused could have been convicted of "grand theft." Pen. Code, §§ 484, 952.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

8. Criminal law 🔑668

Denying accused the right to make a statement at close of opening statement by prosecution, but permitting accused to make such statement when prosecution has rested, is within discretion of trial court. Pen. Code, § 1093.

9. Embezzlement 🔑35

In grand theft prosecution, evidence tending to show commission of offenses of embezzlement and obtaining money by false pretenses was properly admitted, where only the crime of theft was charged in each count under which charge evidence of included offenses was admissible. Pen.Code, §§ 484, 952.

10. Criminal law 🔑1169(2)

In grand theft prosecution, alleged error in admitting in evidence a written memorandum which prosecuting witness allegedly made on day that he had conversation with accused was not prejudicial, where witness had testified to all facts contained in such memorandum. Pen.Code, § 484.

11. Criminal law 🔑1169(2)

In grand theft prosecution, alleged error in admitting a written memorandum made by prosecuting witness containing numerous items of money and dates opposite items which were supposed to represent payments made to accused in connection with several transactions between witness and accused was not prejudicial, where witness had testified that about one-half of his income had been paid to accused, and items admitted covered same ground but contained more details. Pen.Code, § 484.

12. Embezzlement 🔑44(1)

Evidence showing that prosecuting witness entrusted certain sums to accused for purpose of purchasing stock, that accused appropriated such money and never delivered stock, and that accused employed a similar scheme to obtain money from witness, sustained conviction of "grand theft" committed by means of "embezzlement." Pen. Code, §§ 484, 503, 952.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

13. Criminal law 🔑372(8)

In grand theft prosecution against accused who embezzled money from prosecuting witness, evidence of former transactions between accused and witness which covered a period of several years and disclosed a scheme or design on part of accused to mulct witness of his money was admissible. Pen. Code, §§ 484, 503, 952.

14. Criminal law 🔑371(12), 372(1)

Where several crimes are connected as part of one scheme or plan, all of same general character, and tending to same common end, they may be given in evidence to show process or motive and design leading up to particular crime for which prisoner is being tried, and thus directly tending to show logically that crime involved was a part of common scheme.

15. Criminal law 🔑1171(1)

A district attorney was not guilty of prejudicial misconduct, where record did not disclose that district attorney went beyond limit of propriety and fairness or that he did anything to wilfully injure or prejudice accused in the eyes of the jury.

16. Constitutional law ⚿265
Indictment and Information ⚿57

Statutes relating to theft are not unconstitutional as depriving accused of "due process", in that information drawn thereunder gives accused no information as to nature of accusation against him. Pen.Code, §§ 484, 952; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process".

◆

Appeal from Superior Court, Humboldt County; A. K. Wylie, Judge.

Rupert N. Dunn, alias Jack Dunn, was convicted of grand theft, and he appeals.

Affirmed.

Wm. F. Herron, George C. W. Egan, and Edward A. Cunha, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

TUTTLE, Justice.

Defendant was charged by an information in four counts with the crime of grand theft. Sec. 484, Pen.Code.

The first two counts were dismissed by the court. Count III charged in substance that "on or about the 12th day of December, 1938, * * * the defendant did * * * steal, take and carry away the sum of $250 * * * of the personal property of Fred M. Kay."

Count IV charged in substance that "on or about the 1st day of March, 1939, * * the defendant did * * * steal, take and carry away the sum of $765 * * * of the personal property of Fred M. Kay."

After trial by jury the defendant was convicted upon counts III and IV. This is an appeal from the judgment of conviction and from the order denying a new trial.

Fred M. Kay, the principal witness for the People in this case, had been county clerk of Humboldt county for nearly twenty-five years. Prior to that time he had been a deputy in that office for twelve years. At the time of the trial of the instant case he was sixty-eight years of age. He had lived in Humboldt county practically all of his life. He ceased to be county clerk on March 14, 1939. Subsequently, on May 16, 1939, he was found guilty of embezzlement of public funds. The conviction was affirmed by this court. People v. Kay, 34 Cal.App.2d 691, 94 P.2d 361.

During the summer of 1938, appellant discussed with Kay the subject of the Lander Hill Mining Company. Appellant, so Kay testified, stated that he had a typewritten report on the mine; that it was a very wonderful mine, mostly composed of silver ore, and situate near Austin, Nevada. On October 27th of the same year, the witness testified that the following conversation with appellant took place: "* * * he said on October 27, 1938, he wanted some more money, and he said if I could raise a certain amount of money, I don't remember the exact amount now, that he would have 5000 shares of this Lander Hill Mining Company up here, and be able to turn it over to me the next day. And I asked him what we could do with that, and he says we could get some money on that stock; he says we could borrow money on it, plenty of money."

The next day Kay paid appellant $465 on account of the deal. On December 12, 1938, he paid appellant the further sum of $250 for stock in said company. The stock was never delivered to Kay, though he repeatedly demanded it, nor was the money returned. Kay stated that he had faith in appellant, who told him that he would be made president of the company at a salary of $500 per month. Appellant denied that any such payments were made to him, and stated that his reference to installing Kay as president of the company was made in a joking manner. The amount paid on December 12th was borrowed, Kay testified, from W. T. Leroy. The latter corroborated that testimony.

On the theory of the admissibility of other similar transactions to prove a common scheme and design, and also the intent of defendant to commit the crime charged, Kay was permitted to testify concerning a number of other transactions between appellant and him, starting with the year 1933. The first was an investment of funds by Kay in a scheme connected with a patent three-dimension camera lens. Appellant received the money but never received any stock. The next was a timber deal, in which money was paid to appellant. Kay received nothing for his investment. The next was a paint deal. Appellant told Kay that a Los

Angeles woman had a formula for paint to be used on the bottom of ships. Kay invested some funds in the scheme with appellant, and that was the end of it. The next enterprise was a corporation to build airplanes which was being promoted by appellant and other parties. The result was the same as in the other proposals. Kay received nothing for his money. The next was a mining venture. Appellant said he and several others had taken over a mine in Siskiyou county; that a corporation had been formed, and stock would be issued; that Kay would get a certain percentage of such stock. No stock was ever delivered. The next scheme was a chemical plant to grind up redwood stumps. Kay gave appellant funds to be used in the enterprise. The next was a powder deal. Appellant introduced to Kay a man who had invented a certain kind of powder, and stated that a corporation would be formed to manufacture it. Kay gave appellant funds to be invested in the stock. No stock was ever delivered. The foregoing facts appear in the testimony of Kay. All evidence of former transactions between Kay and appellant, except the camera deal, was stricken out on motion of defendant.

[1, 2] It is contended that the evidence is insufficient to establish any offense, for the reason that the testimony of Kay is so inherently improbable that it must be rejected as a matter of law. Appellant points out that the payments made by Kay to appellant were established by oral evidence alone. That a person of ordinary intelligence would require a written receipt under such circumstances. Therefore, appellant urges, the whole story of Kay is utterly worthless as a matter of law. The failure to demand and receive a receipt, appellant contends, coupled with the bad character of Kay, stamp the testimony as inherently improbable. The rule, where an attack of this character is made upon the credibility of a witness, is set forth by this court in the case of People v. Jefferson, 31 Cal.App.2d, 562–566, 88 P.2d 238, 240: "The justices of an appellate court should not substitute their judgment for the conclusions of the jury and the trial judge and reverse a cause on the ground that the evidence of the prosecuting witness is inherently improbable, unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard. To justify a reversal of a judgment on that ground it should clearly appear that the verdict is the result of passion and prejudice."

[3-6] Applying the foregoing rule, we cannot say that the story of witness Kay is inherently improbable, and that the verdict therefore lacks any substantial support. The fact that the witness had been convicted of a felony was a proper ground for impeachment—(sec. 2051, Code Civ. Proc.)—but it was for the jury to decide whether or not they would, in spite of his criminal record, still believe him. This witness did many acts which most normal people would not have done, but that does not render his testimony unworthy of belief. Just because the average person would have demanded and received a receipt for any money paid out under such circumstances, is no justification for condemning as false the testimony of one who did not exact a receipt under the circumstances. These are essentially questions for the consideration of the jury. The credibility of the witness is not a question of law in this case. The case of People v. Lamson, 1 Cal.2d 648, 36 P.2d 361, merely restates the familiar rule that where there is no substantial evidence to support a verdict, it is the duty of an appellate court to set it aside. The evidence in that case was entirely circumstantial, and the court followed the general rule by holding that where circumstantial evidence is relied upon for a conviction, and where every circumstance relied upon as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. Here, the People rely, not upon circumstantial evidence, but upon direct evidence. It is not a matter of links in the chain of evidence, but whether or not the words of a witness are to be given any credence. It cannot be said that the Lamson case in any manner abrogates the old rule that the jury are the sole judges of the facts and of the credibility of the witnesses, and that if there is any substantial evidence to support a verdict, it will not be disturbed by an appellate court. We find such evidence in the record before us.

[7] Appellant contends that "no conviction of either embezzlement or false pretenses can be sustained because the information charges larceny and nothing else". He states that one cannot be charged with one crime and convicted on

a showing that he has committed another. Under the definition of theft, there is included the crimes of larceny, obtaining money, labor or property by false pretenses, and embezzlement. Pen.Code, sec. 484. Section 952 of that Code provides that "* * * In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another". It is clear that the information here meets the requirement of the latter section. The question is not a novel one, but has been definitely settled adversely to the contention of appellant in the following cases: People v. Fewkes, 214 Cal. 142, 4 P.2d 538; People v. Plum, 88 Cal.App. 575, 263 P. 862, 265 P. 322; People v. Mason, 12 Cal.App.2d 84, 55 P.2d 249; People v. McNeil, 27 Cal.App.2d 353, 81 P. 2d 243; People v. Robinson, 107 Cal.App. 211, 290 P. 470. We therefore hold that under the indictment before us, if the evidence showed defendant to have committed any or all of the three included offenses mentioned above, he could have been convicted of grand theft. The information as set forth above charges the said three offenses under the express statutory form set forth in section 952 of the Penal Code. The only case relied upon by appellant is People v. Walther, 27 Cal. App.2d 583, 81 P.2d 452. There the defendant was convicted under a count in an information which attempted to set forth the crime of obtaining money by false pretenses. Pen.Code, sec. 532. This court held that the information did not charge that crime, for the reason that it failed to specify any act or statement of the defendant constituting the alleged crime. No attempt was made in that case to charge the crime of theft under the provisions of section 952 of the Penal Code. Neither did the court there take into consideration the provisions in said section that "It [the count in the information or indictment] may be in the words of the enactment describing the offense." The discussion of this point may very properly be concluded with the following excerpt from People v. Plum, supra: "'Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense.' People v. King, 27 Cal. 507, 510, 87 Am.Dec. 95; People v. Cronin, 34 Cal. 191, 200; People v. Fowler, 178 Cal. 657, 661, 174 P. 892."

[8] Appellant next complains of a ruling of the trial court which denied him the right to make a statement at the close of the opening statement by the prosecution, but which permitted him to make such a statement when the prosecution had rested. He cites no authorities. There is nothing in the "Order of the Proceedings" set forth in the Penal Code (sec. 1093), which gives the defendant the right for which he here contends. It was a matter committed to the sound discretion of the trial court, and he cannot say here that such discretion was abused. Neither can we find that the ruling was prejudicial to defendant.

[9] It is contended that the trial court erred in refusing to exclude any evidence tending to show the commission of the offenses of embezzlement and obtaining money by false pretenses, and upon the ground that the indictment stated but one offense—larceny. This question has been fully discussed above. But one crime was expressly charged in each count—theft. Under that charge, evidence of the included offenses was clearly admissible.

[10] During the testimony of Kay, the trial court admitted in evidence the following writing: "October 27, 1938. Jack told me today that tomorrow I would receive 5,000 shares of ——— stock, par value $100 per share and that I could transfer 2500 shares to ———, and receive $150; that within thirty days if I want to sell the remaining 2500 shares that I can get from a hundred and fifty thousand to two hundred thousand dollars for them. Fred M. Kay."

The witness testified that he made the memorandum on the day he had a conversation with defendant. While the witness had the right to refresh his memory from such memorandum, it is doubtful if the document itself was admissible as evidence. It is unnecessary to discuss the matter further, as it appears that the defendant, prior thereto, testified to all the facts contained in the memorandum. An identical situation arose in the case of People v. Allen, 37 Cal.App. 180–188, 174 P. 374, 377, where this court said: "Under section 2047, Code of Civil Procedure, a witness may 'refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing.' But, where the witness can and does testify fully as to the facts without resort to his memorandum, we do not think he can be corroborated by the introduction of his memorandum. We think, however, that the ruling was without prejudice. Section 4½ of article 6 of the Constitution would seem to apply here."

We can see no prejudice resulting from the ruling.

[11] During the examination of Kay, on rebuttal, and over the objection of appellant, the trial court admitted in evidence a written memorandum made by Kay containing numerous items of money and a date opposite each item. The witness testified that they represented payments made to appellant in connection with a number of transactions between them. Elsewhere, the witness had testified that about one-half of his income, covering several years, and amounting to $7,500, had been paid to appellant. The items admitted covered the same ground, but contained more detail. Assuming that the list of items was not admissible, no prejudice resulted from the ruling. The matter was already substantially in evidence, though not in the same form. What we have said also applies to a small memorandum book containing items showing similar payments by the witness to appellant. All of such items were included in the $7,500 total mentioned.

[12] It is contended that the evidence is insufficient to prove theft or any of the crimes included in the charge, to-wit: larceny, obtaining money by false pretenses, and embezzlement. We are satisfied that the evidence sustains a conviction of theft committed by means of embezzlement. The latter offense is defined as "the fraudulent appropriation of property by a person to whom it has been entrusted". Pen.Code, sec. 503. The jury could reasonably conclude from the evidence that the sums of $250, and $765 were entrusted to appellant for the purpose of purchasing stock in Lander Hill Mining Company, and that he fraudulently appropriated such money. The stock was never purchased or delivered. There is evidence in the record of a similar scheme used by appellant to get money from Kay. It may be designated as the "Griffith Camera Lens" deal, and is mentioned above. There is also the testimony of parties who loaned money to Kay, which tends to corroborate his testimony. According to the record, Kay entrusted money to appellant on two occasions to be used for the purchase of stock in Lander Hill Mining Corporation. The stock was never delivered, nor was the money returned. In our opinion a plain case of embezzlement was made out. Defendant acted as agent for Kay, and it was his duty to use the money entrusted to him in payment of the stock. The following cases, based upon similar transactions, hold that embezzlement was the proper charge to make: People v. Meadows, 199 N.Y. 1, 92 N.E. 128; State v. Monahan, 50 Nev. 27, 249 P. 566; State v. Cooke, 130 Or. 552, 278 P. 936. Appellant urges that the testimony shows that the money was not handed to appellant for any specific purpose; hence the crime of embezzlement was not proven. He relies upon a statement made by Kay on a former occasion, from which the jury might reasonably understand that the use to which the money was to be applied was not mentioned when the payments were made. On the other hand, at the trial of this action, Kay testified that appellant said the stock would be delivered "the next day". If Kay's testimony on the point was contratradicted by a former statement, it was still a matter for the jury to say whether he was telling the truth or not in testifying before them, and we cannot disturb any conclusion which they may have reached on the question of the credibility of the witness.

[13, 14] It is contended that evidence of former transactions between the parties was inadmissible. All testimony of that character, except that relating to the camera deal, was stricken out on motion of defendant. We believe that all of such evidence was admissible. It covered a period of several years, and clearly disclosed a scheme or design upon the part of appellant to mulct Kay of his money. Such evidence is justified under the rule that: "Where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the general crimes are part of a chain of cause and in consequence so linked as to be necessarily connected with the system or general plan, they are admissible." 8 Cal.Jur. p. 69, sec. 173.

This rule was applied in People v. Ruef, 14 Cal.App. 576, 114 P. 48, 54. It is very thoroughly discussed in People v. McGill, 82 Cal.App. 98, 255 P. 261.

[15] It is urged that the district attorney was guilty of prejudicial misconduct. After an examination of the record, we cannot say that the district attorney went beyond the limit of propriety and fairness, or that he did anything to wilfully injure or prejudice the defendant in the eyes of the jury. People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907.

[16] It is urged that sections 484 and 952 of the Penal Code are unconstitutional as being in violation of the due process clause of the Constitution of the United States (Fourteenth Amendment), in that an information drawn thereunder gives the defendant no information as to the nature of the accusation against him. This question was decided adversely to appellant in the case of People v. Robinson, 107 Cal. App. 211, 290 P. 470, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied.

Other points are raised as grounds for reversal. We have examined them and find such contentions are so obviously without merit as to require no discussion of them. The judgment and order denying motion for new trial are, and each of them is, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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39 Cal.App.2d 679

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. RIGGS et al.
SAME v. WHEAT et al.

Civ. 12429, 12430.

District Court of Appeal, Second District, Division 2, California.

June 28, 1940.

1. Garnishment 🔑213

Under statute providing for determination of title to property levied on where claim of third party showing right to possession is filed, corporate stock standing in name of third party claimant on books of garnishee could not be the subject of trial of title or right of possession, since purpose of statute is to protect officer making levy against claims for damages by third parties, and no damage could be shown as against officer in garnishment of stock, in that lien arose upon service of writ without taking possession by the officer. Code Civ. Proc. §§ 542, 549, 689.

2. Garnishment 🔑213

Under statute providing for determination of title to property levied on where claim of third party showing right to possession is filed, an indebtedness of money due by garnishee to third party claimant could not be the subject of trial of title or right of possession since purpose of statute is to protect officer making levy against claims for damages by third parties, and no damage could be shown as against officer in garnishment of money, in that lien arose upon service of writ without taking possession by the officer. Code Civ.Proc. §§ 542, 549, 689.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Actions by Bank of America National Trust & Savings Association against Elwood Riggs and against W. R. Wheat and others, wherein the Riggs Investment Company was a third party claimant. From adverse judgments, the plaintiff appeals.

Reversed with instructions.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for appellant.

Victor Ford Collins, of Los Angeles, for respondent and third party claimant.

MOORE, Presiding Justice.

From two judgments rendered by the trial court upon petitions for determination of title after the filing of third party claims, plaintiff bank appeals on the ground that the court was without jurisdiction to try title to property held under garnishment.

On January 4, 1934, plaintiff obtained judgment against one Elwood Riggs in the sum of $6,239 and thereafter, in a separate action on April 16, 1935, obtained judgment against Wheat, Strong and Riggs, for $5,982. On January 10, 1939, plaintiff caused an execution to issue upon the Wheat judgment and a levy to be made upon certain property of Riggs described below. On January 18, 1939, it brought an action to renew said judgment against said Riggs and caused an attachment to be levied by the Sheriff of Los Angeles county against Grether and Grether, Inc., as to all of its corporate stock belonging to said Elwood Riggs and all right, title and interest of said Riggs in and to the account of Riggs Investment Company, a corporation, hereinafter referred to as "claimant". The garnishee answered to both levies that it was indebted to the claimant in the sum of $1,689.91 and was also holding on its books 393 shares of its corporate stock standing in the name of said claimant. Thereafter claimant filed its third party claims with said sheriff in both cases. By its claim in the Wheat case dated March 20, 1939, it asserted title to and ownership of said corporate shares and the credit levied upon "by reason of its ownership of the building at said location and a lease thereof dated January 4, 1924, to Grether and Grether, Inc." etc., wherein the Riggs Investment Company is the lessor and Grether and Grether, Inc., is the lessee. Again, on the 8th day of May, 1939, it filed its second third party claim in the Riggs case and advised the sheriff that the title to said money and corporate stock levied on and in the hands of said garnishee was vested in claimant. In its claim filed March 20, 1939, in the Wheat case the claimant stated "this claim is made to secure the release of said funds from said writ of execution". In its third party claim filed on May 8, 1939, it stated "this claim is made to secure the release of said funds from said attachment". Thereafter on the 16th day of May, 1939, claimant filed its petitions for hearing to determine title. Trials followed and as a result thereof, judgments were entered June 26, 1939, in both cases whereby it was decreed that claimant was the owner of and entitled to the possession of said moneys and stock in the custody of said garnishee and directed said sheriff to release said property from attachment, and the said sheriff and the garnishee were ordered and directed to pay over and deliver to said claimant said money and stock.

[1] The contention of plaintiff is that, under section 689 of the Code of Civil Procedure, neither corporate stock standing in the name of a third party claimant on the books of the garnishee nor an indebtedness due by a garnishee to a third party claimant is to be the subject of a trial of the title or right of possession of such corporate stock or of such indebtedness owing by the garnishee. Said section is a part of chapter I on "Execution" which is a part of title IX dealing with "Execution of Judgment in Civil Actions" which chapter in turn comes under part II, or "Civil Actions". Title VII of said part II deals with "Provisional Remedies in Civil Actions". It will be borne in mind that one levy herein was made under a writ of attachment provided for in section 542 (of title VII) which provides for the manner of attaching (1) real property; (2) growing crops; (3) personal property capable of manual delivery, herein referred to as "movables"; (4) corporate shares, by leaving with an officer or "managing agent of the corporation" a copy of the writ and a notice stating that "the stock or interest of the defendant is attached, in pursuance of such writ"; (5) debts and credits and other personal property not capable of manual delivery by leaving with the debtor or custodian "a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under

his control, belonging to the defendant, are attached in pursuance to such writ".

While said section 689 is a part of the title relating to the execution of judgments, yet by section 549 of the same code, the provisions of section 689 apply to levies under writs of attachment. Under said section 542, the officer is not required to take possession of corporate shares or money owing to the defendant. In making such attachment his function is to serve the writ by delivering a copy thereof together with notice to the debtor that the money the debtor owes defendant is attached, or, in the case of attaching corporate shares, to deliver such copy together with notice to an officer of the corporate garnishee that the shares described in said notice are attached. In neither case does he take anything into his possession. His duty is done upon the service of the writ of attachment in the manner prescribed by said section 542. In either case, his obligation is identical with that in the situation where he attaches real property. In making a levy upon realty, the sheriff merely files with the county recorder a copy of the writ together with the description of the property attached and serves a copy upon the occupant. Such lien arises promptly upon the service of the writ by virtue of the provisions of sections 542 to 545 of the Code of Civil Procedure and the decisions explanatory thereof. That a third party claimant, where his land is attached, cannot clear his title of the attachment lien by the proceeding outlined in said section 689, has been definitely settled in the case of First National Bank v. Kinslow, 8 Cal.2d 339, 65 P.2d 796, where said section appears in full. The history of said section is there elaborately reviewed and painstakingly treated. From such review, it is developed that the main purpose of the original section as contained in the Practice Act was to give protection to the officer who makes the levy against claims for damages by third parties. Clearly, no damage can be shown as against the sheriff unless it be in those cases where he seizes and detains physical custody of movables held by him under levy. In levying a garnishment, the damage or inconvenience caused the owner or claimant is due to the operation of law and not to any molestation of the property by the levying officer. He neither takes, keeps, nor holds corporate stock after the levy. It is the design of the law, by his service of the writ in attaching land or in garnishing corporate shares or credits, to effectuate a lien that will be security for plaintiff's judgment. While in the attachment of movables, his lien is dependent upon his possession in the attachment of land, corporate shares or credits, he has nothing to do with the possession of the property. But in attaching such properties, plaintiff's lien becomes effective immediately and continues until the writ is discharged or until the property affected thereby is sold under execution.

"The right to the possession of the property levied upon at the time of the levy is, therefore, the only question put in issue by the filing of the third party's claim." First Nat. Bank v. Kinslow, supra, 8 Cal.2d page 344, 65 P.2d page 798. It is there demonstrated that the possession of an occupant of realty is not disturbed by the levy of an execution; that such question does not arise until a year after the sale under execution. But, pending a dismissal or discharge of the writ, before or after the final determination of the cause in which it was issued, the lien subsists solely by reason of law. The subsistence of such lien upon land, credits, or corporate shares does not affect the owner's possession. That right is affected only in those cases where, by statute, the officer's possession is requisite to the lien's existence.

[2] We now turn to a consideration of that part of the judgments ordering the delivery of the money held by the garnishee for the credit of the claimant. The right of the claimant to the possession of the monies held by the garnishee is identical with its right to the possession of said corporate shares. The sheriff was not required to take manual possession of the money owing by the garnishee to the claimant. He merely served a copy of the writ and a notice of the attachment of the moneys owing by the garnishee to the claimant, and directed the garnishee to conduct itself in accordance with the provisions of the statutes in such cases. This act of the sheriff, likewise, by operation of law, effected a lien upon the moneys owing from the garnishee to the claimant.

The right of a third party claimant to try the title to an indebtedness due by a garnishee to such third party claimant received the studied consideration of the appellate department of the superior court in the case of Sunset Realty Co. v. Dadmun, 34 Cal.App.2d Supp. 733, 88 P.2d 947. Said opinion reviews the several code sections and the cases explanatory thereof.

From a thorough review of the authorities, it is there made clear that *when a debt is garnished, the right to collect it is vested thereafter solely in the judgment creditor,* Sec. 544, Code Civ.Proc., and when collected, it is credited directly on the judgment. Inasmuch as the sheriff did not gain possession of the moneys owing, they remained in the same custody where they rested prior to the levies. To remove them, an entirely new action was requisite.

We, therefore, conclude that there is no authorization in said section 689 for the trial of a third party claim where a writ of attachment has been levied either upon corporate stock or upon an indebtedness owing by a garnishee.

For the reasons herein stated, the judgments are reversed with instructions to dismiss both proceedings.

We concur: WOOD, J.; McCOMB, J.

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39 Cal.App.2d 712

DASSO et al. v. BRADBURY et al.

Civ. 11954.

District Court of Appeal, Second District, Division 1, California.

June 29, 1940.

Hearing Denied Aug. 26, 1940.

1. New trial 🔑6

The granting or denying of a new trial rests in the discretion of the trial judge.

2. Appeal and error 🔑981
New trial 🔑99

A claim of newly discovered evidence warranting a new trial is regarded by courts with distrust on ground that public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at the trial of his case all existing evidence in his behalf, but where trial court has exercised its discretion and granted a new trial, such action of the trial court is not looked upon with either distrust or disfavor. Code Civ.Proc. § 657, subd. 4.

3. New trial 🔑102(1)

A party who seeks a new trial on ground of "newly discovered evidence" must have made a reasonable effort to produce all his evidence at the trial, and will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of trial, or which would have been known to him had he exercised reasonable effort to discover and present it. Code Civ. Proc. § 657, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

4. Appeal and error 🔑981

Requirements that party seeking new trial on ground of "newly discovered evidence" must have made reasonable effort to produce evidence at trial, and that the evidence be newly discovered and material, and such as to render a different verdict or decision reasonably probable on a retrial, present questions peculiarly addressed to the discretion of the trial court. Code Civ.Proc. § 657, subd. 4.

5. New trial 🔑100

In action against automobile owners wherein issue was whether chauffeur used automobile with owners' permission at time of collision, granting plaintiffs a new trial on ground of "newly discovered evidence" as to admissions by owner that chauffeur used automobile by permission, and to the effect that owner made no statement to police or in discussing the accident that chauffeur used automobile without permission, was not an abuse of discretion. Code Civ.Proc. § 657, subd. 4.

6. Appeal and error 🔑981

On appeal from order granting new trial on ground of newly discovered evidence, District Court of Appeal could not substitute its judgment for the judgment of the trial judge and, to reverse the order because of an alleged abuse of trial court's discretion, it was required clearly to appear that the injury resulting from the alleged wrong was sufficiently grave to amount to a manifest miscarriage of justice. Code Civ. Proc. § 657, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Jeanette A. Dasso and another against T. D. Bradbury and another for injuries sustained by the named plaintiff when the automobile she was driving was struck by an automobile owned by defendants and operated by defendants' chauffeur.

Judgment for defendants, and from an order granting plaintiffs' motion for a new trial on the ground of newly discovered evidence, defendants appeal.

Order affirmed.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles of counsel), for appellants.

J. Edward Haley and Birger Tinglof, both of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal from an order granting plaintiffs' motion for a new trial on the ground of newly-discovered evidence. The action was one for damages for personal injuries sustained by plaintiff Jeanette A. Dasso when the automobile she was driving was struck by an automobile owned by defendants Mr. and Mrs. T. D. Bradbury and operated by their chauffeur, defendant Fred Rouse, the latter of whom was not served and made no appearance in the action.

In their complaint plaintiffs alleged that defendant Rouse was the agent, servant and employee of defendants Bradbury and at the time of the accident "was acting within the scope and course of his employment and authority". This was denied by the answer. The evidence at the trial disclosed that on the day of the accident, January 22, 1937, defendant Rouse had driven Mrs. Bradbury and her guest to the Santa Anita racetrack, where he left them at about 2:30 o'clock in the afternoon. The accident occurred at about 4:20 p. m. at Monterey street and Huntington drive, approximately two miles from the track. On the question of the authority or permission of Rouse to take the Bradbury car away from the track, the only evidence produced by plaintiffs was that of an acquaintance of Rouse, who testified that during the racing season he had seen Rouse several times at a gasoline station in Monrovia, where he bought gas for the car, and that Rouse had taken the witness riding in the car and on occasions had visited a colored settlement in Duarte, coupled with the testimony of Mrs. Bradbury, given under section 2055 of the Code of Civil Procedure, to the effect that Rouse had been her chauffeur and had been in her employ approximately three months before the accident. However, she testified that on the day of the accident, when she left the automobile at the track she said to the chauffeur, "Don't know how long I will be here. Wait"; that it was her practice to have the car parked in a restricted area reserved for clubhouse members, and when she was ready to leave to have the car paged; that she had never known that Rouse used her car when she was not in it; that they bought gasoline in Los Angeles and she had no knowledge that Rouse ever bought gasoline in Monrovia; that she had never given Rouse permission to use the car for his personal pleasure and had never given him permission to take it to Monrovia.

Testifying in behalf of defendants, Mrs. Bradbury stated that at the time of hiring Rouse she told him he was not to use the car without her permission, and that he was not upon any errand for her at the time of the accident. Mr. Bradbury testified to the same general effect. Another witness, who had accompanied Mrs. Bradbury to the track, testified she heard her say to Rouse, "It is a very miserable day. We may not stay very long, so you wait."

Upon the foregoing evidence the trial judge concluded that "there is no showing that the driver of the car was using it either on the business of the defendants Bradbury or with their permission or consent on the business in which he was engaged", and accordingly gave judgment for defendants. Thereafter plaintiffs filed a notice of intention to move for a new trial, naming among other grounds that of newly-discovered evidence. In support of this particular ground plaintiffs filed certain affidavits. One was by plaintiff Jeanette A. Dasso, in which she averred that prior to the commencement of the action a person representing himself as a claims adjuster contacted her for the purpose of effecting a settlement of the lawsuit. Plaintiff Jeanette Dasso's affidavit further alleges that on the occasion of one of these conversations the party representing himself as an adjuster stated to Mrs. Dasso that "it would be useless for her or affiant's husband to file suit against either of the owners of the automobile involved in the accident or against Fred Rouse, the chauffeur who drove the automobile at the time of the collision, for the reason that he" (the adjuster) "* * * intended to hide out said chauffeur so that said defendant Rouse would not be available as a witness on behalf of plaintiffs and would not be available for service upon him as a defendant".

While the affidavit of this plaintiff avers that diligent search was made by her and her coplaintiff to locate and serve defendant Rouse, we are nevertheless confronted with the fact that she was in possession of information concerning her conversation with the so-called adjuster prior to the commencement of the trial and made no effort to communicate this alleged imposition upon the court to the latter. Concerning the averments contained in Mrs. Dasso's affidavit to the effect that persons contacted by her subsequent to the rendition of judgment advised her of certain admissions made by the chauffeur, Rouse, to the effect that he had "free use" of the car at all times while on duty and that he had the permission of Mrs. Bradbury to take the car on the date of the accident in question, it must be borne in mind that such evidence could not be material because it is hearsay. Further, on the motion for new trial on the ground of newly-discovered evidence no representations were made to the court that in the event of a new trial the chauffeur Rouse could be produced or that plaintiffs had reasonable grounds upon which to predicate a belief that he could be located, served as a defendant and produced as a witness.

However, on the hearing of the motion for new trial, there was presented an affidavit by Mrs. Georgia P. Casner to the effect that she was present at the Santa Anita racetrack on the date of the accident at the hour of about five o'clock, while both she and Mrs. Bradbury were waiting for their respective cars. In this affidavit Mrs. Casner states that she and Mrs. Bradbury conversed regarding the merits of their respective chauffeurs, and "that Mrs. Bradbury stated that she had told her chauffeur to get gasoline and to be back at about 4:30 P. M. when she first came to the races; that in discussing the merits of her chauffeur, Mrs. Bradbury stated that her car was fully covered and she (Mrs. Bradbury) did not have to worry when her chauffeur had the car out, and could for that reason let him use the car". Further, there was presented an affidavit by B. A. Ruechel to the effect that the wrecked Bradbury car was brought to his garage in Monrovia and that Mrs. Bradbury also came there, but that in discussing the accident she "made no remarks of any kind to the effect that the colored chauffeur had stolen the car that afternoon or was using the car that afternoon without her permission * * * that affiant was present when Mrs. Bradbury made her report to the police officers and that she did not at that time make any statement to the effect that the chauffeur was using her automobile without her permission".

In opposition to this showing, defendants filed affidavits by Mrs. Bradbury, the insurance adjuster, the doorman at the racetrack clubhouse, and a police officer, all in substance contradicting plaintiffs' affidavits as to what Mrs. Bradbury had said at the track concerning her chauffeur's permission to use the car, and denying any attempt by the adjuster to conceal the chauffeur, as charged by plaintiffs.

[1] While conceding that the granting or denying of a new trial rests in the discretion of the trial judge, appellants contend that the record herein discloses a clear case of an improper exercise or abuse of discretion, for the reason, according to appellants, that plaintiffs made no showing whatever that the evidence could not with reasonable diligence have been discovered and produced at the trial and also failed to show that the evidence was newly discovered.

[2-4] We are not unmindful that the claim of newly-discovered evidence as a ground for or warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at the trial of his case all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence. People v. Freeman, 92 Cal. 359, 366, 28 P. 261. This does not mean, however, that when the trial court has exercised its discretion and granted a new trial that such action is looked upon with either distrust or disfavor. In fact, it has been said that one of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they are clothed to grant a new trial when the circumstances show that justice would be thereby served. This by reason of the curtailed power of appellate courts to disturb the discretion of the trial court once it is exercised in such matters. It is recognized that despite the exercise of diligent effort, cases will sometimes occur where, after trial, new evidence most material to the issues and which

would probably have produced a different result is discovered. It is for such cases that the remedy of a motion for a new trial on the ground of newly discovered evidence has been given. As declared by subdivision 4 of section 657 of the Code of Civil Procedure, the court may grant a new trial on the ground of "newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial". True, a party who relies upon this ground must have made a reasonable effort to produce all his evidence at the trial, and he will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of trial, or which would have been known to him had he simply exercised reasonable effort to discover and present it. Both the rule just enunciated, as well as the requirement that the evidence be material and such as to render a different verdict or decision reasonably probable upon a retrial, present questions peculiarly addressed to the discretion of the trial court. In the counteraffidavits filed by appellants in the lower court, we are not directed to any particulars indicating wherein respondents were lacking in diligence in attempting to produce the evidence at the trial. But the affidavit of Mrs. Dasso does disclose the futility of any additional efforts on the part of respondents to produce some of the evidence, because of the alleged surreptitious activities on the part of the adjuster referred to in her affidavit.

[5, 6] Bearing in mind that the aim and object of judicial proceedings is to do, so far as humanly possible, even and exact justice through ascertainment of the truth, we cannot say in the instant case that the trial judge abused the discretion vested in him to grant a new trial when by his action in so doing he made it possible to present to the court evidence concededly most material to a fair and just decision, for surely it cannot be denied that the newly-discovered evidence of the witness Mrs. Casner was not only material to the issues, but if believed by the court would probably have produced a different result. The rule governing the power of appellate tribunals to disturb orders made by the trial court in the exercise of a discretion vested in it was thus stated by this court in the case of Brown v. Newby, 103 P.2d 1018: "It should be emphasized in that connection that the showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice; without indulging in further detail, the record reveals appellants' showing to be insufficient in this regard. See 2 Cal.Jur. p. 896 et seq."

For the foregoing reasons the order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

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39 Cal.App.2d 739

MAMMOTH GOLD DREDGING CO. v. FORBES et al.

Civ. 6457.

District Court of Appeal, Third District, California.

July 1, 1940.

1. Evidence 🔑65

Grantor of placer mining property, as a lawyer, was presumed to understand the legal meaning of phrase "present high water mark on the right bank" which he used in deed.

2. Boundaries 🔑14

Deed conveying the land between the present high-water mark on the right bank of the Yuba river and the center of the river conveyed river bed land bounded by visible high-water mark then existing on base of permanent red earth river bank, rather than land bounded by temporary five-foot gravel bank of summer stream.

3. Evidence 🔑10(5)

The court would take judicial knowledge that in California mountain streams which are fed by winter rains and melting snows the greatest quantity of water flows in the winter and spring months.

4. Boundaries 🔑14

A deed to land between present high-water mark on right bank of Yuba river and the center thereof would be construed as designating the high-water mark reached by the river during season immediately preceding execution of the deed.

5. Deeds 🔑93

The intention of the parties is the real object to be determined in construing the language of a deed.

6. Boundaries 🔑14

The fact that water of river had washed a smooth visible line along base of river bank and that it was devoid of vegetation along the line were competent circumstances to consider in locating boundary line designated by deed conveying land between present high-water mark on right bank of river and the center thereof.

7. Boundaries 🔑37(4)

In suit to quiet title to land conveyed by deed which described the premises as lying between present high-water mark on right bank of Yuba river and the center thereof, evidence sustained finding that grantor intended to convey land bounded by a visible high-water mark then existing along base of permanent red earth bank of river.

8. Boundaries 🔑1

The question of the location of a boundary line of demised land is primarily determined by ascertaining intention of the parties derived from language of the deed together with surrounding circumstances.

9. Deeds 🔑90

Ambiguity in deed should be resolved in favor of grantee and against grantor. Civ. Code, § 1069.

10. Waters and water courses 🔑89

The bed of a nonnavigable river must be deemed to be bounded by the permanent banks which confine the waters in their course at their highest level, in absence of language in deed to the contrary.

11. Waters and water courses 🔑89

The "banks of a river" are the boundaries which confine the water to its channel throughout the entire width when stream is carrying its maximum quantity of water.

See Words and Phrases, Permanent Edition, for all other definitions of "River Banks".

12. Waters and water courses 🔑89

The ordinary maximum flow of water in a river during the wet season of each year may not be deemed to be a mere "flood" or "storm waters", and the average level of the water attained by such river in its annual seasonal flow establishes its "high water mark".

See Words and Phrases, Permanent Edition, for all other definitions of "Flood", "Storm Waters" and "High Water Mark".

13. Trial 🔑392(3)

Proposed findings which were argumentative and which contained mere recitations of evidentiary facts as distinguished from ultimate facts were properly rejected.

14. Appeal and error 🔑1071(6)

Where judgment was adequately supported by adopted findings, and many of proposed findings were in conflict with the judgment, and findings more specific than those adopted would necessarily have been adverse to those proposed, rejection of proffered findings was not error.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by the Mammoth Gold Dredging Company against E. F. Forbes and another to quiet title to a tract of land. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edward J. Bloom, of San Francisco, for appellants.

Rich & Rich, W. P. Rich, of Marysville, and Richard H. Fuidge, of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them in a suit quieting title to a tract of land consisting of eight acres of the Yuba river bed at a point about fifteen miles northeast of Marysville. The land was purchased for placer mining purpose. The deed was executed in October, 1914, and described the premises as "lying and being between the *present high water mark on the right bank of the Yuba River* and the center of said river commencing with the south boundary line of Section Number Twenty-one (21) in township number sixteen (16)

North, of Range number six (6) East M. D. B. and M. and running to the southerly line of the Havey claim (also known as the Mt. Clair Placer Claim) situate in said Section number twenty-one (21) the length of the land hereby conveyed being 1320 feet in length, more or less". There was then a clear high water mark visible along the base of the permanent red earth bank of the river on the east.

The questions to be determined on this appeal are: 1. Did the grantor intend by the language of the deed to bound the demised land on the east by the permanent, perpendicular, high, red earth bank which extends along the margin of the clearly-defined gravel bed of the river, or by the temporary five-foot gravel bank adjacent to the diminished summer flow of the stream? 2. By the use of the term "*present* high water mark on the right bank" did he intend to convey land to the clearly-defined water mark which was then visible on that bank, or only to a theoretical *average* high water mark of the river?

The appellants contend that the findings and judgment are not supported by the evidence.

The Yuba river rises in the Sierra Nevadas and flows southwesterly into the Feather river in the vicinity of Marysville. It is a typical California mountain stream with a variable volume of water, depending upon the seasons and the amount of rainfall and melted snow which are supplied from its watershed. The river is at its highest level in the winter and spring months when the rain and the melted snow are running off. For many decades this river has annually carried great quantities of water as indicated by its permanent high banks and by the depth and broad expanse of the river bed. In the vicinity of the property in question the river bed is from 400 to 1,000 feet in width and is composed of a deep layer of sand, gravel and boulders containing Piedmont Deposit from which a considerable quantity of gold has been extracted by placer mining enterprises since the pioneer days of California. That gravel bed is 30 or 40 feet in depth. The stream frequently changes its course along the river bed in the dry months of the summer when the water is low. During that period of time the summer flow of water often forms temporary gravel banks along the course of the stream eight or ten feet in height. Those temporary banks are usually washed away by the force of the greater volume of water during the wet seasons. The river, at its highest level, fills the entire channel from the red earth bank on one side of the stream to the bank on the other side. These permanent banks rise almost perpendicularly from the outer edges of the gravel bed to a height of 30 feet or more.

As the river reaches a point just west of the line between Nevada and Yuba counties, where the town of Smartville is located, it makes an abrupt turn to the north for a distance of about a mile, describing a U-shaped curve called the Timbuctoo Band, and then returns to its original southwesterly course, flowing into the Feather river at Marysville. The land which is involved in this suit is located about fifteen miles northeast of Marysville and consists of eight acres of the river bed on the easterly side thereof just beyond the turn of its course to the north, at Smartville. The land is adjacent to the southerly line of section 21, and extends northerly therefrom a distance of 1,320 feet, thence westerly to the thread of the stream and back to the point of beginning. It is bounded along the easterly side by the visible high water mark on the base of the permanent perpendicular red earth bank of the river. The plaintiff owns all of the land on the westerly side of the river, opposite the land in question and there is therefore no dispute regarding that western line of the property. The entire controversy is over what constituted the "present high water mark on the right bank of the Yuba River" when the deed was executed in October, 1914.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in every essential respect. A decree was accordingly rendered quieting title in the plaintiff to the strip of land which is described in the findings and judgment by metes and bounds, extending to the visible high water mark on the base of the permanent red earth bank on the eastern side of the river. From that judgment the defendants have appealed.

The findings and judgment are adequately supported by the evidence.

[1] Col. E. A. Forbes, now deceased, the grantor of the placer mining property in question, was a lawyer of some prominence, a member of the legislature and the owner of extensive grazing and farming lands in that locality. The gravel flat was purchased for placer mining dredging pur-

poses. Other similar enterprises of that nature had been previously conducted in the bed of the Yuba river in that vicinity. We must presume that Col. Forbes as a lawyer understood the legal meaning of the phrase, "present high water mark *on the right bank*" which he used in the deed. There can be no doubt the parties to that deed intended that conveyance to extend along the easterly side to the visible high water mark on the base of the permanent bank of the Yuba river, and not merely to the temporary five-foot gravel bank near the middle of the river bed which confined the greatly-diminished summer flow of water. The very purpose for which the land was purchased is proof of that fact. The flat expanse of that river bed was to be dredged for gold. At the location in question the summer stream followed closely the permanent river bank on the west side. The plaintiff owned the land on the western side of that stream. Most of the bare gravel bed which was then desirable for placer mining was located on the easterly side of the summer stream, which was then quite narrow. If the easterly line of the purchased property was to extend only to the high water mark on the temporary gravel bank of the summer stream, then the plaintiff secured only a very narrow and comparatively useless strip of land for mining purpose. Moreover, the reservations in the deed refute that unreasonable theory. The grantor reserved the right to dig and maintain a canal "along the * * * right bank of the river on said (demised) land", as a means of disposing of excess water used in operating an upper placer claim. At that location the summer stream flowed close to the westerly bank of the river. Almost the entire uncovered portion of the gravel bed at that point, which was over 400 feet in width, lay between the channel of the summer stream and the permanent bank of the river on the east. If no part of that gravel bed was intended to be conveyed by that deed, the grantor had no reason to reserve the easement for the ditch because he would then have retained all of that broad expanse of gravel bed which was adequate and far more suitable for the proposed canal than the narrow strip of loose gravel along the margin of the five-foot temporary bank of the diminished summer stream. The maintenance of a water ditch along the edge of the summer stream would have then been unnecessary and useless. It would seem to be impossible and certainly impracticable to maintain a water ditch in the loose gravel along the margin of the summer stream. The reservation in the deed refutes the theory that the demised land was to be bounded on the east by the temporary bank of the summer flow of the river.

[2] The very purpose for which the land in the river bed was purchased, the reference in the deed to the visible *"present* high water mark on the right bank" of the river, the definition of the term "river bank" and the reservation of the easement to dig a ditch "along the right bank of the river on said land" furnish satisfactory proof that the grantor intended to convey river bed land bounded on the east by the visible high water mark then existing on the base of the permanent red earth river bank, and not merely to the temporary five-foot gravel bank of the summer stream.

[3, 4] Two civil engineers and four other witnesses testified that the high-water mark of the river was plainly visible by the washed surface and the absence of vegetation along the foot of that eastern red earth bank of the river. There is substantial evidence that the entire river bed is ordinarily covered with water from one permanent bank to the other in the rainy seasons of each year. Several witnesses testified to having frequently seen the entire river bed covered with water from bank to bank. At least one witness said he saw the river in that condition in 1914, when the deed was executed. He observed the water flowing from bank to bank over the entire river bed. Photostatic copies of government statistics of water measurements of the Yuba river, covering a period of several years, offered in evidence by the appellants, show that the water was higher in 1914 than usual. As compared with a maximum discharge of twelve or fifteen thousand second feet of water flowing in that river the preceding year, it contained 45,700 second feet of water in December, 1913. The evidence shows, and this court may take judicial knowledge of the fact that the greatest quantity of water occurs in these California mountain streams, which are fed by winter rains and the melting snows, in the winter and spring months. It follows that the water in Yuba river must have been quite high in the year 1914 when the deed was executed. The evidence of witnesses who testified that they saw the water flowing over the entire gravel bed from bank

to bank in 1914 is therefore satisfactorily corroborated. It will be observed the disputed eastern boundary of the land in question is not described as the *ordinary* high water mark on the right bank of the river, but it is more particularly referred to as the "*present* high water mark", which was then visible *on the right bank*. We are of the opinion that specific reference may be reasonably construed to designate the high water mark reached by the river during the season immediately preceding the execution of the deed. It is said in 4 Thompson on Real Property, page 342, section 3231: "The effect of the deed depends upon its terms and the presumptions arising therefrom, unless the terms used are uncertain or ambiguous, so that parol evidence is admissible to explain them."

[5] The intention of the parties is the real object sought to be determined in construing the language of a deed. Certainly the rule contended for by the appellants is not controlling under the circumstances of this case. They assert that the high water mark must be ascertained by taking an average of the high marks reached by the river over a period of ten or more years prior to the making of the deed. All of the circumstances of this case seem to refute that theory. It is contrary to the apparent intention of the parties to the deed. It is true, as expressed in 9 Corpus Juris, page 192, section 75, that ordinarily, when the intention of the parties does not otherwise appear, that: "In streams, lakes, or ponds in which the tide does not ebb or flow, low water mark is the point to which the water recedes at its lowest ordinary stage, and not that of an unusually dry season. High water mark is the point to which the water rises at its average highest stage."

[6] This case, however, does not present the question of ascertaining the location of *an average high water mark*. It clearly presents the question as to whether the language of the deed, construed in the light of surrounding circumstances, indicates that the grantor intended to convey land bounded on the east by a visible high water mark then existing along the base of the permanent red earth bank of the river. There is ample evidence that visible high water mark then existed on that permanent river bank.

A specific reference in a deed to the "present high water mark on the right bank of the Yuba River" may be reasonably construed to apply to a definite visible water mark which clearly appeared at the time of the execution of the deed on the face of the bank, rather than to a mere theoretical or invisible line estimated as the point to which the water rises *at its average highest stage*. In this case the deed clearly refers to the "present" mark caused by high water which appears on the right bank of the river. There can be no doubt the grantor referred to the permanent right bank of the river, and not to the temporary gravel bank on the margin of the summer stream. The evidence clearly proves that a high water mark actually existed along the foot of that permanent bank in 1914 when the deed was executed. All the circumstances surrounding the case corroborate that fact. In the present case there is evidence that the water of the river had washed a smooth, visible line along the base of the river bank. It was devoid of vegetation along that line. These are competent circumstances to consider in locating a designated boundary line. Carpenter v. Board of Com'rs of Hennepin County, 56 Minn. 513, 58 N.W. 295; St. Louis, etc., R. Co. v. Ramsey, 53 Ark. 314, 13 S.W. 931, 8 L.R.A 559, 22 Am. St.Rep. 195; Ephraim Creek Coal, etc., Co. v. Bragg, 75 W.Va. 70, 83 S.E. 190; 9 C.J. 193, note 43 [b] and [c].

[7] Moreover, there is substantial evidence that the visible washed line along the base of the east permanent bank in October, 1914, when the deed was executed, was the average high water mark of the Yuba river at that time.

The evidence shows that the Yuba river at the location of the demised land has a broad bed of sand and gravel bordered on either side by permanent red earth banks 30 or 40 feet in height, and that the water usually flows down that bed in the rainy winter and spring months of each year in sufficient quantity to cover the entire bed from one bank to the other, and that a distinct water mark was visible along the base of the east bank in 1914 when the deed was executed.

Drury Butler, a civil engineer with about thirty-five years of practical experience, testified in detail to the character and appearance of the Yuba river, with which he had been familiar for many years. He described the broad graveled river bed with its high, almost perpendicular red earth banks on either side in the locality of the land in question. He said that the bed consists of loose gravel, sand and boulders washed out by the action of the water and containing no vegetation except occasional bunches of willow sprouts; that in the summer time during dry periods and low water the stream became comparatively small and often changed its course from one side of the river bed to another, sometimes forming false or temporary banks several feet in height which were usually leveled or swept away during high water; that the high water mark referred to in the deed is clearly visible along the base of the permanent right bank of the river. He said that he observed "wash on the bank itself, the bank is washed smooth". And he added that the washed portion is devoid of vegetation of any sort. He declared there was no vegetation growing on the sand bar, "not even weeds". To the question propounded to him, "Would, in your opinion, the high water overflow the (demised) land measured within the survey?" he replied, "Absolutely."

Mr. Waggoner, a reputable civil engineer from Nevada City, with forty-eight years of experience, who for many years served as California state débris commissioner, was familiar with the action of the Yuba river during that period of time. He corroborated Mr. Butler with respect to the bed of the river and the permanent and false banks thereof together with the effect of the volume of water flowing therein during the wet and dry seasons. He personally observed the flow of the river from 1907 to the time of the execution of the deed. He testified that the water often flowed from bank to bank, covering the entire gravel bed during the wet seasons. He said in regard to high water:

"The water flows from bank to bank.

"Q. Does that overflow this sand bar? A. It does, absolutely.

"* * * In your opinion does the high water mark come up on that (permanent) bank every time there is high water? A. Certainly. * * * In 1907 the water covered everything in the bed. It was a moving mass of water."

He testified that the permanent banks and the natural flow of the river are now about the same as they were in 1914; that there was "very little change in them since then". He said the high water mark was plainly visible on those permanent banks, and that no vegetation grew on the sandy bed of the stream. He maintained a measuring gauge for many years in Deer creek which is a stream tributary to Yuba river, and testified that his records showed high water in the years 1914 to 1917, inclusive, and in 1925 and 1928. The government statistics offered by the defendants corroborated the fact that there was high water in 1914.

James O'Brien, who had lived for 75 years at Smartville near the location of the land in question and whose father operated a placer mining enterprise just across the river from that point, testified regarding his observation of the action of the water in Yuba river for many years following 1909. He said he had often seen signs of high water marks on the permanent red earth banks in the vicinity of the demised property; that the high water mark "is on the red bank", and that at times of high water when it reaches that mark it would cover the entire sand bar four or five feet in depth. During his examination as a witness the following colloquy occurred:

"Q. Have you seen the river during the winter season when we have average rainfall, at high water mark? A. I have seen it at flood stage * * * going from bank to bank, * * * the red natural banks * * *

"Q. You think in ordinary high water marks the river runs from bank to bank, to your knowledge? A. Yes sir. * * * I think the average flood year the bar was covered every year, I don't think there is any question about it."

By the use of the terms "flood water" and "flood year", it is evident that the witness merely meant ordinary high water conditions. There is no evidence of what may be technically termed flood conditions with relation to that river.

W. F. Johnson acted as patrolman for the Pacific Gas and Electric Company in the vicinity of the land in question from 1908 to 1936. He was perfectly familiar with the water conditions of that river during that period. He testified that he often saw the water flowing in the channel from bank to bank, covering the entire gravel bed of the stream.

James M. Hapgood lived for 65 years at Timbuctoo near the location of the property in question. He testified that he had seen the water flowing from bank to bank several times, and that on those occasions the gravel bed of the stream was entirely covered. The following testimony was adduced in that regard:

> "When we have the average winter, the average run off and high water mark, would it overflow (the river bed)? A. Yes it would be all covered. * * *
>
> "Q. On an average year when there is plenty of snow in the mountains, and you have the ordinary spring run off (is the sand bar covered)? A. Yes."

Joseph French, who had lived at Smartville for 35 years and who was familiar with the river in that vicinity, said he had seen the river nearly every day during that period, and that in the winter time he had often seen the river flowing from bank to bank, "touching the red bank", and completely covering the sand and gravel composing the bed of the stream. He testified that it was so in 1914, and that there was then "twenty-six feet of water in there".

While there may be some conflict of evidence furnished by the government statistics regarding the quantity of water which flowed in the Yuba river from year to year during the years from 1903 to 1914, from which it is argued that the *average* high water mark could not have been at the visible line on the permanent right bank of the stream which was determined by the court to have been the eastern boundary of the land according to the intention of the parties to the deed, the foregoing evidence sufficiently supports the findings and judgment of the court. This is certainly true if it is assumed, as we think it should be, that it was not the intention to refer to the *average* high water mark on that bank, but rather to the particular mark of high water which was visible on the bank when the deed was executed.

[8, 9] The question of the location of a boundary line of demised land is primarily determined by ascertaining the intention of the parties derived from the language of the deed, together with the surrounding circumstances. Miller & Lux v. Secara, 193 Cal. 755, 762, 227 P. 171; 18 C.J. 252, § 198. If there is an ambiguity in the language of the deed the uncertainty should be determined favorable to the grantee and against the grantor. Sec. 1069, Civ.Code; Serviss v. Jones, 133 Cal.App. 640, 24 P.2d 881; 8 R.C.L. 1051, § 104. In this case it was clearly the intention of the parties to bound the property conveyed on the east by the *"present* high water mark" on the permanent bank of the Yuba river.

[10, 11] It is reasonable to conclude that the description in the deed to the property in this case which bounds the land on the east by the "present high water mark *on the right bank* of the Yuba River" refers to the permanent red earth bank of the river and not to the temporary gravel bank at the margin of the summer flow of the stream. These permanent banks clearly mark the boundaries of the Yuba river in its ordinary annual flow augumented by the usual winter rains and melted snow supplied from its natural watershed. The evidence justifies the conclusion that the gravel river bed is ordinarily covered by water in the wet and rainy seasons. The condition of the gravel bed which is comparatively free from vegetation, and which reaches to the permanent banks on either side where visible marks of the washing water may be seen confirms that inference. In the absence of language to the contrary, the bed of a nonnavigable river must be deemed to be bounded by the permanent banks which confine the waters in their course at their highest level. The banks of a river are the boundaries which confine the water to its channel throughout the entire width when the stream is carrying its maximum quantity of water. That definition is peculiarly applicable to those California rivers which depend upon periodical supply of water from winter rains and melted snow, and which diminish in the summer time to mere rivulets which aimlessly wander about over dry gravel beds. Ventura Land & Power Co. v. Meiners, 136 Cal. 284, 290, 68 P. 818, 820, 89 Am. St.Rep. 128. In the case last cited it is said: "According to the most approved definitions, the banks of rivers or other water courses are 'those boundaries * * * which contain their waters at their highest flow'; or, as otherwise expressed by the same judge, they are 'the fast land which confines the water of a river in its channel or bed, in its whole width.' * * * 'By this term is understood what contains the river in its natural channel, when there is the greatest flow of water.' * * * The principle thus established is peculiarly appropriate to this state, where the changes in rainfall from year to year may be said to be periodical. * * * Both definitions agree in holding that the bed of the river is bounded by the perma-

nent or fast banks by which its waters are confined."

[12] The ordinary maximum flow of water in a river during the wet season of each year may not be deemed to be mere "flood" or "storm waters". The average level of the water attained by such a river in its annual seasonal flow establishes its high water mark as defined by the authorities. That rule is applied to the San Joaquin river, which is similar in character to the Yuba river, in the case of Herminghaus v. Southern California Edison Co., 200 Cal. 81, at page 88, 252 P. 607, at page 610 the Supreme Court said:

"The natural flow of water in the said San Joaquin river is, and has always been and always will be, if unobstructed, variable in quantity in the course of each and every year; that is to say, the same is, has been, and will be largest and most abundant at times of heavy rainfall over its watershed in said mountains in each winter season, and will also have a larger accretion in the spring and summer seasons by reason of the melting of the snows in said mountains; that these annually occurring accretions in the amount and flow of the waters of said river are natural and regular, and occur in their usual, expected, and accustomed seasons, and result in an increased amount and flow of the waters of said river. * * * the conclusion is inevitable that the waters of the San Joaquin river annually flowing therein before and during and after these regularly occurring accretions in the volume thereof *constitute the usual and ordinary flow of said river, and are in no sense 'storm' or 'flood' or 'vagrant' or 'enemy' waters as these terms are understood in law.* * * *

" 'In the present case the storm and freshet waters are not something distinct and separate from the ordinary waters of the Fresno river. As a fact, and under the authorities, being annually recurring floods and freshets, flowing in a clearly defined channel, *they constitute a part of the ordinary flow of the waters of such river.*' " (Italics ours.)

We conclude that the *"present* high water mark on the right bank of the Yuba River", as that phrase is used in the deed of conveyance in this case, was intended by the parties to refer to the visible mark thereof then existing and plainly visible on the permanent right bank of the river, and that there is sufficient evidence to support the determination of the court that the demised land is bounded on the east by that line. The findings and judgment quieting title in the plaintiff are adequately supported.

[13, 14] The appellants may not complain of the rejecting of numerous findings proposed by them for the reasons that they were argumentative, inconsistent with the judgment and many of them contain mere recitations of evidentiary facts as distinguished from ultimate facts. It is the established rule that ultimate facts, only, should be found. It is usually unnecessary and improper to incorporate evidentiary facts in the findings. Since the judgment is adequately supported by the findings which were adopted and many of the findings which were offered by the appellants are in conflict with the judgment, and findings more specific than those which were adopted would have necessarily been adverse to them, it was not error for the court to reject the proffered findings. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; 24 Cal.Jur. 944, §§ 188 and 203.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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40 Cal.App.2d Supp. 825

BROWN et al. v. ROLAND et al.

No. 99727.

Appellate Department, Superior Court, San Diego County, California.

June 13, 1940.

Rehearing Denied July 8, 1940.

1. Infants 🔑87

Judgment against minor and his parents, who signed minor's application for driver's license, for damage to automobile caused by accident which occurred while automobile was being operated by minor who had borrowed it from dealers, was not invalid because of failure to appoint a guardian ad litem for the minor. Vehicle Code, § 352, St. 1935, p. 145.

2. Bailment 🔑8

In action by bailor against bailee for damage to the subject matter of the bailment, the bailee will not be allowed to set up title in another.

3. Bailment 🔑8

In action by automobile dealers against minor and his parents, who signed his driver's license application, for damage to automobile which was loaned to minor and was involved in collision as result of minor's negligence, defendants could not defeat recovery on ground that dealers had no title to automobile and merely carried it on consignment, especially in view of fact that at all events dealers had such a "special property" in automobile as gave them control of automobile and they were presumably responsible to anyone holding paramount title for any damages thereto. Vehicle Code, § 352, St.1935, p. 145.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Property".

4. Automobiles 🔑193(1)

The statutory liability imposed upon automobile owner for death or injury to person or property resulting from negligence in operation of automobile by any person using or operating it with permission of owner is liability for damage to person or property of third parties. Vehicle Code, § 402(a), St. 1935, p. 153.

5. Automobiles 🔑184

Automobile dealers who loaned automobile to minor for demonstration purposes did not "waive" right to recover from minor and his parents, who signed his driver's license application, for damage to automobile resulting from minor's negligent operation thereof in consequence of statute providing that owner of automobile is responsible for death or injury to person or property resulting from negligence in operation of the automobile by a person using or operating the automobile with permission of owner. Vehicle Code, §§ 352, 402(a), St.1935, pp. 145, 153.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Bailment 🔑14(1)

A compensated bailee under a bailment for the benefit of both parties is bound to exercise ordinary care in preservation of the property bailed and is liable for ordinary negligence.

7. Bailment 🔑14(1)

A minor who was permitted by automobile dealers to use automobile for his own purposes, with idea that a purchase might be promoted, was a "compensated bailee" who was liable for damage to automobile resulting from his negligent operation thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensated Bailee".

8. Automobiles 🔑184

Where minor's parents signed application for minor's driver's license as required by statute, automobile dealers who delivered automobile to the minor for demonstration to the minor's parents could recover from parents for damage to the automobile resulting from an accident caused by the minor's negligent operation thereof. Vehicle Code, § 352, St.1935, p. 145.

9. Automobiles 🔑184

The statutory liability of parents who signed and verified application of minor for driver's license for the liability of the minor arising out of his driving the automobile does not depend upon consent or knowledge of the parents with respect to possession or operation of the automobile by the minor on a particular occasion. Vehicle Code, § 352, St.1935, p. 145.

10. Damages 🔑113

Where an automobile is susceptible of repair, damages recoverable for injury to the automobile include reasonable cost of repair plus the actual depreciation due to the injury.

11. Damages 🔑188(2)

Evidence of decrease in sale price of automobile damaged below list price for that class of automobiles at time of accident formed a proper measure of the "depreciation damage" recoverable by owner, in absence of other evidence on the subject.

See Words and Phrases, Permanent Edition, for all other definitions of "Depreciation Damage".

◆

Appeal from Municipal Court, County of San Diego; Philip Smith, Judge.

Action by Fred V. Brown and another, copartners doing business under the firm name and style of Brown Motor Company, against Grace Roland and others, for damages to an automobile loaned by plaintiff to defendant

Robert Roland, which resulted from an automobile accident. From a judgment of the municipal court, the defendants appeal.

Affirmed.

C. C. Pease, of San Diego, for appellants.

Luce, Forward, Lee & Kunzel, of San Diego, for appellees.

PER CURIAM.

Plaintiffs Fred V. Brown and B. E. Stewart are doing business under the firm name of Brown Motor Company as dealers in automobiles. The record shows that through one of their employees they allowed the defendant Robert Roland, described in the body of complaint as a minor, to drive a Mercury sedan automobile, constituting part of their stock, for the purpose of demonstrating it to his parents, the defendants Grace Roland and D. E. Roland, who, as he gave plaintiffs to understand, might be interested in buying it. Although young Roland is thus described as a minor, he is not designated as such in the caption of the complaint nor does he appear herein by a guardian ad litem. His minority, however, seems to us sufficiently admitted on the pleadings.

With the permission of the plaintiffs' salesman young Roland took his mother for a drive, thereafter returning the car to the plaintiffs. Subsequently he represented to the plaintiffs' salesman that on the following Sunday his father was to make a trip to Loma Linda and would be interested in trying out the car on that trip. On the Saturday afternoon before the contemplated Sunday trip he, with the permission of the plaintiffs' salesman, took the car out once more and while driving it with some guests of his own and without the presence of his parents, wrecked it. The father testified that when the son had spoken to him about using the car on Sunday that he had told him to "forget it," as he was not able to buy a car. It appears that the minor held an operator's license, issued to him by the State of California upon his parents' verified application. The plaintiffs now sue both the minor and his parents to recover damages for the injury to the automobile. Judgment was given in plaintiffs' favor for $411.77, made up of an aggregate of $311.70 expended for repairs on the car and $100 depreciation caused by the accident. The defendants appeal.

[1] There is no merit in the contention that a failure to appoint a guardian ad litem invalidates the judgment. Pascoe v. Payne, 124 Cal.App. 528, 12 P.2d 1091.

[2, 3] With respect to the ownership of the car, we think the general rule should be applied that in an action by the bailor against the bailee the latter will not be allowed to set up title in another. 8 C.J.S., Bailments, pp. 253, 254, § 21, and cases there cited; 4 Cal.Juris. p. 13; Hayden v. Davis, 9 Cal. 573, 574; Davis v. Donohoe-Kelly Banking Company, 152 Cal. 282, 285, 92 P. 639. These authorities recognize various exceptions to the rule, but we see nothing in the facts of this case to bring it within any of such exceptions. Whether the plaintiffs, as dealers, owned the car which they lent, or carried it on consignment, seems to us immaterial. At all events they had such a special property in it as gave them control of it and they were presumably responsible to anyone holding paramount title for any damages that were sustained by it.

[4-7] We see nothing in the claim that the plaintiffs have waived the right to damages as against the defendants in consequence of the specific provisions of Vehicle Code, § 402 (a), St.1935, p. 153. The obvious meaning of that section is that the liability imposed on one who lends a car is for damage to the person or property of others. To say that he becomes liable for damages to himself would be absurd. It would be equally absurd to say that because he might be liable for damage done to others by the borrower of the car, therefore the borrower cannot be liable to him. As respects the liability of the minor, therefore, it does not seem to us that the evidence that he was the bailee of plaintiffs militates against their right to demand the use by him of ordinary care for the protection and preservation of the car. "A compensated bailee under a bailment for the benefit of both parties is bound to exercise ordinary care in the preservation of the property bailed and is liable for ordinary negligence." 4 Cal.Juris. 22. One permitted to use an automobile for his own purposes, even though with the idea that it may promote a purchase, would appear to fall within the definition of a "compensated bailee." We see no reason, therefore, why Robert Roland, the minor, is not liable for such damages as the trial Court found to be due to his negligence. The record sufficiently supports the finding by the trial Court that his negligent operation of the automobile was the proximate cause of the injury to it.

[8, 9] As to the liability of the parents, the central question presented for consideration seems to us to be: "Does the owner of an automobile who delivers it to a minor for demonstration to the minor's parents have a right of recovery against the parents for the minor's negligent damage to the automobile, when the minor's parents have signed the application for the minor's license as required by the Vehicle Code?" Section 352 of the Vehicle Code, St.1935, p. 145, provides in part: "(a) Any liability of a minor arising out of his driving a motor vehicle upon a highway is hereby imposed upon the persons or person who signed and verified the application of such minor for a license for all purposes of civil damages and said persons or person shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct." We see nothing in the facts of this case to take it out of this statutory rule of liability above quoted. The liability does not seem to us to depend on either consent or knowledge of the parents with respect to the possession or operation of the car by the minor on a particular occasion.

[10, 11] As far as the measure of damages is concerned, we understand the correct rule to be, where an automobile is susceptible of repair, that the damages include the reasonable cost of repair plus the actual depreciation due to the injury. In this instance there is no dispute about the cost of the repairs, and we think that the Court was entitled to consider the evidence of the decrease in sale price below the list price for that class of car at the time of the injury, and that such comparison forms a proper measure of the depreciation damage in the absence of other evidence on the subject.

For the foregoing reasons the judgment is affirmed.

15 Cal.2d 651

RIGGIN v. DOCKWEILER et al.

L. A. 17225.

Supreme Court of California.
July 16, 1940.

Health 🔑32

The federal and state housing acts were enacted to provide for low-cost housing incidental to slum clearance, but there is no requirement that the new structures be confined to slum areas. St.1938, Ex.Sess., pp. 1–23; p. 18, § 13; United States Housing Act of 1937, 42 U.S.C.A. §§ 1401 to 1430.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmett Wilson, Judge.

Proceeding by Herbert Riggin against Isidore B. Dockweiler and others for an injunction to enjoin housing project under federal and state housing acts. From a judgment sustaining defendants' demurrer to amended petition without leave to amend, the plaintiff appeals.

Affirmed.

Barry Sullivan, of Los Angeles, for appellant.

J. H. O'Connor, County Counsel, and Edward H. Gaylord and Beach Vasey, Deputy County Counsels, all of Los Angeles, for respondents.

EDMONDS, Justice.

The same legislation upheld in Housing Authority of the County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794, is challenged in this proceeding. A demurrer to his amended petition for an injunction was sustained without leave to amend, and he appealed from the judgment which followed that order.

The petition held insufficient to state a cause of action, recites in considerable detail the provisions of the statutes passed at the special session of the legislature held in 1938 in order to take advantage of the United States Housing Act of 1937, 42 U.S.C.A. chapter 8, sections 1401 to 1430; Stats. 1938, Ex.Sess. chap. 3 and chaps. 1, 2, 4; Deering's 1939 Supp., Acts 3483–3485. The allegations of fact are that the board of supervisors of Los Angeles county appropriated $50,000 for the use of the Housing Authorities Law Commission, of which $40,000 has been paid to it, that the Housing Authorities Law Commission has designated certain real property in the city of Los Angeles, but not in a slum area, as the site for a housing project; and that the housing authority is about to expend $3,000,000 for the construction of 500 houses in this area, to be operated for the exclusive use of persons of the Mexican race and upon a schedule for liquidation within a 60-year period.

According to the appellant, the question for decision concerns the constitutionality of the California statutes referred to. More particularly, he asserts, this court should decide whether the special session of the legislature which passed the statute was legally convened and whether the board of supervisors had authority to create the Los Angeles County Housing Authority, a public corporation, within 90 days after the enactment of the statute.

By the former decision of this court each of the points raised by the appellant has been determined adversely to his contentions. However, his petition asserts that the respondent is about to build a housing project upon land which is not in a slum area, and as the former case was decided upon issues concerning the constitutionality of the housing legislation without regard to any particular land, the effect of this allegation will be considered.

The Housing Authorities Law (Stats. 1938, chap. 4; Deering's 1939 Supp., Act 3483) authorizes the creation of public bodies corporate and politic to investigate housing conditions, to determine where slum areas exist and to construct or repair housing projects. But the statute contains no provisions making it imperative that a new housing project be located in a slum area. On the contrary, the legislature has commanded: "In the planning and location of any housing project, an authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which the housing authority functions." (Sec. 13.)

In working out the problem of low-cost housing, it may appear that the clearance of a slum area is desirable because the dwellings in use are insanitary, or present fire hazards or are maintained under such conditions that their removal would be in the interest of the public welfare. Also, the location may be an undesirable one for dwellings. Where such circumstances exist, it would be folly to require the new buildings to be constructed at the old location, and compel the new units to be crowded into the space taken up by those cleared away. Such an interpretation of the housing act would thwart the very purposes for which it was passed and effectively block slum clearance in districts where the problem is most acute.

No such result is contemplated. Under the terms of the federal and state statutes, a housing project may be built in any location deemed desirable by those charged with their administration. The legislation was enacted to provide for low-cost housing incidental to slum clearance, but with no requirement that the new structures be confined to slum areas. Chapman v. Huntington, W. Va., Housing Authority, W. Va., 3 S.E.2d 502, 509.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; CARTER, J.

15 Cal.2d 637

In re O'DEA'S ESTATE.

O'DAY et al. v. LYNCH et al.

L. A. 17536.

Supreme Court of California.

July 3, 1940.

As Corrected on Denial of Rehearing

Aug. 1, 1940.

1. Descent and distribution ⚷71(7)

In proceeding to determine heirship, an order denying plaintiffs' motion for relief under statute concerning relief from judgments taken by mistake from plaintiffs' default for failure to appear at trial was not an appealable order, since proceeding was a "matter in probate" and order was an "order in probate" and was not included within statute specifying orders and judgments in probate from which an appeal will lie. Code Civ. Proc. §§ 473, 963, subd. 3; Probate Code, §§ 1190, 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Order in Probate" and "Matter in Probate".

2. Courts ⚷202(5)

The only exception to general rule confining appeals from orders or judgments in probate to those specified in Probate Code is that an appeal will lie from an order granting or denying a motion for new trial in those proceedings in probate in which motion is proper. Probate Code, § 1240.

3. Courts ⚷107

The language of a decision and question thereby decided are to be construed with relation to facts of case in which decision is made and confined to cases of similar import.

In Bank.

Appeal from Superior Court, Los Angeles County.

Proceeding in the matter of the estate of Michael F. O'Dea, sometimes known as M. F. O'Dea, deceased, by Henry J. O'Day and another against James Lynch and others, to determine the heirs of Michael F. O'Dea, deceased. From an order denying plaintiffs' motion to be relieved of their default for failure to appear at trial, plaintiffs appealed. On motion to dismiss appeal.

Motion granted.

Claud B. Andrews, John Leo Harris, and Mosher & Shafer, all of Los Angeles, for appellants.

Bailie, Turner & Lake, of Los Angeles, for respondent Harriett T. O'Dea.

Salisbury, Robinson & Himrod, Freston & Files, and Faries & McDowell, all of Los Angeles, for respondents.

CURTIS, Justice.

This is a motion to dismiss an appeal from an order denying the motion of the appellants to be relieved of their default for failure to appear at the trial. The appellants' motion to be relieved of said default was made in pursuance of the provisions of section 473 of the Code of Civil Procedure. The present motion to dismiss is made upon the ground that the order of denial from which the appeal purports to be taken is not an appealable order. The proceeding in which said order of denial was made was instituted under section 1190 of the Probate Code to determine the heirs of Michael F. O'Dea, deceased, who died intestate and whose estate was then in course of administration in the Probate Court of the county of Los Angeles. The appellants herein, Henry J. O'Day and Genevieve O'Day Jensen, together with hundreds of other claimants, had appeared in said proceeding and after a number of days' trial the court, on July 25, 1939, made an order of dismissal and nonsuit against 235 of said claimants, including the two appellants herein. Thereafter, and on April 15, 1940, the appellants made a motion to set aside said order and for relief under section 473 of the Code of Civil Procedure. This motion was denied, and the present purported appeal was taken by the appellants from said last-named order.

[1] Section 1240 of the Probate Code specifies the orders and judgments in probate from which an appeal will lie, and an order denying relief under section 473 of the Code of Civil Procedure is not one of the orders so specified. A proceeding to determine heirship is a matter in probate. In re Blythe's Estate, 110 Cal. 226, 42 P. 641. As this order denying the appellants' motion brought under section 473 of the Code of Civil Procedure to be relieved of their default was one made in probate, no appeal will lie from said order under the provisions of said section 1240 of the Probate Code.

[2] The only exception to this general rule confining appeals from orders or judgments in probate to those specified in said section 1240 of the Probate Code is that an appeal will lie from an order granting or denying a motion for a new trial in those proceedings in probate in which motion is proper. Estate of Allen, 175 Cal. 356, 165 P. 1011. The exception to the general rule is fully considered in the case of Estate of Armstrong, 8 Cal.2d 204, 64 P.2d 1093, and the reason therefor is explained in some detail. In that case we reiterate our adherence to the general rule, as stated above, and to the exception thereto as declared in the Estate of Allen, supra. Section 1240 of the Probate Code is simply the reenactment of subsection 3 of section 963 of the Code of Civil Procedure, and this court has on numerous occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure, or from any other order not specified in subsection 3 of section 963 of the Code of Civil Procedure, with the one exception above mentioned. Estate of Allen, supra; Estate of Spafford, 175 Cal. 52, 165 P. 1; Estate of Calahan, 60 Cal. 232; Estate of Lutz, 67 Cal. 457, 8 P. 39; Estate of Wiard, 83 Cal. 619, 24 P. 45; and Estate of Cahill, 142 Cal. 628, 76 P. 383.

[3] The appellants rely upon the case entitled Estate of Baker, 170 Cal. 578, 150 P. 989, 992, but in that case the order of dismissal was made in a proceeding in which the party against whom the proceeding was intended to be dismissed was dead on the date when said order was made, and her personal representative, not having been appointed until after the time to appeal from said order of dismissal had expired, had no opportunity to appeal from said order of dismissal. When the personal representative of the deceased had qualified as such, he moved to set aside the order of dismissal, and upon his motion being denied he appealed from the order of denial and this court reversed said order. In reversing said order this court stated, "Since the judgment sought to be vacated was subject to an appeal, the right to this appeal from the order refusing to vacate it *under the indicated circumstances* is with the administrator." (Emphasis ours.) The peculiar and unusual situation arising out of the facts in that case does not lay down any general exception to the rule that appeals in probate matters must be limited to those orders and judgments specified in section 1240 of the Probate Code. On the other hand, the language of that decision and the question thereby decided should be construed with relation to the facts of that case, and confined to cases of similar import. The facts in the instant case have no similarity to those in the Baker case and for that reason the decision herein should not in any manner be controlled by what was said in that case.

The motion to dismiss the appeal should be and hereby is granted.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.

40 Cal.App.2d 97

PEOPLE v. McNEESE.

Cr. 3357.

District Court of Appeal, Second District, Division 1, California.

July 12, 1940.

1. Criminal law ⚷1159(2)

Where there is substantial evidence tending to support the ultimate issue presented to the jury, reviewing court cannot as a matter of law substitute its judgment on the facts for that of the triers of fact. Code Civ. Proc. §§ 1847, 2061.

2. Criminal law ⚷572

Testimony of druggist and his clerk identifying accused as person who at point of gun robbed druggist of narcotic drugs sustained conviction of armed robbery, notwithstanding testimony of accused's alibi witnesses. Code Civ.Proc. §§ 1847, 2061.

3. Criminal law ⚷1160

Before a verdict of a jury which had been approved by trial court can be set aside on appeal on the ground that it does not sustain conviction, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusions reached in court below.

4. Criminal law ⚷829(7)

Where court, in prosecution for robbery while armed with deadly weapon, fully and fairly instructed jury on defense of alibi, refusal to give requested instructions that defense of alibi was legitimate and referring to testimony of alibi witnesses was not error.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Allen J. McNeese was convicted of robbery while armed with a deadly weapon, and from the judgment and an order denying a motion for new trial he appeals.

Judgment and order affirmed.

William W. Larsen, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Following trial before a jury, defendant was convicted of the crime of robbery committed while armed with a deadly weapon. He also admitted the truth of the allegation contained in the information that he had suffered a prior conviction for the crime of robbery and had served a term of imprisonment in the penitentiary at San Quentin therefor. This appeal is from the judgment and the order denying defendant's motion for a new trial.

Following is a brief but fair epitome of the evidence introduced both by the People and the defendant. On the night of June 21, 1939, a man entered the drug store of Guy H. Miller in the city of Los Angeles and at the point of an automatic pistol held up and robbed the druggist of certain narcotic preparations of the value of $18. Both the proprietor and his clerk positively identified the defendant as the man who committed the robbery. With reference to the lighting conditions prevailing in the drug store at the time of the robbery, the evidence indicated that the same was brightly lighted, while the identifying witnesses had an opportunity to observe the robber from distances of from two to four feet. The intruder wore no mask or disguise of any kind, and according to the testimony of the proprietor, "a 200-watt light was right over his head * * * his face was well lighted". Subsequently the police visited the apartment where defendant resided and found therein a tin box containing an assortment of narcotics. The containers of these narcotics found by the officers were exhibited to the druggist at the trial and he identified the same by reason of the cost marks written in his own handwriting upon such containers. Also found in the apartment of defendant were some hypodermic needles, a gun holster, some .32 and .38 caliber cartridges, and an imitation police badge. Defendant admitted at his trial that he was a drug addict.

In opposition to the foregoing, the defendant offered the testimony of a witness that the latter saw him in a bar in the city of San Francisco about eight o'clock on the evening when the robbery was committed, and which witness also testified he saw the defendant in the northern city the day before and three or four days after June 21. Another witness testified that he met the defendant in Oakland about a quarter of seven on the evening of June 21; and there was testimony that defendant was not present at a Father's Day party tendered his father in Los Angeles June 19 for the reason that he was in the northern part of the state, the last-mentioned testimony coming from members of defendant's family. Testifying in his own behalf, defendant denied participation in the robbery, claimed he was in San Francisco from June 17 to June 30, and while admitting he was a narcotic addict, asserted that the drugs found in his apartment, containers of which were identified by one of the victims of the robbery, had been purchased by the defendant from a narcotic peddler in San Francisco.

[1-3] In urging that the verdict is against the law and the evidence, appellant contends that the testimony showing that he was in San Francisco on the date of the alleged robbery "was not broken or shaken in any way, and that in the light of the fact that the identification testimony * * * was shown under cross-examination to be inexact in many particulars"; and that therefore a new trial should have been granted, and now that the judgment and the order denying a new trial should be reversed. Upon innumerable occasions the appellate tribunals of this state have reiterated the rule that where there is substantial evidence tending to support the ultimate issue presented to the jury, appellate courts cannot, as a matter of law, substitute their judgment on the facts for that of the triers thereof. As was said by this court in People v. Gilbert, 26 Cal.App.2d 1, at page 21, 78 P.2d 770, 781, "No rule of criminal law and procedure is better established in this state". It must be remembered that the appellate court is not permitted to see the witness, observe his demeanor upon the stand, or note the candor or apparent lack of candor in giving his testimony, and therefore the legislature of this state has ordained that the jury are the exclusive judges of the credibility of witnesses, Code Civ.Proc., sec. 1847, and they are also the judges of the effect and value of evidence addressed to them, except as limited by the provisions of section 2061 of the Code of Civil Procedure. From the foregoing it necessarily follows that the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration, to absolutely reject the testimony that was contradictory of the witnesses who positively identified the defendant, and by the same token were they authorized to disbelieve the testimony of the defendant, together with his alibi witnesses, and to accept the testimony of the druggist and his clerk as to the immediate circumstances of the robbery and that the defendant was the participant therein; and this they could do however weak in places the testimony of the prosecution witnesses may have been made to appear, or however sharply their testimony on other important points might have conflicted with the testimony of other witnesses. It is not our function, but the function of the jury in the first instance and the trial court after verdict, to determine what facts are established by the evidence in the case; and as was said in People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393, "* * * and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." See also, People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467; People v. Marble, 8 Cal.2d 139, 140, 64 P.2d 135. Manifestly, the testimony of the druggist and his clerk cannot be said to be so inherently improbable as to amount to no substantial evidence at all. Such being the case, we are without power to disturb the findings of the triers of fact.

[4] Finally, appellant contends that the court erred in refusing to give certain instructions offered by the defendant and in the giving of a certain instruction presented by the prosecution. While one or more of defendant's proffered instructions on the issue of an alibi might have been given, it must be held that the jury were fairly and correctly instructed upon that defense when the court advised them: "An alibi simply means that the defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and, if the evidence on the subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed." All that the instructions offered by the defendant added to the foregoing was to declare the defense of alibi to be a legitimate one and make reference

to the testimony of particular witnesses who testified the defendant was not at the scene of the robbery on the evening of its commission. Appellant's claim that the alibi instructions given by the court emphasize the fact that the defense of alibi should be more carefully scrutinized than other testimony is without merit, because a mere reading of the given instruction indicates that the jury were admonished that if from a consideration of all the evidence, including that upon the issue of alibi, there was generated in their minds a reasonable doubt of the guilt of the defendant, he was entitled to an acquittal. A reading of the instructions in their entirety convinces us that they were fair and just to the accused.

The judgment and the order from which this appeal is taken are, and each of them is affirmed.

We concur: YORK, P. J.; DORAN, J.

40 Cal.App.2d 38

PEOPLE v. ONE 1937 PLYMOUTH 6 4-DOOR SEDAN, ENGINE NO. P4-211565 (ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO et al., Interveners).

Civ. 11104.

District Court of Appeal, First District, Division 2, California.

July 8, 1940.

1. Appeal and error 🔑1222

Where, on state's appeal in forfeiture proceedings, District Court of Appeal reversed portion of judgment allowing costs to intervening claimants and clerk erroneously inserted words "The appellant to recover costs of appeal" in remittitur, District Court of Appeal had jurisdiction thereafter to recall and modify the remittitur.

2. States 🔑215

Costs could not be awarded against state, notwithstanding state was losing party on its appeal from judgment denying forfeiture of automobile. Code Civ.Proc. § 1034.

3. States 🔑215

Prevailing party on appeal is not liable for other party's costs even though the state is the other party. Code Civ.Proc. § 1034.

4. Costs 🔑234

Where judgment denying forfeiture of automobile was affirmed on state's appeal but award of costs to intervening claimants was reversed, court rule that when a judgment is modified clerk should insert in the remittitur that appellant recover costs was inapplicable, on ground that trial court's award of costs was a mere incident to and not a part of the judgment so that there was no modification of the judgment within rule. Code Civ.Proc. §§ 1032, 1034; Rules of the Supreme Court and the District Court of Appeal, rule 23.

5. States 🔑215

Where state was losing party on its appeal so that costs could not be awarded against losing party and, in absence of statute, costs could not be awarded against prevailing party, District Court of Appeal was not required to insert in its judgment a clause that each party should pay its own costs. Code Civ.Proc. § 1034.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

On application of interveners and claimants to recall and modify remittitur.

Remittitur recalled and modified in accordance with opinion.

For prior opinion, see 98 P.2d 750.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Robert G. Partridge, of San Francisco, (Leo Marshall Cook, of San Francisco, of counsel), for claimant, intervener and respondent.

James B. Boland, of San Francisco, for intervener, claimant and respondent.

STURTEVANT, Justice.

[1-3] This is an application to recall and modify the remittitur heretofore issued in the above entitled action. The judgment rendered by the trial court was as follows: "Ordered, adjudged and decreed that plaintiff take nothing by its said petition, complaint, and notice of seizure, and that the automobile described as one 1937

Plymouth 6 4-Door Sedan Engine No. P4-211565, be returned to defendants and interveners Grace Barry, and Anglo California National Bank of San Francisco, a National Banking Association." The judgment ordered by this court provided as follows: "That portion of the judgment denying a forfeiture and ordering a return of the automobile is affirmed. That portion allowing costs to interveners and claimants is reversed." 98 P.2d 750, 755. In preparing the remittitur the clerk inserted therein: "Whereupon it is ordered, adjudged and decreed by the court that that portion of the judgment of the Superior Court in and for the City and County of San Francisco denying a forfeiture and ordering a return of the automobile in the above entitled cause be and the same is hereby affirmed. That portion allowing costs to interveners and claimants is reversed. *The appellant to recover costs of appeal.*" The interveners and claimants contend that the last sentence contained in the remittitur was inserted through the mistake of the clerk and that it should be stricken out. The plaintiff contends that the error, if any, was the error of the court and that it has lost jurisdiction. We think the latter contention is without merit. Except as hereinafter specifically noted the judgment of the trial court was affirmed in toto. It is statutory that the prevailing party on appeal shall be entitled to his costs. Code Civ.Proc. § 1034. However the losing party was the plaintiff, the People of the State of California. As there is no statute providing that the state of California will pay costs in such a proceeding, and as the state of California is not bound by general words contained in the statutes, no authority existed to award costs against the state. People v. One Plymouth Sedan, 21 Cal.App.2d 715, 717, 69 P.2d 1011. The statute provides that an order for costs may be made by the trial court, Code Civ.Proc. § 1032. Such orders are not correctly speaking a part of the judgment but are merely incidental thereto. Cain v. French, 29 Cal.App. 725, 727, 156 P. 518; Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 42 N.W. 232, 17 Am. St.Rep. 131. There is no statute that authorizes costs to be awarded against the prevailing party. No different rule obtains when the state is a party. Commonwealth of Kentucky v. H. I. Todd, etc., 9 Bush, Ky., 708.

[4] The plaintiff asserts that rule XXIII of the Rules of the Supreme Court and the District Court of Appeal provides that when a judgment is modified and the order of modification is silent that the clerk should insert in the remittitur a provision that the appellant recover costs. If the judgment in the instant case had been modified and the modification was not made of the mere incident (the order awarding costs in the trial court), that assertion would have merit. But in the present case, as stated above, the modification made by this court was made of the incidental order and not of the judgment proper. It follows that said rule has no application. Such, in effect, has been held when the court, instead of the clerk, worded the remittitur. Strupelle v. Strupelle, 59 Cal.App. 526, 532, 211 P. 248. The clerk's powers are certainly no more than the powers of the court.

[5] Nor may it properly be said that in the present case this court should have inserted in its judgment a clause that each party should pay its own costs. Presumably each party had done so. Such clause was not required by any statute, by the rules of this court, nor by reason of established practice. Curtin v. State of California, 61 Cal.App. 377, 393, 214 P. 1030. It was settled law that the state was not liable to pay the defendant's costs. There was no statute that the prevailing party should pay the costs of the other. Under the common law no such liability existed. Commonwealth of Kentucky v. H. I. Todd, etc., supra. Therefore this court was not required to insert the clause mentioned.

It follows that the clerk was mistaken in assuming that rule XXIII required him to insert in the remittitur the words complained of and that the remittitur should be recalled. Oakland v. Pacific Coast Lumber, etc., Co., 172 Cal. 332, 337, 156 P. 468, Ann.Cas.1917E, 259.

It is therefore ordered that said remittitur be recalled, the sentence, "The appellant to recover costs of appeal", be stricken out and, as so changed, that the remittitur be returned to the trial court.

I concur: NOURSE, P. J.

40 Cal.App.2d 93

ALLEN v. BRICE et al.

Civ. 12740.

District Court of Appeal, Second District, Division 2, California.

July 11, 1940.

Appeal and error 🔑805

Where an appellant filed in superior court an abandonment of his appeal to District Court of Appeal, appeal would be dismissed. Code Civ. Proc. § 954a.

Appeal from Superior Court.

Action by Edgar Allen against Fannie Brice and E. R. Gelberg. From an adverse determination, plaintiff appeals.

Appeal dismissed.

Cantillon & Glover and Thomas B. Sawyer, all of Los Angeles, for appellant.

Richard Coblentz, of Los Angeles, for respondent.

McCOMB, Justice.

It having been called to the attention of this court that the appellant has filed in the Superior Court an abandonment of his appeal in accordance with the provisions of section 954a of the Code of Civil Procedure, the appeal in the above-entitled case is hereby dismissed.

I concur: WOOD, Acting P. J.

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40 Cal.App.2d 119

INDEMNITY INS. CO. OF NORTH AMERICA v. SAMPSON et al.

Civ. 2354.

District Court of Appeal, Fourth District, California.

July 12, 1940.

Hearing Denied Sept. 7, 1940.

Subrogation 🔑33(2)

Surety on former trustee in bankruptcy's bond which was required to make good former trustee's defalcations was subrogated to new trustee's right to recover the misappropriated funds and hence, on theory of "subrogation", could maintain action against former referee in bankruptcy who allegedly participated in former trustee's embezzlement and use of some of the funds. Civ. Code, §§ 2847–2849.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogation".

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by the Indemnity Insurance Company of North America, a corporation, against Robert K. Sampson and J. A. Isaacson to recover of defendant Sampson money embezzled by him as receiver and trustee in bankruptcy, for which embezzlement plaintiff had to pay as surety, and to recover from defendant Isaacson money in the embezzlement and use of which he allegedly participated as referee in bankruptcy. Defendant Isaacson's general demurrer to the complaint was sustained, and from judgment for defendant Isaacson, plaintiff appeals.

Judgment reversed, with instructions.

Atherton & Atherton, of San Diego, for appellant.

J. A. Donnelley, and Richard P. MacNulty, both of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered in favor of J. A. Isaacson after his general demurrer to plaintiff's complaint had been sustained without leave to amend.

At all times material here Isaacson was referee in bankruptcy of the United States District Court, Southern District of California, Southern Division. He appointed Robert K. Sampson receiver and trustee in bankruptcy in the twenty estates in bankruptcy involved here. Plaintiff became surety for Sampson in each of those estates. Because of embezzlements from them the surety had to pay about sixteen thousand dollars to the referee in bankruptcy who succeeded Isaacson in that office. Plaintiff sought to recover from Sampson the total amount misappropriated, and from Isaacson a lesser amount, in the embezzlement and use of which it is alleged he participated.

The complaint contains twenty causes of action. As each involves the same principle we find it necessary to summarize the allegations of but one of them.

The foregoing facts are alleged in detail as is the corporate existence of plaintiff. It is alleged that Sampson embezzled and misappropriated to his own use money belonging to the estates coming into his possession; that Sampson and Isaacson conspired and colluded together to misappropriate funds of the estates to their own use; that all checks on estate funds drawn by Sampson were countersigned by Isaacson, who knew that the funds withdrawn by such checks were being misappropriated and converted; that plaintiff repaid the money so embezzled to such estates under the terms of its bonds; that in the estate of Walter J. Carr, a bankrupt, Sampson issued four checks in the total sum of $341.42, all countersigned by Isaacson; that two of those checks were payable to Sampson and two to Isaacson; "that all of said checks were spurious checks and were wrongfully issued without any value or consideration, and were cashed by the said defendants, and the money realized therefrom was misappropriated and converted by said defendants to their own use"; that Sampson collected $25 belonging to the estate which he appropriated to his own use and which he did not account for, and that he also received $13.73 as trustee's fees in excess of the amount to which he was legally entitled. No recovery was sought against Isaacson for these latter amounts.

Counsel for Isaacson seek to support the judgment on two principal grounds. First, it is urged that when plaintiff paid the defalcations it extinguished the liability of its bonds and can maintain no action upon them other than against its principal, Sampson, under sections 2847 and 2848 of the Civil Code and the authority of Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094. Second, it is urged that if the action be considered as one in tort there can be no contribution between joint tort-feasors; that as plaintiff must stand in the shoes of its principal, Sampson, it can claim no contribution from Isaacson, who must be regarded as a joint tort-feasor.

There can be no question of the general soundness of the authorities cited, but their application to the factual situation here presented is not apparent. Rather, this case comes under the broad doctrine of subrogation and the provisions of section 2849 of the Civil Code. The first two sections cited have more to do with the reimbursement of the surety through contribution than with subrogation. The last-cited section permits the subrogation of the surety in the place of the creditor and gives the surety the right to follow every security held by the creditor for the original debt.

The case of Yule v. Bishop, supra, cannot be considered as authority supporting the position of Isaacson. That case merely held that when a surety paid the note of a corporation the obligation of the note was extinguished and that suit on the note could not be maintained against the corporate stockholders. It also held that the surety could recover against the stockholders under their statutory liability; that the payment of the note by the surety created a new obligation upon which the stockholders of record at the time of the payment could be held.

There is no attempt here to sue Isaacson on the obligations of the bonds to which he was not a party. The action is to recover from him money which he and Sampson wrongfully appropriated to their own use and which obligations the surety had to pay.

United States v. Union Surety & Guaranty Co., D.C., 118 F. 482, holds that a trustee in bankruptcy is considered the person who has been injured by the misappropriation of the funds of a bankrupt estate by a former trustee; that he is the proper party plaintiff to bring an action to recover funds misappropriated by the former trustee. He, therefore, must be regarded as the creditor to whose rights the surety is subrogated upon payment of the defalcation under the clear provisions of section 2849 of the Civil Code. Title Guaranty, etc., Co. v. Duarte, 54 Cal.App. 260, 201 P. 790; King v. Hartford Acc. & Indem. Co., 133 Cal.App. 711, 24 P.2d 906; Estate of Elizalde, 182 Cal. 427, 188 P. 560; 23 Cal.Jur. 930, and cases cited.

It would seem too clear to need any extensive citation of supporting authorities that the new trustee in bankruptcy could have maintained an action against Isaacson to recover the money which the latter had wrongfully extracted from the bankrupt estates and which he had retained and refused to return. As the surety was compelled to make good those defalcations it was subrogated to all of the rights of the trustee against Isaacson. County of San Diego v. Croghan, 2 Cal.App.2d 494, 38 P.2d 474; Meyers v. Bank of America, 11 Cal.2d 92, 77 P.2d 1084; United States Fidelity & Guaranty Co. v. Title Guaranty & Surety Co., D.C., 200 F. 443; National Surety Co. v. State Savings Bank, 8 Cir., 156 F. 21, 14 L.R.A.,N.S., 155, 13 Ann.Cas. 421; Street v. Pac. Indemnity Co., 9 Cir., 79 F.2d 68; United States Fidelity & Guaranty Co. v. Citizens Nat. Bank, D.C., 13 F.2d 213. As the new trustee could have proceeded to recover the money Isaacson assisted in embezzling, and as plaintiff was subrogated to the rights of the new trustee when it made good the defalcations, it could maintain this action against Isaacson.

It follows that the complaint stated causes of action against Isaacson and that the general demurrer was wrongfully sustained.

The judgment is reversed with instructions to the trial court to overrule the demurrer and give Isaacson a reasonable time in which to answer the complaint.

We concur: BARNARD, P. J.; GRIFFIN, J.

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40 Cal.App.2d 67

PEOPLE v. DAWSON.

Cr. 457.

District Court of Appeal, Fourth District, California.

July 10, 1940.

Criminal law 🔑1182

Where clerk's and reporter's transcripts were filed in the District Court of Appeal on June 14, 1940, and no appearance was made for defendant by brief or otherwise although the cause was regularly calendared for July 9, 1940, the attorney general's motion for an affirmance under statute was granted, and judgment convicting defendant of arson and burning property with intent to defraud an insurer was affirmed. Pen.Code, § 1253.

◆

Appeal from Superior Court, San Diego County; Edw. J. Kelly, Judge.

Mrs. Minnie Dawson, was convicted of arson and burning property with the intent to defraud an insurer, and she appeals.

Affirmed.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was convicted, under two counts of an information, of arson and burning property with the intent to defraud an insurer. She appealed from the judgment which followed.

The clerk's and reporter's transcripts were filed in this court on June 14, 1940. No appearance has been made for the appellant by brief or otherwise, although the cause was regularly calendared for July 9, 1940. The attorney-general has moved for an affirmance under section 1253 of the Penal Code.

The motion is granted and the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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40 Cal.App.2d 56

DEARTH v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 12687.

District Court of Appeal, Second District, Division 2, California.

July 9, 1940.

1. Criminal law 🔑576(1, 11)

Where petitioner was not brought to trial within 60 days after filing of information against petitioner in superior court, and delay was not due to petitioner's fault, superior court was bound to dismiss action against petitioner, under statute and constitutional provision, unless good cause was shown why action was not sooner brought to trial, and burden was upon prosecution to show existence of good cause why petitioner was not brought to trial within 60-day limit. Pen.Code, § 337a, subd. 3; § 1050; § 1382, subd. 2; Const. art. 1, § 13.

2. Criminal law 🔑576(2)

In determining whether good cause was shown why a criminal prosecution against petitioner was not brought to trial within 60 days after filing of information in superior court, a showing that a large number of civil cases had been pending before superior court did not excuse failure to assign a sufficient number of judges to handle criminal matters. Pen.Code, §§ 1050, 1382.

3. Mandamus 🔑61

Where petitioner was not brought to trial within 60 days after filing of information against petitioner in superior court, and delay was not due to petitioner's fault, and prosecution failed to show existence of good cause as to why petitioner was not brought to trial within 60-day limit, petitioner was entitled to mandamus to compel superior court to dismiss criminal action. Pen.Code, § 337a, subd. 3; § 1050; § 1382, subd. 2.

◆

Mandamus proceeding by Lee Dearth against the Superior Court of the State of California in and for the County of Los Angeles, to compel the Superior Court to dismiss a criminal action pending against petitioner, wherein an alternative writ was issued.

Peremptory writ issued.

James J. McCarthy, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas DeCoster, Deputy Co. Counsel, both of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

In this proceeding petitioner seeks a writ of mandamus to require the superior court of Los Angeles county to dismiss a criminal action pending against him on the ground that he has not been brought to trial within the time required by law. From the petition and the answers thereto the following facts appear: An information was filed against petitioner in the superior court on February 21, 1940, charging him with the violation of subdivision 3 of section 337a of the Penal Code. He entered a plea of not guilty in department 41 on February 26, and his trial was set for March 27 in department 44. On the last-mentioned date petitioner appeared in department 44 and answered ready for trial but the judge presiding in that department on his own motion continued the trial to April 22, at which date petitioner again appeared ready for trial but the trial date was continued to April 23. Petitioner appeared on April 23 in department 44 ready for trial but the presiding judge of respondent court had assigned a civil case to department 44 for trial and the judge presiding in department 44 commenced the trial of the civil case and continued the trial of petitioner to April 26. On April 24 petitioner moved the court to dismiss the action pending against him on the ground that he had not been brought to trial within 60 days as required by section 1382 of the Penal Code. The judge presiding in department 44 denied petitioner's motion and in commenting on the motion stated for the record that he was ready to try petitioner's case on April 23 if the presiding judge had not assigned a civil case to his court for trial. On April 26 petitioner again appeared in department 44 and moved the dismissal of the action on the ground that he had not been brought to trial within the time provided by law but the motion was denied and the action transferred to department 41, the master calendar department of respondent court. Petitioner's motion to dismiss was again made before the judge of the master calendar department and was by him denied and petitioner's trial was continued to May 13 in department 41. Thereafter petitioner applied to this court for a writ of mandamus and an alternative writ was issued herein on May 9, 1940.

[1] The Constitution of California, article I, section 13, provides that in criminal prosecutions "the party accused shall have the right to a speedy and public trial". In section 1382 of the Penal Code it is provided: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: 1. * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." In 1927 the legislature added section 1050 to the Penal Code by which it is provided that criminal cases shall be given precedence over civil matters and that if the court is unable to hear all criminal cases pending before it within 30 days after the respective defendants have entered their pleas it must immediately notify the chairman of the judicial council. Upon

the constitutional provision and in accordance with the requirement of section 1382 of the Penal Code it was the duty of the court to dismiss the action against petitioner unless good cause was shown why the action was not sooner brought to trial. The burden was upon the prosecution to show the existence of good cause why petitioner was not brought to trial within the 60-day limit. People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873; Ex parte Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A., N.S., 882, Ann.Cas.1912D, 1267.

[2, 3] It is pointed out by respondent that petitioner is deemed to have consented to several of the continuances for the reason that no objections were made at the time the continuances were ordered. Be that as it may, there can be no question but that petitioner objected to a further continuance on April 24 in department 44 and also on April 26 in the master calendar department. The 60-day period had at that time expired and no sufficient cause was shown why petitioner could not have been brought to trial at the times when his motions for dismissal were made. The nearest approach to a showing of cause for delay appears in the answer filed herein on behalf of respondent in which it is set forth that a protracted criminal trial had been transferred to a civil department of respondent court and that for this reason the presiding judge had assigned civil cases to department 44. To comply with the provision contained in section 1050 of the Penal Code that criminal matters should be given precedence over civil matters and to enable defendants in criminal actions to have the speedy trials which are guaranteed by the Constitution a greater number of judges should have been assigned to departments handling criminal matters. There are fifty judges in the superior court of Los Angeles county, and the showing that a large number of civil cases were pending does not excuse the failure to assign a sufficient number of judges to handle criminal matters. Nor was there any showing made that the chairman of the judicial council was notified that a sufficient number of judges was not available to try criminal cases. In rule 25, adopted by the judicial council for the guidance of the superior court, it is provided that the departments handling criminal cases "shall be sufficient in number to hear all criminal cases within the time required by law". Petitioner is unquestionably entitled to relief by a proceeding in mandamus. Ex parte Ford, supra.

Let a peremptory writ issue.

I concur: McCOMB, J.

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40 Cal.App.2d 102

PEOPLE v. HIGHTOWER.

Cr. 3351.

District Court of Appeal, Second District,
Division 1, California.
July 12, 1940.

1. **Criminal law** 🔑1144(13)

Reviewing court is required to review evidence in light most favorable to prosecution, following guilty verdicts.

2. **Criminal law** 🔑566

Evidence identifying a defendant as perpetrator of crime charged need not be positive and uncontradicted, to sustain a conviction.

3. **Criminal law** 🔑1159(2)

On appeal, reviewing court cannot reverse a conviction unless court can say as a matter of law that there was no evidence to support it.

4. **Criminal law** 🔑741(2)

Jury in robbery prosecution was justified in rejecting testimony, or circumstances which might have been contradictory to, or inconsistent with testimony identifying defendant as one of the perpetrators of the robbery. Code Civ.Proc. §§ 1847, 2061.

5. **Robbery** 🔑24(1)

Evidence sustained conviction for robbery and attempted robbery.

6. **Criminal law** 🔑404(1)

In prosecution for robbery and for attempted robbery, a revolver found under house where defendant lived, but which was not positively identified as one of the revolvers used in the robbery, was admissible to show that defendant had means of doing what prosecuting witnesses had charged him with doing, especially where there was evidence that gun was similar to one of those used in robbery.

7. Criminal law ⚷786(2)

Instruction, that defendant having taken witness stand in his own behalf should have his testimony judged by same rules as testimony of any other witness, was properly refused.

8. Criminal law ⚷788

An instruction based on the statute that, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within power of party, evidence offered should be viewed with distrust, was properly refused. Code Civ.Proc. § 2061, subds. 6, 7.

9. Criminal law ⚷759(1)

An instruction that failure of defendant to recall his whereabouts, on evening of commission of robbery, should not be considered by jury as evidence of guilt, was properly refused as invading province of jury.

10. Criminal law ⚷822(1)

Instructions must be considered in their entirety.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Adolphus Hightower was convicted of robbery and attempted robbery, and he appeals.

Affirmed.

David Lynn, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county appellant and one George Joseph were accused in count one of the crime of robbery; counts two and three alleged the commission by them of the crime of attempted robbery; while in count four they were charged with the offense of attempted murder. Trial before a jury resulted in verdicts, finding defendants guilty as charged on counts one, two and three of the information and not guilty of the offense set forth in count four. From the judgment and the order denying his motion for a new trial, defendant Adolphus Hightower prosecutes this appeal.

[1] Viewing the evidence in the light most favorable to the prosecution, as we are required to do following guilty verdicts, we find in the record testimony that about 8:30 o'clock on the evening of September 16, 1939, three men entered the El Mirador Market at Watts in Los Angeles county, and at the point of guns held up the employees working therein. At the time of the entry of the robbers there was in the market an elderly couple who had just completed purchasing some merchandise, together with six employees, the latter of whom were making preparations to close the market for the day. At the time the intruders entered an employee named Paul Chavez was in the act of closing the front doors. The defendant George Joseph approached Pedro Espinosa, an employee working in the grocery department of the market, and at the point of a gun compelled him to go to a store room located in the rear portion of the establishment. After Espinosa and other employees were back in the store room, defendant Joseph demanded that they empty their pockets. About the same time defendant Joseph approached Espinosa the appellant, Adolphus Hightower, ran over toward the meat market section with a gun in his hand, where one Perez, the manager of the market, and another employee were working, and at which time appellant said, "Throw up your hands." At the time this command was given the manager, Perez, "grabbed a cleaver", which action being noticed by appellant, the latter fired his gun and Perez fell to the floor, feigning injury. No one was struck by the shot and the bullet lodged in an adjacent wall. Immediately after firing the shot appellant jumped over the counter toward the location of the cash register, where another employee was standing, and ordered the latter back to the store room, to which place he was followed by appellant. The victims were relieved of a small amount of money. A few days after the robbery police officers found a .45 revolver under a house where appellant was residing.

As a first ground of appeal it is urged by appellant that the evidence is insufficient to sustain the verdicts, mainly because of the claimed failure to sufficiently identify appellant as one of the robbers. That such contention cannot be sustained is evidenced by the testimony given by one of the victims, Paul C. Chavez, who testified that he was closing the front door of the market at the time the three men entered, and that when appellant Hightower entered the north door of the market he had a gun in his hand. Concerning his identification of appellant, we find in the record the following:

"Q. Just what you saw and what you heard and what you know yourself. A. I heard a lot of commotion at the other door, and I saw that boy over there running toward the meat counter; then I heard a shot.

"Q. What you mean—wait a moment. A. I saw that boy in the blue jacket running fast, very sudden.

"Q. That is the man sitting along by Mr. Lynn, that is Hightower? Is that right? A. All right, Mr. Hightower.

"Q. You saw him running in from the north door? A. Yes.

"Q. What did he do? A. He ran up to the meat counter; then I heard a shot. I saw him over in that little space, then he fired, and then the boss is down; then the next thing I saw is Mr. Joseph, he was taking the other boy inside the store room, and the third person, he is not here.

* * *

"Q. What did you hear and see in that respect? A. Well, I heard a shot, and then I saw Mr. Perez fall and then we were forced into the store room.

"Q. Who did you see there with any guns near Mr. Perez, at the time the shot was fired? A. At that time?

"Q. Yes. A. Mr.—Mr.—Mr.—Hightower. * * *

"Q. Then one of them started running toward the rear? A. Toward this end, and then this boy and the others stayed near the front.

"Q. That is, two of them were over here, and did the other one go on a run or a walk? A. At the time Mr. Joseph—at the time I didn't see Mr. Joseph do any running, but I did see Mr. Hightower do some running and walking fast. * * *

"Q. The one you say is Hightower, how was he dressed? A. He was dressed with a coat and sort of a cap.

"Q. Sort of a cap? A. Yes.

"Q. Was it a cap or a hat? A. Some kind of a cap. * * *

"Q. Where did you stay and what did you do? A. I stayed there where the others was, and then Mr. Hightower passed the door and said something to him and then Mr. Joseph closed the door and told us not to move until five minutes, or something like that, and stay there, or something like that, and then they went out. * * *"

By way of corroboration of the foregoing, we find in the record testimony given by another victim, Pedro Mejia, whose testimony in connection with the participation of appellant in the robbery was as follows:

"Q. Now, the one that came straight to the meat section, do you know who that was? A. As I said before the one that it seemed to me, he was the one—that boy there with the sweater on.

"Q. That is, the green coat? A. Yes, the one in the green sweater.

"Q. That is the defendant Hightower. How close to you did he get? A. Just before he fell, he got right up alongside of me and opened the cash register.

"Q. Who fell? A. When the shot was fired, the boss fell to the floor and he didn't get up again.

"Q. How close to you or to the boss did the man get who fired the shot? A. He jumped over where the scale was, jumped over the counter and stood alongside the cash register and I remained there, standing.

"Q. Then he was right up near you, is that it, close to you? A. Well, pretty close, almost touching me, and he then put the pistol up against me and said to go back into the room. * * *

"Q. Now, did you walk back from the butcher shop to the back room backward, or did you walk forward? A. I went walking forward and he was walking along with me.

"Q. And who was walking along with you? A. The one that fired the shot.

"Q. Do you know who that is now? A. That is the man, the same one I told you.

"Q. Which one was it, just tell us again. A. The two who are here. The two who are here; he was the one there who fired the shot. No one else fired any shot.

"Q. Which one went with you or followed you back to the back room? A. The one with the green jacket."

Obviously, from his previous testimony, when the witness referred to the "one with the green jacket", he was designating appellant Hightower, who had fired the shot and who walked with the witness back to the store room.

[2-5] While the claimed inconsistencies in the testimony of the foregoing witnesses, such as the positions they were in at the time when they claimed ability to see and identify appellant, as well as other claimed weaknesses in their testimony, undoubtedly afforded grounds for a forceful argument to the jury, nevertheless they cannot avail appellant as grounds for a reversal, because the evidence identifying a defendant as the perpetrator of the crime charged need not be positive and uncontradicted. As stated in People v. Farrington, 213 Cal. 459, 2 P.2d 814, 815: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." Undoubtedly because reviewing judges are obviously in no position to determine the credit which should be accorded to witnesses or to weigh their testimony, our Constitution provides that appellate courts are without authority to review evidence except where, on its face, it may justly be held to be insufficient to support the ultimate issue involved, in which latter case of course it is not a review of a question of fact, but purely one of law. The jury being the exclusive judges of the credibility of witnesses, Code Civ.Proc. sec. 1847, and of the effect and value of evidence addressed to them, except as modified by section 2061 of the Code of Civil Procedure, they were in this case justified, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony or circumstances which might have been contradictory to or inconsistent with testimony identifying appellant as hereinbefore narrated. We perceive nothing in the testimony identifying appellant that would warrant us in saying that such testimony is not true or is improbable upon its face.

[6] We cannot agree with appellant that the trial court erred in admitting into evidence a revolver which was found by the police officers under the house where appellant lived. There is in the record positive evidence that all three participants in the robbery were armed, and while it is true that the gun admitted in evidence was not positively identified as one of those used in the robbery, nevertheless, appellant's objection to this evidence runs rather to its weight than to its admissibility. People v. Stoerkel, 87 Cal.App. 336, 339, 340, 262 P. 825. People v. Hale, 81 Cal. App. 734, 254 P. 639, 640, is authority for holding that even if the revolver were not admissible in evidence as proof that it was used in committing the robbery, it was admissible for "the purpose of showing that the defendants had the means of doing what the witness had charged them with doing". The fact that there was testimony that the gun introduced in evidence was similar to one of those used in the robbery, coupled with the fact that it was found on the premises where appellant had resided, sufficiently satisfies the rules of law to warrant its reception into evidence. People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Elliott, 104 Cal.App. 107, 110, 285 P. 401; People v. Lewis, 110 Cal.App. 381, 384, 294 P. 22; People v. Raucho, 8 Cal.App.2d 655, 666, 47 P.2d 1108; People v. Smith, 74 Cal.App. 510, 516, 241 P. 267.

[7-10] We find no merit in appellant's contention that the court erroneously refused to give certain instructions proffered by appellant. The requested instruction that the defendant, having taken the witness stand in his own behalf, should have his testimony judged by the same rules as the testimony of any other witness, was properly refused on the authority of People v. Woodward, 136 Cal.App. 149, 153, 28 P.2d 36. People v. Anderson, 106 Cal.App. 335, 338, 288 P. 1095, upholds the trial court in refusing to give additional instructions on the quantum of evidence required on the issue of identification. The third instruction requested and refused provided in substance that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. Although the

basis for this instruction is found in subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure, nevertheless the rejection of such an instruction has been held not to be error for the reasons assigned in People v. Cuff, 122 Cal. 589, 591, 55 P. 407. See, also, People v. Brown, 71 Cal.App. 181, 188, 235 P. 72, and People v. McInerney, 30 Cal.App. 283, 284, 158 P. 128. The fourth and last instruction refused advised the jury that the fact that appellant could not recall his whereabouts on the evening of the commission of the robbery should not be considered by the jury as evidence of guilt. Such an instruction invaded the province of the jury and was rightfully rejected. When we remember that instructions must not be singly considered, but in their entirety, the instructions given in the instant case, when so reviewed, are not subject to the criticism urged by appellant. From an examination of all the instructions given, we are convinced that the learned trial judge fully and fairly advised the jury as to the kind, quality and degree of proof required before appellant could be convicted of the charges lodged against him.

By reason of the foregoing, it follows that the judgment and the order denying the motion for a new trial, and each of them, must be affirmed. It is so ordered.

We concur: YORK, P. J.; DORAN, J.

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40 Cal.App.2d 48

PEOPLE v. OLIVAR et al.

Cr. 3327.

District Court of Appeal, Second District, Division 2, California.

July 9, 1940.

Larceny 🔑62(1)

Evidence that automobile was removed from garage without owner's consent and taken to an alley, where accused was caught in act of stripping it when officers arrived, was sufficient to sustain conviction of grand theft.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

John Olivar and Orville Ragsdale Scott were convicted of grand theft and burglary, and Orville Ragsdale Scott appeals.

Affirmed.

Anna Zacsek, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for respondent.

WOOD, Acting Presiding Justice.

Appellant and John Olivar were convicted of the crimes of grand theft and burglary by the court sitting without a jury. Both defendants were sentenced to the penitentiary and an appeal from the judgment was taken by defendant Scott.

A Ford automobile, the property of one William Caramelli, was left in the owner's garage in the city of Los Angeles between 11 and 12 o'clock p. m. on June 16, 1939. At 4:25 a. m. on June 17 police officers apprehended appellant and defendant Olivar in the act of stripping Caramelli's automobile in an alley some distance from Caramelli's garage. A number of articles which had been taken from the Caramelli car were found in appellant's garage. At the time of his arrest appellant stated that his name was Strong but later at the police station stated that it was Scott. Appellant told the officers that he had taken articles from the Caramelli car to his garage while Olivar continued to take parts from the car. One of the officers testified that on the evening of the day of appellant's arrest he had a conversation with appellant in which appellant stated that he and Olivar met "some fellow" at Florence and Broadway, who asked them to go over and strip an automobile for him; that all appellant knew about this fellow was that his first name was Dick and that he hung out at a pool hall at Florence and Broadway. Appellant was sworn as a witness at the trial and stated that he and Olivar had started to remove the distributor of the Caramelli car when the officers placed them under arrest.

Counsel for appellant concedes that the prosecution established that the crime of burglary was committed but she argues that the crime of grand theft was not proved. The evidence clearly shows that the Caramelli car was removed without the owner's consent from the garage where it had been placed and taken to an alley where appellant was caught in the act of stripping it. Thereafter appellant made false statements concerning his connection with the matter and various articles stolen from the car were found in his garage. In her brief counsel states: "By the proof that appellant was arrested in the act of stealing the distributor from the motor of the automobile, it must follow that he could not have had the intent to commit grand theft; to steal the automobile." In effect her argument is that the trial court could not reasonably draw the conclusion that appellant feloniously took the car itself. The argument falls of its own weight. The appeal is devoid of merit.

The judgment is affirmed.

I concur: McCOMB, J.

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40 Cal.App.2d 60

LYONS v. SCHWARTZ et al.

Civ. 6270.

District Court of Appeal, Third District, California.

July 10, 1940.

1. Dedication 🔑15, 31

To constitute a valid dedication of a right of way to the public, there must exist an intention on part of owner of land to dedicate right of way, and an acceptance thereof by public.

2. Dedication 🔑17, 20(5)

Dedication of a right of way to the public may be either by "express dedication", in which event intention of owner may be manifested by oral declarations or by outward acts, or by "implied dedication", which may arise when the necessary intent is implied by law from acts, such as long user by the public of a roadway, which do not directly manifest the intent.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Dedication" and "Implied Dedication".

3. Dedication 🔑20(5)

Use by the public of a right of way without further facts does not disclose intention of landowner to dedicate right of way to public nor constitute necessary offer to dedicate, but merely raises presumption of an intent to dedicate, and every use of a roadway by members of the public does not constitute a "dedication" even though it be continued without objection beyond statutory period required by law to bar a right of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

4. Dedication 🔑44

Intention to dedicate, to the public, land or a roadway must be proven clearly and unequivocally.

5. Dedication 🔑44

To prove dedication of a neighborhood or country roadway, much stronger evidence is required than is required in proof of such dedication of a street in a town or city.

6. Dedication 🔑44

In suit to quiet title to an alleged right of way in the country, which was the only means of access to plaintiff's property, evidence was insufficient to establish that right of way existed as a public road prior to 1900, or that use of right of way, since that time, raised presumption of a dedication of right of way to the public.

7. Easements 🔑5

An "easement" or right of way by prescription may be acquired by adverse user for statutory period of five years, provided that use be open and notorious, hostile to true owner, exclusive and under claim of right.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

8. Easements 🔑1

An "easement" is an interest in the land of another, but such interest carries only right to use of the land, and not the fee.

9. Easements 🔑36(1)

Burden is on one who claims an easement by prescription to show that elements of open and notorious use, hostility to true owner, and claim of right existed throughout statutory period.

10. Easements ⚿36(3)

Evidence sustained finding that plaintiff's occasional use of country road was permissive only and not hostile or under a claim of right which would entitle plaintiff to an easement, as against landowners.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Suit by Bert J. Lyons against H. B. Schwartz and others to quiet title and for an injunction. From an adverse judgment, plaintiff appeals.

Affirmed.

H. L. Preston and Lilburn Gibson, both of Ukiah, for appellant.

James E. Busch, of Ukiah, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This suit was brought for the purpose of quieting title to an alleged right of way across the property of the defendants. The complaint also contained a prayer for an injunction against the blockading of this right of way and for a judgment of $1,000 damages.

The cause was tried by the court sitting without a jury and judgment was rendered against plaintiff and in favor of defendants. The court found that the property described and alleged to have been owned by defendants was the property of Maude Perry Schwartz. The findings conclude that plaintiff is not the owner of a right of way or easement across the land of defendants, and that the plaintiff's use of the land was by permission only.

It is contended by appellant that the findings and judgment are not supported by the evidence. A right of way across respondents' property is claimed by appellant to exist under either one of two theories. The first theory is that the strip of land constitutes a public road and has existed as such since the year 1900. Appellant then takes the position that even though this may not be deemed to be a public road, that nevertheless he has procured a prescriptive right to the use of the road.

The properties belonging to respondents and appellant, respectively, are located about five and one-half miles from the town of Hopland in Mendocino county. The property of appellant is located contiguous to and south of the Schwartz property. The strip of land in question branches from a county road near Hopland and leads across the lands of a number of persons before reaching the Schwartz property. This roadway then crosses the Schwartz property and extends to the line of appellant's land. There is no other road leading from appellant's property.

Mr. Schneider, a witness for appellant, testified that he moved onto the property now owned by Mrs. Schwartz in 1900 and lived there until 1914. He acquired the property by perfecting a homestead claim. Mr. Schneider testified that there was formerly a roadway leading onto the appellant's property but that appellant built his house across and upon that road and thereby prevented its further use as a road. About 1902, a brother-in-law of Mr. Schneider filed a claim of homestead on the property now belonging to appellant. Thereafter the right was acquired by Homer Martin. Schneider testified that he helped Martin haul his household goods from the coast to the property now belonging to appellant. In order to get the goods to the property it was necessary for them to widen the roadway and construct a new road around the Schneider house and to build a bridge on appellant's property. These goods were apparently hauled over the road by means of a horse and wagon. Mr. Schneider further testified that this road as it existed in 1900 extended across appellant's property and connected with an old toll road on top of the ridge. He stated that this road leading to the ridge had been used by a number of persons until the time he left the property in 1914, but that no automobiles traveled that road prior to that time.

There is very little evidence of the use of this roadway between the years 1914 and 1922. The appellant acquired his property by homesteading in 1922. The property now owned by Mrs. Schwartz was purchased by the Baumgartner family that same year. He subsequently sold it to Mr. and Mrs. Miller in July, 1936, from whom the Schwartzes purchased the land in 1937 and immediately moved thereon, since which time they have continued to occupy it.

The evidence regarding the extent and manner of use of the roadway subsequent to the year 1922 to the present time is somewhat conflicting. Mr. Lyons, the appellant, testified that he had used the road continuously from the time he moved onto his property in 1922 until the erection of the barricade by respondents in 1937. He stated that he had traveled over the road on foot, on horseback, by wagon, and in an automobile. Mr. Lyons testified that he never asked permission from anyone to use the road in going to and coming from his premises and that no objection to the use of the road was ever made by anyone before the respondents purchased the property. Lyons said that he drove a car over the property to his cabin at least twenty or thirty times while it was owned by the Baumgartners. On at least one occasion during the time that Baumgartner was living on the property the gate at the entrance to this road was locked by Mr. Baumgartner and the appellant borrowed the key from him to use the roadway. Some time prior to the year 1930, one of the bridges across this roadway on the Baumgartner place was burned and it was necessary to construct a new bridge. Appellant aided in the construction of this new bridge and he received pay for his work. Lyons testified that he had not owned an automobile for six or seven years and that on several occasions when he did own a machine he parked it on the Johnson ranch and was then required to proceed on foot to his property. The Johnson ranch is located south of appellant's property. It was necessary for appellant to walk through an orchard to reach his place.

Mr. Hiatt, a witness for appellant, testified that he had used this road only about twice a year for the last ten years and that he had never seen an automobile traveling over the road between the Schwartz property and the Lyons place.

Mr. Hardy testified for respondents that he worked on the Baumgartner place in 1935 for about a year, during which time he never saw an automobile go through the Baumgartner place to Mr. Lyons' property.

Mr. La Franchi testified that he frequently worked for Mr. Baumgartner between the years 1928 and 1934 and that he never saw the appellant drive a car from the Baumgartner property to the Lyons place. Mr. La Franchi testified that until the time he left the Baumgartner place in 1934 the roadway between the two properties was in some places "just a trail".

Mrs. Schwartz, one of the respondents, testified that she went upon the property about the 7th of April, 1937, and that Mr. Lyons and the Millers were then using the roadway with their automobiles. At this time the road was in such a condition that the automobiles were being driven right up to the Lyons place. Mrs. Schwartz stated that she had no knowledge of the existence of any right of way across her property and that when she complained of the use of the road to the agent through whom she purchased the land he told her to lock the gate, which she did. Mrs Schwartz gave the Millers, who had parked their cars on the Lyons place, two weeks' notice to remove them, after which she locked the gate. After Mr. Lyons brought this suit the respondent, Mrs. Schwartz, erected a barricade which completely blocked this alleged right of way.

We are of the opinion the findings and judgment are supported by the evidence and that appellant has failed to establish any right to the use of the roadway in question.

The evidence submitted at the trial of this case discloses the fact that in 1900 there was an existing roadway running across the property now belonging to the respondents and thence over appellant's land leading to an old toll road along the top of the ridge. There is no evidence, however, as to whether this was a public or a private road at that time. Mr. Schneider stated that when he took possession of the property now owned by Mrs. Schwartz he built his house right on this road. He further testified that during the period from 1900 to 1914 the only means of travel between the Schwartz property and the Lyons place was on foot or on horseback. The roadway was not used by wagon or automobile with the exception of the one occasion when Mr. Schneider aided in hauling some goods with a wagon to the property now owned by appellant. The evidence is insufficient to support a conclusion that this roadway existed as a public road prior to 1900 and there is also a lack of the necessary elements constituting an implied or presumptive dedication of this roadway to the public subsequent to this time.

[1-5] In order to constitute a valid dedication to the public it is necessary that there should exist an intention on the part of the owner of the land to dedicate the

right of way and that there be an acceptance thereof by the public. Dedication may be either express or implied. In the case of express dedication the intention of the owner may be manifested by oral declarations or by outward acts. Dedication by implication may arise when the necessary intent is implied by law from acts which do not directly manifest the intent. Long user by the public of a roadway, for instance, would constitute an act from which such implication may arise. Use by the public without further facts does not, however, disclose the intention to dedicate nor constitute the necessary offer, but, it merely raises the presumption of an intent to dedicate. It does not necessarily follow that every use of a roadway by members of the public constitutes a dedication, even though it be continued without objection beyond the statutory period required by law to bar a right of action. The cases of Hartley v. Vermillion, 141 Cal. 339, 74 P. 987, and Hare v. Craig, 206 Cal. 753, 276 P. 336, relied on by the appellant, are not in conflict with what we have previously said regarding implied dedication. The courts have consistently held that the intention to dedicate to the public land or a roadway must be proven clearly and unequivocally. When the dedication rests upon acts and conduct, the intent must clearly appear. Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154. It is also necessary in order to prove the dedication of a neighborhood or country roadway that much stronger evidence be presented than is required in proof of such dedication of a street in a town or city. Quinn v. Anderson, 70 Cal. 454, 11 P. 746; Harding v. Jasper, 14 Cal. 642.

[6] The evidence as to the use of the roadway in question from 1900 to 1937 is insufficient to raise the presumption of a dedication to the public. There is sufficient evidence, however, to sustain the implied finding that the use of this roadway by members of the public was permissive and not adverse or under a claim of right.

[7, 8] An easement or right of way by prescription may be acquired by adverse user for the statutory period of five years. An easement is an interest in the land of another, but such interest carries only the right to the use of the land. The easement in the land does not carry the fee. It is essential in gaining an easement by prescription that the use be open and notorious, hostile to the true owner, exclusive and under claim of right.

[9, 10] The burden rests upon one who claims to have gained a prescriptive right in the land of another to show that the elements of open and notorious use, hostility to the true owner, and claim of right existed throughout the statutory period. It cannot be said that as a matter of law the use of the roadway by appellant from 1922 to 1937 was of such a nature as to satisfy the requirements necessary for gaining an easement by prescription. The manner in which appellant used this roadway from time to time on foot, on horseback, or occasionally by means of a wagon, or automobile does not necessarily disclose hostility to the former owners of the property. The determination of the question as to the nature of the use of another's land under such circumstances is properly disposed of in Clarke v. Clarke, 133 Cal. 667, at page 670, 66 P. 10, at page 11. The language of the court is as follows:

"The defendant and his tenants were in the habit of passing over the uninclosed strip of land when going to or from their business. The question as to whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, was a question of fact to be determined by the court in the light of the relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances."

There is sufficient evidence to sustain the finding that the use made by the appellant of the roadway in question was permissive only and not hostile or under a claim of right as against the respondents or the former owners of the property. The findings and judgment are supported by the evidence.

The judgment is affirmed.

We concur: PULLEN, P. J., STEEL, Justice pro tem.

40 Cal.App.2d 124

PEOPLE v. WILT.

Cr. 534.

District Court of Appeal, Fourth District, California.

July 15, 1940.

1. Criminal law 🔑563

The "corpus delicti" is established when it is proved that the crime charged was committed, and it is unnecessary to establish corpus delicti, that it be proved that crime was committed by defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Criminal law 🔑535(2)

In robbery prosecution, testimony of prosecuting witness that some one knocked him down, went through his pockets, and removed his money, sufficiently established "corpus delicti" to permit introduction of three confessions by defendant.

3. Robbery 🔑24(1)

Evidence sustained robbery conviction.

4. Criminal law 🔑1186(4)
Witnesses 🔑277(2)

In robbery prosecution, wherein defendant admitted striking prosecuting witness but claimed to have done so in resisting improper advances, cross-examination of defendant, who had made three confessions, whether he had told anybody that prosecuting witness had made degenerate advances, was error where attention of defendant had not been directed, at time of his confession, to any improper advances, but did not result in a "miscarriage of justice" requiring reversal of conviction. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

5. Criminal law 🔑1186(4)
Witnesses 🔑337(5)

In robbery prosecution, cross-examination of defendant as to when he had been released from prison after serving a sentence imposed after a prior conviction was error, but did not result in a "miscarriage of justice" requiring reversal of conviction, where trial court, by an instruction, attempted to correct the error, and defendant did not request a more specific instruction on the subject. Const. art. 6, § 4½.

6. Criminal law 🔑1186(4)

The reviewing court cannot reverse a conviction merely because of technical errors in the admission of evidence. Const. art. 6, § 4½.

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Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Harold Wilt was convicted of robbery and with having suffered a prior conviction, and he appeals.

Affirmed.

John Said, of Fresno, for appellant.

Earl Warren, Atty. Gen., Lewis Drucker, Deputy Atty. Gen., and William C. Tupper, Dist. Atty., and S. L. Heisinger, Jr., Deputy Dist., Atty., both of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment and from an order denying defendant's motion for new trial.

Defendant was charged with the crime of robbery and with having suffered a prior conviction. He admitted the prior conviction and entered a plea of not guilty to the charge of robbery.

Defendant urges that the evidence was insufficient to sustain the verdict and judgment in three particulars: (1) That the corpus delicti was not sufficiently proven and, therefore, three confessions made by him should not have been admitted in evidence nor considered against him; (2) that independent of those confessions there was no evidence identifying him as one of the perpetrators of the crime; (3) that there was no evidence that any money was taken from Odee Toon, the victim of the robbery.

Toon testified that on the evening of February 16, 1940, he was in a cafe in Selma, California, where he had been drinking for some time; that at about midnight defendant and G. W. Mainard entered the cafe and drank with him; that later, as the cafe was being closed, he invited those present to come to his hotel room and "have a few drinks"; that defendant and Mainard accompanied him to his room; that as he opened the door and turned on the light defendant struck him, knocking him onto the bed; that some one went through the pockets of his trousers, taking his money, and through the dresser drawers and the clothes hanging in his closet; that both his eyes were swollen from the blows. There is evidence that on the next day his eyes were blackened and his face bruised.

On cross-examination Toon became confused. He did not know how many persons went with him to his room, who struck him, how much money he had nor who rifled his pockets. He consistently maintained, however, that some one struck him, knocking him down; that some one went through his pockets and removed his money as he heard the clink of coins being taken from him.

[1, 2] The corpus delicti is established when it is proved that the crime charged was committed. It is not required that it be proved the crime was committed by the defendant. People v. Ward, 134 Cal. 301, 66 P. 372; People v. Bollinger, 196 Cal. 191, 237 P. 25; People v. Cowan, Cal.App., 101 P.2d 125. The evidence here sufficiently established the corpus delicti to permit the introduction of the three confessions.

The other uncertainties in Toon's testimony are clarified by these confessions and by the testimony of defendant and Mainard. It appears from the testimony of defendant and Mainard that the two men, and no others, accompanied Toon to his room. It appears from the confessions that defendant struck Toon in the face three times and removed $1.10 from his person; that defendant gave Mainard 55 cents and kept a like amount for himself.

[3] This summary of the evidence demonstrates that it sufficiently supports the verdict and judgment.

[4] In his evidence defendant admitted striking Toon but claimed to have done so in resisting improper advances. On cross-examination he was asked, in connection with a confession made in the office of the district attorney, "You never told anybody that this man had made degenerate advances to you, did you? His counsel objected to this question on the ground that defendant could not be so impeached unless, at the time of the confession, his attention had been directed to this approach by Toon. The objection was overruled for the reason that it appeared that defendant had been asked to detail everything that had happened in Toon's room at the time of the robbery.

A similar question was asked of the chief of police of the city of Selma concerning a conversation with defendant at the time he made another confession. A like objection was made and overruled. This was error as the attention of defendant had not been directed at the time of this confession, either generally or specifically, to any improper advances made by Toon. People v. Casanova, 54 Cal.App. 439, 202 P. 45.

[5] Defendant complains of another purported error disclosed by the following excerpt from the record:

"Q. Have you ever been convicted of a felony, Mr. Wilt? A. Yes.

"Q. What was it? A. Grand theft.

"Q. Pursuant to that you served a term in the San Quentin Penitentiary, didn't you? A. That was the sentence there, grand theft.

"Q. Yes. A. My prior conviction.

"Q. When did you get out? A. 1938.

"Mr. Said: May it please the Court, we wish to object to this line of testimony. Counsel well knows just the length to which he can go on cross-examination as to that. What he is trying to do here is crucify this man on something he did when he was 19 years old.

"Mr. Heisinger: The judge knows I am not trying to do that.

"The Court: "The Court will instruct the jury counsel has the right to ask the witness if he has been previously convicted of a felony, and ask the witness what the felony was and whether he served the time in a penal institution. And I take it the only proper objection would be the length of time he served. I don't think counsel has a right to show how long."

It is rather clear that the trial court attempted, by this instruction to the jury, to correct the error of the district attorney in asking defendant when he had been released from prison. Had defendant desired a more specific instruction on the subject he should have asked for one. This he did not do.

[6] A study of the record leaves us with the conviction of defendant's guilt and that there has been no miscarriage of justice in this case. That being true, we cannot reverse the judgment merely because of technical errors in the admission of evidence. (Sec. 4½, art. VI, Const.)

The judgment and order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

In re WATKINS' ESTATE. *

WATKINS et al. v. KEELE.

Civ. 12610.

District Court of Appeal, Second District,
Division 2, California.

June 28, 1940.

As Corrected on Denial of Rehearing
July 23, 1940.

Hearing Granted Aug. 26, 1940.

1. Husband and wife 🔑14(3)

A written agreement by husband and wife renting safe deposit box, stating that box was held in joint ownership with right of survivorship and that on death of either husband or wife contents of box "insofar as bank was concerned" should be absolute and exclusive property of survivor, created a "joint tenancy" in securities in box at time of husband's death, the quoted phrase not defeating the intent to create a joint tenancy.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

2. Husband and wife 🔑14(3)

An agreement executed by husband and wife opening bank account, stating that moneys deposited in account were payable to either husband or wife or to the survivor, created an account in "joint tenancy," by which title to moneys deposited passed out of community at time of deposit and each tenant was seized of the whole estate from the moment of the deposit and agreement. St.1913, p. 335, § 16; St.1925, p. 512, § 15a.

3. Husband and wife 🔑249

The declaration in joint and mutual will of husband and wife that "property here disposed of was accumulated and acquired during our marriage and is community property," did not convert their separate property or property held in joint tenancy into community property.

4. Husband and wife 🔑249

In absence of some agreement between spouses, mere declaration in will that certain property is separate or community is insufficient in itself to establish actual character of ownership of such property, and is merely testator's opinion as to character of ownership of property, and will not contradict terms of actual agreements by which joint tenancies were created.

5. Husband and wife 🔑249

Whether property is separate property or community property or is held in joint tenancy is determined from mode in which property was acquired.

6. Taxation 🔑895(9)

An inheritance tax order incidentally deciding questions concerning succession and beneficial ownership is not binding except for tax purposes as between persons claiming estate.

7. Taxation 🔑895(3)

An inheritance tax appraiser's report cannot be construed as forming basis of any judgment concerning character of ownership of property, notwithstanding that report is sufficient for purpose of determining inheritance taxes.

8. Husband and wife 🔑249

Community ownership of property is inconsistent with ownership as joint tenants, and the two forms of ownership cannot exist in the same property at the same time.

9. Taxation 🔑895(9)

A court order, made during course of administration of estate, fixing amount of inheritance tax was not "res judicata" in subsequent proceeding to determine heirship, as to character of ownership of property, notwithstanding that order accepted as true the report of the inheritance tax appraiser stating that property was community property.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

10. Judgment 🔑665, 715(1)

The doctrine of "res judicata" does not apply except in actions or proceedings where parties are identical and the issues are the same.

11. Evidence 🔑265(18), 313

All admissions, including admissions against interest, must be weighed in light of circumstances in which made.

12. Husband and wife 🔑266

A husband and wife may by agreement convert their community property into the separate estate of either spouse.

13. Husband and wife 🔑264

A wife's affidavit filed in proceeding to determine inheritance tax to be paid on estate of deceased husband, reciting how property had been acquired and that it was held in joint tenancy and stating that her attorney had advised her that the property was community in character, was insufficient to show in proceeding to determine heirship of wife who subsequently died that the property was community property.

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* Subsequent opinion 108 P.2d 417.

14. Husband and wife 🔑14(3)

A husband and wife executing agreements of joint tenancy with reference to their safe deposit box and their bank account and taking deeds of joint tenancy, with a full and correct understanding of result to be achieved by creating a joint tenancy, did not act under a mutual mistake of law which would invalidate the joint tenancies, notwithstanding that there was a mutual misunderstanding between husband and wife and one of their counsel, and that another counsel gave erroneous advice, as result of which both husband and wife declared in their joint will that their property was community in character.

15. Courts 🔑1
Judges 🔑1

The word "court" is commonly used synonymously or interchangeably with the word "judge."

See Words and Phrases, Permanent Edition, for all other definitions of "Court" and "Judge".

16. Jury 🔑19(7)

At common law, trial by jury was unknown in probate.

17. Jury 🔑19(7)

The statute providing that issues of fact in probate proceedings must be tried in conformity with rules of practice in civil actions, and that court must settle and frame issues to be tried when party is entitled to jury trial and jury is demanded, was intended to allow jury trials in probate proceedings in which jury trial is specifically provided by other statutes, but not in probate proceedings in which jury trial is not so provided. Probate Code, § 1230.

18. Statutes 🔑195

In construing statutes, expression of one thing is the exclusion of another.

19. Constitutional law 🔑70(1)

The court is without power to supply an omission in a statute.

20. Descent and distribution 🔑1

A conflicting statutory provision outside of the chapter relating to determination of heirship is not controlling in a proceeding to determine heirship. Probate Code, §§ 1080–1082; Pol.Code, § 4482.

21. Jury 🔑19(7)

The statute providing for jury trial when a party to probate proceeding is entitled to jury trial, did not authorize jury trial in proceeding for determination of heirship, in view of statute providing that the court shall hear and determine who are the heirs. Probate Code, §§ 1081, 1230.

22. Jury 🔑19(7)

A proceeding to determine heirship is a proceeding to determine a fact concerning a decedent and no issue is created by traversing of allegations of fact in the petition, and hence proceeding is not an "adversary contest" in which a jury trial is authorized but is a "proceeding in rem." Probate Code, §§ 1080–1082.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Contest" and "Proceeding in Rem".

23. Stipulations 🔑18(6)

Where parties to action stipulate to existence or nonexistence of certain facts, a finding contrary to such stipulation is unwarranted.

24. Descent and distribution 🔑6

The descent of property is governed by the law in force at time of death of intestate.

25. Husband and wife 🔑274(1)

The statute providing that on death of intestate without issue any portion of intestate's estate which had been community property of intestate and previously deceased spouse should be distributed equally to heirs of intestate and heirs of previously deceased spouse is applicable also to property which had formerly constituted a part of community estate of spouses but which survivor had acquired as her separate property by an inter vivos gift from her previously deceased spouse. Probate Code, § 228.

26. Husband and wife 🔑266

The interest of each spouse in community property which is converted into an estate in joint tenancy is "separate property."

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

27. Husband and wife 🔑266

The action of community partners in investing their property with a title in joint tenancy is conclusive evidence of their intention to vest title in the survivor.

28. Husband and wife ⇨49½(3), 49¾(2)

The conversion of separate estate of each spouse into an ownership in joint tenancy does not constitute a "gift inter vivos" on the part of either.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Inter Vivos".

29. Descent and distribution ⇨71(7)

In proceeding to determine heirs entitled to estate of deceased wife, wherein parties stipulated that all realty and personalty of deceased wife and her previously deceased husband was community property prior to execution of instruments creating joint tenancies, trial court's finding that deceased husband and deceased wife had accumulated various parcels of realty, part separate and part community property, was prejudicial error, where collateral relatives of deceased wife would have been awarded a share in the distribution of estate of wife if court had made its finding in accordance with such stipulation. Probate Code, §§ 1080–1082.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding in the matter of the estate of Jean Watkins, deceased, wherein William Elmer Watkins and others filed their petition to share in the distribution of the residuary estate of deceased, and Laurence Keele filed his statement of claim with his petition claiming that he was entitled to the residuary estate of deceased. From the judgment, William Elmer Watkins and others appeal.

Reversed, with direction.

Simpson & Simpson, of Los Angeles, for appellants.

Noel Edwards and Louis Thomsen, both of Los Angeles, for respondent.

Faries & McDowell, of Los Angeles, amici curiæ.

MOORE, Presiding Justice.

This is an appeal from the judgment in a proceeding to determine heirship. Appellants are the collateral relations of the decedent, Jean Watkins. The respondent, Laurence Keele, filed his statement of claim with his petition in the probate proceedings of said decedent claiming that by reason of his being the grand-nephew and sole heir of decedent he was entitled to the residuary estate of decedent. In the same proceeding appellants filed their petitions alleging that the said residuary estate consisted either of community property of decedent and her deceased spouse or, in the alternative, that if it was not such community property it had become the separate property of decedent by reason of an inter vivos gift of her said deceased husband out of the community estate, and that in either event they were entitled to share equally with the heirs of Jean Watkins in the distribution of said residuum. The trial court adjudged the respondent to be the sole heir of decedent and as such entitled to the residue of all of decedent's estate, after the payment of specified legacies.

Henry and Jean Watkins, having married in 1899, continued as husband and wife until Henry's death on December 30, 1926. Just six days prior to his demise Henry and Jean executed their joint and mutual wills wherein they declared that "all property here disposed of was accumulated and acquired during our marriage and is community property". On November 20, 1920, Henry and Jean had jointly rented a safe deposit box. Subsequent to his death it was found to contain securities of the value of $129,262. Also, at the same time there was on deposit in the commercial department of the Merchants National Bank of Los Angeles a joint tenancy account in the amount of $16,087.40, which had been created by virtue of an agreement signed by decedent and her said husband May 20, 1915. Prior to Henry's death he and Jean had acquired various parcels of real property which at the death of Henry were held in joint tenancy by the two. But when his will was probated all of the estate was distributed to Jean Watkins in accordance with the terms of his said will.

On November 2, 1936, Jean also departed this life, leaving a will by the terms of which she made specific legacies and bequeathed the residue of her estate to her business manager and her attorney in equal shares. When her said will was offered for probate various contests were filed. The controversies resulted in a settlement in which said residuary legatees and devisees assigned to the heirs of Henry and Jean Watkins, as their interests might appear, all right, title and interest in said residual estate except certain specified items. To establish their right to share in the interest thus assigned appellants seek a decree awarding to them out of said residuum the share which had belonged to Henry Watkins as community partner of Jean.

[1] 1. It is contended by appellants that the evidence is insufficient to support the finding that the securities found in the safe deposit box at the time of Henry's death were held in joint tenancy by Henry and Jean Watkins. To answer this contention we now refer to the agreement of said decedents under which the deposit box was rented. It reads as follows: "The undersigned acknowledge they have this day rented from the Merchants National Bank of Los Angeles * * * Safe Deposit Box No. 745. Said box is rented and held during the rental period by said undersigned in joint ownership, with right of survivorship, to be open and accessible to the joint or several order of said undersigned during their lives and upon the death of either to the order of the survivor of them subject to State and Federal laws relating thereto. Upon the death of either, the contents of said rental box shall be, insofar as the Merchants National Bank of Los Angeles is concerned, the absolute and exclusive property of the survivor by right of survivorship, and such survivor may have access to said box and remove therefrom all the contents thereof subject to State and Federal laws relating thereto. * * * All property of whatever kind or nature deposited or hereinafter deposited in said box shall be subject to the terms and conditions herein expressed. * * *" This writing discloses a clear intention on the part of the husband and wife that the contents of said safe deposit box at the time of the writing or at any subsequent time should be jointly owned by them during their lifetime and that upon the death of one of them all of the contents of said box should be owned exclusively by the survivor. By said writing a valid joint tenancy was created. Young v. Young, 126 Cal.App. 306, 14 P.2d 580; Hurley v. Hibernia Savings, etc., Soc., 126 Cal.App. 314, 14 P.2d 574. Appellants contend that by the phrase which appears in the agreement, towit, "insofar as the Merchants National Bank of Los Angeles is concerned", it was intended to restrict the application of the agreement and the rental of the safe deposit box to their relation to said bank. Such interpretation would be a narrow construction of the agreement. Said phrase did not in the slightest detract from the validity of the agreement as between its authors, nor does it defeat their avowed purpose to create a joint tenancy account. The inclusion by them of an express direction to the bank did not alter the binding force of the agreement upon the parties themselves. They could not declare themselves joint tenants and require the bank to permit the survivor to remove the contents of the box and at the same time have reserved to each of them some interest in or title to said contents not disclosed. When they both declared that the survivor of them should have "the absolute and exclusive" ownership of said contents their joint tenancy was established. The cases relied upon by appellants, such as Security-First National Bank v. Stack, 32 Cal.App.2d 586, 90 P.2d 337, are not in point because they involved the renting of deposit boxes where the agreements are silent as to the ownership of the contents.

[2] 2. Appellants contend that the court erred in finding that the money on deposit in their joint bank account was owned in joint tenancy. The error of this contention is likewise susceptible of demonstration. The agreement executed by the parties in opening said joint bank account reads as follows: "Know all men by These Presents: That we, the undersigned, do hereby open a deposit and checking account with the National Bank of California, at Los Angeles, California, in the name of H. G. Watkins and Jean Watkins. All deposits made with said bank by us, or either of us, in the names aforesaid, and the increase thereof, are hereby made deliverable or payable to either of us, or to the survivor, or survivors of us, on checks, drafts or orders drawn upon said account in the name of either of us, or the survivor or survivors of us; and in order to further facilitate the transaction of said business, each of us hereby assigns, each to the other, the whole of said account and the moneys deposited in said account, and all future deposits or increase thereof." This writing is neither ambiguous nor uncertain. It demonstrates a zealous intention of both parties to create a joint tenancy in establishing said account and in providing that all subsequent deposits and additions thereto should be held in joint tenancy. That such is clearly the law may at once be determined by reference to section 16 of the Bank Act, Stats.1909, as amended by Stats.1913, p. 335, which was in effect at the time the account was opened. Said section reads as follows: "When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or the survivor or survivors of

them, such deposit thereupon, and any additions thereto made by either of such persons upon the making thereof, shall become the property of such person[s] as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named * * *." Said section was amended in 1925, Stats.1925, p. 512, and became section 15a of the Bank Act. It was in effect at the time of the death of Henry Watkins and contained in substance the same provisions as said section 16, which it superseded. That such is a fair construction of the contract of said decedents as well as of said section is emphasized by the decision of Hurley v. Hibernia Savings, etc., Society, supra. In that case Patrick J. Hurley opened an account in joint tenancy with his minor son, Daniel. The surviving widow of Patrick sued to recover the money on deposit in said bank account. The account was opened with an agreement as follows: "Patrick Hurley and Daniel Hurley, a minor age 14 years, 8 months. Payable to either or to the survivor of them. In account with the Hibernia Savings and Loan Society". At the same time they jointly subscribed to an agreement to the by-laws and rules of the society. The question squarely presented to the court was whether or not said bank account constituted an account in joint tenancy between Patrick and his son. "There is no ambiguity or uncertainty about this language," said the court. "It was undoubtedly intended to and did create a joint interest or ownership in the deposit * * * it must have been the intention of the deceased Hurley * * * that upon his death his son should take the deposit as survivor. * * * He declares that as deposited by him it is not his separate property but the joint property of himself and his son." [126 Cal.App. 314, 14 P.2d 577.] In the light of that language we could find no excuse for the trial judge herein had he determined otherwise. The language used by Mr. and Mrs. Watkins in opening their said bank account can lead to no other conclusion than that they purposed to create an account in joint tenancy with its concomitant incidents. By such an account "the title to the money deposited passed out of the community at the time of the deposit" and each tenant was seized of the whole estate from the moment of the deposit and agreement. Estate of Gurnsey, 177 Cal. 211, 170 P. 402, 403.

[3-5] 3. It is contended that the court erred in finding that all of the property owned by said decedents was held in joint tenancy. They urge that the court committed error in admitting the deeds and contracts to vary the declaration in said will; that as a matter of law the effect of said declaration was to convert titles held in joint tenancy into community property. The joint and mutual will of the decedents contained the following provisions: "We declare that the property here disposed of was accumulated and acquired during our marriage and is community property". Also, each party declared that he devised and bequeathed to the other "all of my property, community and separate, whatsoever and wheresoever". Said contention of appellants is without support. In the absence of some agreement between spouses, the mere declaration in a will that certain property is separate or community is insufficient in itself to establish the actual character of the ownership of such property. Rather is the character of an estate determined "from the mode in which the property was acquired". Estate of Granniss, 142 Cal. 1, 75 P. 324, 325; Bias v. Reed, 169 Cal. 33, 145 P. 516; Estate of Fritz, 130 Cal.App. 725, 20 P.2d 361. Such a declaration is merely the testator's opinion as to the character of the ownership of such property and cannot be considered to contradict the terms of the actual agreements by which the joint tenancies were created. Estate of Fritz, supra.

The cases relied upon by appellant are not in point. In Flanagan v. Capital National Bank, 213 Cal. 664, 3 P.2d 307, at the time the husband executed his will in which he disposed "of all the community property" his wife signed a writing in which she agreed to the provisions of the will and waived all of her rights in the community property. Under such circumstances the instrument which the wife signed was held to be a contract in which she agreed to accept the devises and bequests in the will in lieu of her rights in the community estate.

In Security-First National Bank v. Stack, supra, [32 Cal.App.2d 586, 90 P.2d 338], the will of the husband declared "that all of the property * * * in my name or in the name of myself and my wife, is our community property, and it is my intention hereto to dispose not only of my separate estate and my share of the community property, but of the entire community estate". A waiver and election to take under the will was signed by the wife. By that instrument it is recited that the wife understood that the will disposed of the husband's separate property and "our community property"; that the wife waived all claims to the community estate and "upon any of the property disposed of by said Will". A subsequent claim of the wife to certain securities as the surviving joint tenant failed for the reason that by the will and waiver both spouses had agreed that all property, whether of joint tenancy or otherwise, became a part of the entire community estate and was therefore disposed of by the will.

In the case at bar there is no evidence of any agreement between Henry and Jean Watkins to change the character of their titles from separate or joint tenancy to community. The declaration in their mutual will that the property disposed of was community in character was at most a legal conclusion of the spouses as to the status of the titles of their properties. It appears affirmatively from the evidence that such declaration was undoubtedly inserted in said will through inadvertence or ignorance. The attorney who prepared the will testified that he had advised the decedents that if the property had been acquired before marriage or after marriage by gift, devise or descent, it would be separate property; but that "if it was acquired after marriage otherwise, it would be community property". They thereupon announced that their "property to be disposed of by this will was community property". No inquiry was made by said attorney concerning the manner in which such property had been acquired or in whose name the title stood at the time of giving his advice. Nothing was said by either decedent relative to the fact that all of their property was held in joint tenancy.

[6-10] During the course of the administration of the estate of Henry Watkins, Jean filed, in connection with her petition for an order terminating said joint tenancy, an affidavit for the purpose of determining the inheritance tax, in which she alleged "that all of the property of which the said Henry G. Watkins died possessed, either in his own right or as tenant in common with affiant, or as joint tenant with right of survivorship with affiant * * * was as to each and every item and parcel thereof community property of this affiant and said Henry G. Watkins". The report of the inheritance tax appraiser filed in said probate proceeding of Mr. Watkins contained the following statement: "also property held in joint tenancy amounting to $314,153.75, which is taxable * * * (all community property)". Thereafter the court duly made its order concerning said report of said appraiser as being true and correct and fixing the amount of the inheritance tax. Appellants contend that said order is res adjudicata as to the community character of the property taken over by Jean Watkins after the passing of her husband. However, it has been held that even though an order fixing the inheritance tax may incidentally decide questions concerning succession and beneficial ownership, such an order is not binding except for tax purposes as between those who claim the estate. Estate of Rath, 10 Cal.2d 399, 75 P.2d 509, 115 A.L.R. 836. The report of the inheritance tax appraiser, in the absence of other showing, was sufficient for the purpose of determining the inheritance taxes, but it cannot be construed as forming the basis of any judgment concerning the character of the ownership of the property in question. Such report is ambiguous in that it apparently states that the property which is held in joint tenancy is community property. One of the fundamental principles of law is that community ownership of property is inconsistent with ownership as joint tenants, and the two forms of ownership may not exist in the same property at the same time. The order of the court in fixing said inheritance tax was clearly not res adjudicata as to the character of the ownership of the property. Estate of Rath, supra. That order was made on behalf of the state against Mrs. Watkins to fix the amount of her inheritance tax. The doctrine of res adjudicata does not apply except in actions or proceedings where the parties are identical and the issues are the same.

[11-13] Appellants contend that the declaration of Jean Watkins in her said affidavit, to the effect that said property was community in character, was an admission against interest. It is indeed of the nature of an admission against interest. But here, as in the case of any admission, it must be weighed in the light of the circumstances in which it occurred. Said affidavit was filed in a proceeding to determine the amount of inheritance tax to be paid by Jean upon the estate of her deceased husband, and it merely recited the manner in which the property

had been acquired and the fact that it was held in joint tenancy. The affidavit sets forth that she had stated the facts to her attorney and that he had advised her that all of said property was community in character. The same attorney testified on the trial of this action that in his opinion the property was community and that the fact that it was held in joint tenancy did not alter its community character. Argument to show that the attorney's opinion was erroneous will not be necessary. A husband and wife may by agreement convert their community property into the separate estate of either spouse. In re Kessler, 217 Cal. 32, 17 P.2d 117; Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; Estate of Gurnsey, supra. The averment of Mrs. Watkins in her affidavit was not a statement of fact but was here mere conclusion expressly based upon said erroneous advice.

[14] 4. It is insisted that the evidence is insufficient to support the conclusion that the joint tenancies were validly created if said decedents acted under a mutual mistake of law. The claim of mistake of law is based upon the mutual misunderstanding between decedents and one of their counsel and upon the erroneous advice of another, as a result of which they both declared in their joint will, and Jean declared in her said affidavit, that their property was community in character. But it appears without conflict in the evidence that it was the intention of both Mr. and Mrs. Watkins to place their properties in joint tenancy. The fact that there is a conflict in the evidence as to the result they may have anticipated is not a conflict as to what they did. They did execute agreements of joint tenancy with reference to their safe deposit box and their bank account, and they took deeds of joint tenancy. From the testimony of the witness Harper, a business associate of Mr. Watkins, it appears that the latter fully and correctly comprehended the result to be achieved by creating a joint tenancy. The trial court was amply warranted in determining that the joint tenancies were validly created and with definite purpose.

5. Appellants contend that prejudicial error was committed in denying them a trial by jury. They base their contention upon the theory that sections 1080–1082 of the Probate Code should be read in connection with section 1230 thereof, and that said section authorizes a jury in such proceedings. Section 1080 provides that any person claiming to be an heir of decedent, or otherwise entitled to distribution of the estate, may after the time for filing claims against the estate has expired file a petition setting forth his claim with a prayer "that the court determine who are entitled to distribution of the estate"; and further, that any person may appear and file a statement of his interest in the estate, and that the clerk shall set the petition for hearing by the court.

Section 1081 reads: "At the time appointed, the court shall hear the petition and any objection thereto that may have been presented, and shall determine who are the heirs of the decedent * * * of the estate and shall specify their interests."

Section 1082 provides: "When such decree becomes final it shall be conclusive upon the matters determined during the remainder of the administration of the estate and upon any subsequent proceeding for distribution."

The foregoing three sections comprise chapter XVII, Division III, of the Probate Code, and the title of the chapter is "Determination of Heirship".

Section 1230 of the Probate Code is as follows: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions. Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions." It is the language of section 1230 which appellants claim should be consulted in connection with an interpretation of said sections 1080–1082, comprising said chapter XVII, and they emphasize those portions of section 1230 which provide (a) that all issues must be tried in conformity with the rules of practice in civil actions, and (b) "when a party is entitled to a trial by jury and a jury is demanded", etc.

In support of their contention appellants cite three cases, namely, Estate of Sheid, 122 Cal. 528, 55 P. 328; Estate of Baird, 173 Cal. 617, 160 P. 1078, and In re Barton's Estate, 16 Cal.App.2d 246, 60 P.2d 471, 472. Upon a consideration of said code section and said authorities we are forced to the conclusion that the claim of the appellants cannot be sustained. Referring first to the cited cases, it will be observed that in Estate of Barton a verdict was returned in favor of the Connor claimants, whereupon the court sustained the motion of the McGrew claimants for a judgment notwithstanding the verdict. The motion was granted and judgment was entered accordingly. Subsequently the motion for a new trial was granted in favor of the Connor claimants on the ground of newly discovered evidence, and both parties appealed. The holding of the district court of appeal that was pertinent to the contentions made by the parties was that the trial court has no power to grant a motion for judgment notwithstanding the verdict where there is a conflict of evidence. Since there was a conflict in the evidence presented by the two groups of claimants, it was held error to have granted said motion of the McGrew claimants. For that reason the case was remanded with instructions to enter judgment on the verdict. The opinion of the court continues thus: "In a proceeding to determine heirship issues of fact are joined and either party is entitled to a jury trial." This was emphatically dictum, in view of the paramount question which was presented there. The direction of said court of appeal to the trial court to enter a judgment upon the verdict is more rationally construed as meaning that the trial court having asked for an advisory verdict got it and in reason should act upon it in the absence of any contrary finding by the trial judge. Also, the authorities cited in said opinion fall far short of supporting dictum. Estate of Baird, supra, is a case which arose on a petition for distribution, which is provided for in chapter XVI of the Probate Code, within which there is no such language as that contained in chapter XVII, sections 1080–1082. Furthermore, section 1081 was not cited in connection with said Barton's appeal.

The McGrew claimants merely denied the right to a jury trial under said section 1081; the Connor claimants replied by citing Estate of Baird, supra, and Estate of Sheid, supra. When a hearing was sought in the Supreme Court, the petition omitted any reference to the question of a jury trial but was confined to a discussion of the evidence. The Estate of Sheid case arose out of the petition for distribution, which was dismissed by the superior court. The Supreme Court held that such a petition could not be properly filed prior to the settlement of the final account and that it could not be considered because it was premature, having been filed within less than a year after the issuance of the letters of administration. The language of the Supreme Court, at page 532, of 122 Cal., at page 330 of 55 P., in which they said "that said issue is of a character which would render its submission to a jury entirely proper", meant no more than to say that there is no objection to having a jury render an advisory verdict in such a case.

[15] Returning now to a consideration of the code sections, said section 1230 is a general rule, is a part of article III of chapter XXII, Division III, dealing with notices, orders and procedure, and applies to the administration of estates. In its enactment the legislature had in mind that there are, definitely, certain probate proceedings in which a party is entitled to a trial by jury while in others he has no such right. But sections 1080–1082 are of a separate chapter and apply specifically to proceedings for the determination of heirship. Section 1080 provides that the claimant shall pray that the "court determine who are entitled to distribution of the estate". Had it been intended that a jury should ever have to pass upon the question as to who constitutes the heirs, the section would have said "the jury, or when the jury is waived, the court". The word "court" has a clearly defined and settled meaning, in that it is commonly "used * * * synonymously or interchangeably with [the word] 'judge.'" Newby v. Bacon, 58 Cal.App. 337, 339, 208 P. 1005; Von Schmidt v. Widber, 99 Cal. 511, at page 513, 34 P. 109.

Even the code itself distinguishes between trial by a jury and a trial by the court. Chapter V, Title VIII, Part II, of the Code of Civil Procedure, sections 631–636, treats of "trial by court"; but Chapter IV of Title VIII, sections 600–629, treats of "trial by jury". In the last-mentioned chapter the trials referred to comprehend the submission to the jury of issues of fact. Said Chapter V likewise treats of the trial by the court of questions of fact. A similar distinction is followed in the Probate Code. Section 371 provides "If no jury is demanded, the court must try and determine the issues joined", with respect to will contests. Also, section 382 observes the same distinction when it provides "if the jury shall find or the court shall decide that the will is invalid * * *," in will contests after probate. And the very section 1230 itself maintains the same policy when it provides that "if no jury is demanded, the court must try the issues joined."

[16-19] Within the Probate Code four separate sections provide expressly for jury trials. In view of the principle of common law wherein trial by jury was unknown in probate, can there be any conclusion other than that the legislature intended that jury trials should be allowed only in those cases for which the statutes specifically provide for it? It is an elementary rule of construction that the expression of one excludes the other, and it is equally well settled that the court is without power to supply an omission. Estate of Pardue, 22 Cal. App.2d 178, 181, 70 P.2d 678; Estate of Ohm, 82 Cal. 160, 22 P. 927.

[20] Since this controversy arose out of a proceeding to determine heirship, it cannot be that a statutory provision outside of the chapter providing for such determination could control. "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject matter of such chapter." Sec. 4482, Title II, pt. 5, Political Code.

In section 371 of the Probate Code, Article I, which is a part of Chapter II, Division III, dealing with contests before probate, it is provided that any issue of fact, etc., "must be tried by a jury, unless a jury is waived". Also, in section 382, which is a part of the article providing for "Contests After Probate", it is provided that "a trial by jury must be had", etc., unless a jury is waived. In section 928, which is a part of Chapter XV, Article III, dealing with exhibits and accounts, it is provided that either party "is entitled to a trial by jury of the issues of fact", etc.; and in section 1471, which is part of Chapter V of Division IV, dealing with "Restoration to Capacity", it is provided that "the question of his restoration to capacity" must be tried by a jury. The emphatic language used in the four quoted sections indicates an intention to veer from the common law rule in those particular cases.

[21] Therefore, in view of the language of the said section 1081 that "the court shall hear * * * and shall determine who are the heirs", the legislature could not have intended to grant trial by jury in questions involving determination of heirship solely because of the provisions of said section 1230, which says no more than that a trial by jury shall be had "when a party is entitled to a trial by jury * * *." The authors of that section had in view the variety of probate proceedings that pass through the courts, and for some of them such authors had provided for trials by jury. The language there used does not attempt to declare a rule for jury trials, but on the contrary it is a specific requirement that the court must settle the issues when a jury is demanded. It indicates no intention to authorize trial by jury in probate proceedings other than in those where that privilege is unmistakably granted.

[22] Another reason why a jury trial is not authorized by sections 1080–1082 is that the proceeding to determine heirship is not an adversary contest but is rather a proceeding in rem. Section 1082 requires that the decree entered by the court provides that "when such decree becomes final it shall be conclusive upon the matters determined". It does not provide that the decree shall be conclusive upon merely the parties or the claimants but, on the contrary, it shall be conclusive as against the world. In such proceedings there is no issue created by the traversing of allegations of fact in the petition. It is a proceeding to determine a fact concerning a decedent, and the determination of that fact controls the matter of inheritance. The proceeding is not limited to the conflicting claims of those parties who appear, but it applies to any person extant who might, by reason of the degree of his consanguineal relationship to the decedent, be entitled to inherit from him whether or not such person appear to present his claim. There need be no conflict between the several claimants and groups of claimants. If a proceeding be undertaken to establish the rights of a nephew and at the hearing the court finds that decedent has a surviving son, the court would decree the distribution of the estate to such son although he had filed no claim.

For these reasons we think the trial court was free from error in denying a jury trial.

[23] 6. We come now to the consideration of a more serious question, namely, whether the court erred in finding that decedents had accumulated various parcels of real property, part separate and part community, contrary to the stipulation of the parties that all of the real and personal property of said decedents was community prior to the execution of any of said instruments creating said joint tenancies. The court also found that on September 2, 1922, the titles of real properties held as separate and as community were converted into titles of joint tenancy of the decedents. Appellants rely upon the rule that where the parties to an action stipulate to the existence or nonexistence of certain facts a finding contrary to such stipulation is unwarranted. Faust v. City of San Diego, 115 Cal.App. 277, 1 P.2d 543; Crawford v. Imperial Irr. Dist., 200 Cal. 318, 253 P. 726; Wilson v. Mattei, 84 Cal.App. 567, 258 P. 453; Henning v. Wuest, 48 Cal.App. 147, 191 P. 713.

[24-27] Respondent asserts that such error, if any, was not prejudicial because it was upon an immaterial matter. But it is not immaterial, as we shall presently see. The descent of property is governed by the law in force at the time of the death of the intestate. Estate of Harris, 9 Cal.2d 649, 72 P.2d 873. When decedent Jean Watkins departed this life, section 228 of the Probate Code was in effect. That section provides that upon the decease of an intestate without issue, any portion of decedent's estate which had been the community property of decedent and a previously deceased spouse shall be distributed equally to the heirs of the decedent and the heirs of the previously deceased spouse. This section applies also to property which had formerly constituted a part of the community estate of the spouses but which the survivor had acquired as her separate property by an inter vivos gift from her previously deceased spouse. Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; Estate of Slack, 13 Cal.2d 721, 91 P.2d 1052. These cases held that where during the lifetime of the spouses the community property is converted into the separate estate of either, the portion received by the wife is to be deemed a gift inter vivos, succession to which is governed by said section 228. Where community property is converted into an estate in joint tenancy of the spouses, the interest of each is separate property (Siberell v. Siberell, supra; In re Kessler, supra); and when the community partners invest their property with a title in joint tenancy it is conclusive evidence of their "intention * * * to vest title in the survivor". Estate of Gaines, Cal. Sup., 100 P.2d 1055, 1061.

[28, 29] Of course, where each spouse contributed his separate property to the creation of an estate in joint tenancy it cannot be denied that the conversion of such separate estate into an ownership in joint tenancy does not constitute a gift inter vivos on the part of either (Estate of Harris, supra) for the evident reason that their contributions were mutually supported. But in this case the stipulation of the parties was that all property owned by the decedents comprised their community estate prior to the creation of any joint tenancy, and the record contains no evidence contrary to such stipulation. Therefore, in the light of the Rattray decision, supra, it is clearly to be seen that if the court had made its finding in accordance with said stipulation, or no finding at all, the appellants would necessarily have been awarded their share in the distribution of the estate of decedent herein on the theory that one-half of her estate was an inter vivos gift from her previously deceased spouse. The error in making such finding, it is plainly to be seen, is prejudicial. It follows that the judgment awarding respondent all of the residual estate cannot be supported.

For the reason above mentioned the judgment is reversed with direction to proceed in accordance with the views herein expressed, appellants to recover costs on appeal.

We concur: WOOD, J.; McCOMB, J.

40 Cal.App.2d 50

ACKERS v. CITY OF LOS ANGELES.

Civ. 12571.

District Court of Appeal, Second District, Division 2, California.

July 9, 1940.

Hearing Denied Sept. 6, 1940.

1. Municipal corporations ⇨767, 768(1), 821 (5, 6)

In actions under Public Liability Act against municipalities for injuries allegedly sustained as result of defective sidewalks or streets there is no hard and fast rule as to character or extent of defect in sidewalk or street that is necessary to impose liability upon municipality, and each case must stand upon its own particular facts, and, generally, whether a defect in sidewalk or street is of such nature as to render municipality liable is for jury. St. 1923, p. 675, § 2.

2. Municipal corporations ⇨821(6)

In action under Public Liability Act against a municipality for injuries allegedly received when plaintiff fell upon a defective sidewalk, where complaint alleged that depression in sidewalk was about 12 inches long, 3 inches wide and 2 inches deep, issue of municipality's liability was for jury. St. 1923, p. 675, § 2.

3. Municipal corporations ⇨761(1)

The Public Liability Act concerning liability of cities for injuries resulting from defective condition of public streets and highways includes injuries resulting from defective condition of sidewalks, notwithstanding provisions of Improvement Act. St.1911, p. 750; St.1923, p. 675, § 2.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Dina J. Ackers against the City of Los Angeles, a municipal corporation, for personal injuries claimed to have been suffered when plaintiff fell upon a defective sidewalk. From the resulting judgment after defendant's demurrer to the second amended complaint was sustained without leave to amend, plaintiff appeals.

Reversed.

J. F. Rosen and H. Wolpin, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Robert A. McMillan, Deputy City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

Plaintiff seeks by this action to recover a judgment against the City of Los Angeles for injuries which she suffered when she fell upon a defective sidewalk. The demurrer of defendant city to the second amended complaint was sustained without leave to amend and the appeal is taken from the resulting judgment.

The question presented for determination is whether paragraph IV of the second amended complaint sets forth facts sufficient to attach liability to the city. The allegations in this paragraph are as follows: "That for a long time prior to the 26th day of November, 1938, a portion of the sidewalk in front of the Canyon Drive Super Station located on the westerly side of Canyon Drive near its intersection with Hollywood Boulevard was insufficient and defective and in need of repairs in this: That the concrete upon said sidewalk was old, decayed and broken with holes and openings in and through the same, and on the 26th day of November, 1938 and for a long time prior thereto there was a dangerous depression in said concrete which was about twelve inches long, about three inches wide and about two inches deep; that no barrier or guard had been or were placed around said hole and by reason of the aforesaid condition of the sidewalk it was unsafe and dangerous to walk upon; that said condition had existed for a period of over one year prior to the 26th day of November, 1938, and during that time said hole had been by the defendants carelessly and negligently and with knowledge thereof permitted and suffered to be and remain in that condition. A photograph of which defective portion of sidewalk is hereto attached, marked 'Exhibit A,' and made a part hereof."

[1] Plaintiff's action is predicated upon the Public Liability Act of 1923, which provides that cities shall be liable for injuries to persons resulting from the dangerous or defective condition of public streets and highways in all cases in which the governing board or persons in authority had knowledge or notice of the defective or dangerous condition and failed or neglected for a reasonable time after acquiring such knowledge or notice to remedy such condi-

tion. Many decisions have been rendered by the reviewing courts of California in actions predicated upon this act. From these decisions it is established that no hard and fast rule can be laid down in such cases as to the character or extent of the defect in the sidewalk or street but each case must stand upon its own particular facts; that as a general rule it is a question for the jury to determine whether a defect in the sidewalk or street is of such a nature as to render the city liable. Sandstoe v. Atchison, T. & S. F. R. Co. and the City of Pasadena, 28 Cal.App.2d 215, 82 P.2d 216; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Hook v. City of Sacramento, 118 Cal. App. 547, 5 P.2d 643; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Barrett v. Southern Pac. Co., 207 Cal. 154, 277 P. 481; Gerberich v. Southern Cal. Edison Co., 5 Cal.2d 46, 53 P.2d 948.

[2] In Barrett v. City of Sacramento, 128 Cal.App. 708, 18 P.2d 356, where a judgment in favor of plaintiff was affirmed, the reviewing court states the facts as follows: "The evidence before the jury showed the defect complained of was a broken area in a cement sidewalk near the center thereof, irregular in outline, approximately twelve inches across and about three-eighths of an inch deep, and that the sidewalk had existed in that condition for over five years, during which time city employees had, on various occasions, been working in that vicinity." In the complaint in the case now before us it is alleged that the depression in the sidewalk was "about 12 inches long, about 3 inches wide and about 2 inches deep". It is manifest that this defective condition is more serious than the condition mentioned in the Barrett case where the length of the depression was 12 inches and the depth only ⅜ of an inch. The opinion in the Barrett case does not contain a lengthy discussion of the law but refers to the discussion contained in Hook v. City of Sacramento, supra [118 Cal.App. 547, 5 P.2d 644], where the court sustained a judgment in favor of the plaintiff against the defendant city in an action in which the depression on the apron of a sidewalk was "between 18 inches and 2 feet long, and as wide as her foot and an inch to an inch and one-half inches deep". The depression in the sidewalk in the present case was, according to the allegations of the complaint, deeper than the depressions in the Hook and Barrett cases. It cannot be held as a matter of law that the defective condition of the sidewalk was of such a minor nature that the issue could not be submitted to a jury. The question of notice need not be considered since it is alleged that the city had notice of this defective condition for over three months prior to the accident.

[3] Defendant contends that a city is not liable for the defective condition of its sidewalks, basing its argument upon the fact that by section 39 of the Improvement Act of 1911, St.1911, p. 750, municipalities were exempted from liability to persons using a "street or public highway, or sidewalk * * *". It is pointed out that the Public Liability Act of 1923, St.1923, p. 675, § 2, makes cities liable for the "defective condition of public streets, highways, buildings, grounds, works and property * * *" without specifically mentioning sidewalks. We need not give serious consideration to defendant's contention nor the plaintiff's argument that the Act of 1923 repealed section 39 of the Act of 1911 and that the term streets includes sidewalks (19 Cal.Jur. 16), for the reason that cities have been held liable for the defective condition of sidewalks in so many cases since the enactment of the Act of 1923 that it must be considered as settled law in California that the Public Liability Act of 1923 includes injuries resulting from the defective condition of sidewalks. In the Hook and Barrett cases, supra, judgments were upheld against the cities for injuries resulting from defective sidewalks. In Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990, 991, although the point now presented was not directly considered, the court in its opinion stated: "There is here present no element of conspicuousness or notoriety showing any dangerous character in the slight rise of a portion of a sidewalk, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute." Counsel for defendant argues that this point has not been passed upon by any reviewing court notwithstanding he has raised the point in briefs which he filed in White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 993, and in Whiting v. National City, supra. Apparently in those cases the reviewing courts did not consider the point of sufficient merit to call for discussion.

The judgment is reversed.

I concur: McCOMB, J.

WHITACRE et al. v. HALL et al.

Civ. 2380.

District Court of Appeal, Fourth District, California.

July 10, 1940.

Rehearing Denied Aug. 5, 1940.

See 104 P.2d 660.

1. Factors 🔑30

Where contract for consignment of 50 cars of lettuce to licensed vegetable broker who advanced certain sum and guaranteed certain minimum price per car provided for an accounting at close of transaction and that "all railroad or other claims" should be the property of consignors to whom all instruments on each car and notations on conditions of cars on arrival at destination were to be sent, consignors were entitled to sums recovered by consignee from railroad for damage to shipments of lettuce, and consignee was not entitled to a corresponding credit on minimum price guaranteed per car of lettuce.

2. Appeal and error 🔑80(6)

Where brokers sought damages for breach of consignment contract and reformation of contract which provided that all claims against railroad should be property of consignors, so as to entitle brokers to benefit of amounts recovered by consignors from railroad for damages to lettuce shipments, and it was stipulated that issue of reformation should be first tried and decided and that trial on other issues should be deferred, judgment referring to stipulation and decreeing that contract was without ambiguity and that consignors were entitled to retain proceeds from railroad claims, denying reformation and ordering an accounting was not a "final judgment" from which an appeal could be taken. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

3. Appeal and error 🔑452

Where judgment rendered by trial court was purely interlocutory so that appeal therefrom was of no effect, trial court retained jurisdiction to proceed with other issues raised and the granting of permission to file a cross-complaint was within its discretion. Code Civ.Proc. § 963.

4. Appeal and error 🔑78(3)

Where judgment rendered by trial court was purely interlocutory and thereafter trial court permitted defendants to file a cross-complaint, order refusing to strike the cross-complaint was not appealable. Code Civ. Proc. § 963.

5. Factors 🔑2½

Where vegetable broker agreed with consignors that consignors should be entitled to all claims against railroad and thereafter failed to turn over amounts collected on claims from railroad to the consignors, consignors failing to show fraud or deceit on the part of the broker were not entitled to recover from surety on broker's bond for amounts collected by broker from railroad and not turned over to consignors. St.1933, p. 278, § 1265.

6. Factors 🔑2½

Where vegetable broker failed to pay to consignors amounts recovered from railroad for damages to lettuce shipments as provided by contract, liability of vegetable broker and surety was one to be enforced by the director of agriculture in an action brought by him under the statute relating thereto and could not be enforced in an action arising out of contract by consignors. St.1933, p. 278, § 1265.

7. Factors 🔑2½

Consignors seeking to recover from vegetable broker's surety for failure of broker to turn over to consignors amounts recovered from railroad on claims for damages to vegetables as provided by contract had burden to prove fraud and deceit and that they were injured thereby. St.1933, p. 278, § 1265.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by W. E. Whitacre and another against Ed. C. Hall and C. L. Hall, copartners, doing business under the firm name and style of the Hall Packing Company, to recover an amount advanced on five cars of lettuce consigned to plaintiffs with damages for nondelivery of such lettuce and for an accounting and a reformation of a contract, wherein defendants filed a cross-complaint naming as cross-defendants the plaintiff William Shapiro, Inc., a corporation, and its surety, the Fidelity & Casualty Company of New York, a corporation. From an adverse judgment, from an order denying a new trial, and from an order denying a motion to strike the cross-complaint, William Shapiro, Inc., and the Fidelity & Casualty Company of New York appeal.

Judgment in accordance with opinion.

Harry W. Horton, of El Centro, for appellant.

Whitelaw & Whitelaw, of El Centro, for respondents.

BARNARD, Presiding Justice.

William Shapiro, Inc., which will be referred to as the plaintiff, was licensed as a vegetable broker under the Agricultural Code of this state, its bond having been furnished by the Fidelity and Casualty Company of New York. During the 1936 season, the plaintiff entered into a written contract with the defendants, under the terms of which the defendants agreed to consign to the plaintiff at El Centro fifty cars of lettuce during the season, the lettuce to be of a certain quality and to carry certificates of federal-state inspection. The lettuce was to be handled by the plaintiff on a commission basis, but the plaintiff guaranteed to the defendants $275 per car "irrespective of the final outcome of the deal". The contract provided for an advance to the defendants of $5,000, being $100 per car, and for the further payment to the defendants of $175 as each car was loaded. It also provided for "an accounting of the proceeds from the sales" at the end of the deal, and contained a provision that "all railroad or other claims" should be the property of the defendants and that "all instruments on each car" and "notations on conditions of cars on arrival" were to be sent to them by the plaintiff.

The defendants delivered forty-five cars of lettuce to the plaintiff at El Centro with the necessary bills of lading and certificates of inspection, all of which were accepted by a representative of the plaintiff. As each car was delivered an additional $175 was paid to the defendants. Accounts of sales of the various cars were furnished to the defendants. Because of unusual freezing weather a part of the lettuce in some of the cars was damaged and certain crates of lettuce were unsalable when they reached the eastern markets. The plaintiff filed claims against the railroad companies based upon this damage and collected various amounts therefor, which amounts it retained.

In this action which followed, the plaintiff sought to recover $500 covering the advance on the five cars which had not been delivered, with $350 as damages for the nondelivery of those five cars, and further sought an accounting, together with a reformation of the contract to the end that the plaintiff in such accounting should have the benefit of the amounts it had collected on the claims against the railroads.

It was stipulated between the parties that the issue as to the reformation of the contract should be first tried and decided by the court, and that the trial on the other issues should be deferred until that matter was decided. After a trial on that issue it was decided in favor of the defendants. The court thereupon signed and filed so-called "findings of fact and conclusions of law" and a judgment in which, after reciting that the parties had stipulated to present the issues as to the construction of this contract and as to whether or not there was any fraud or mistake in connection with its execution, the court ordered and decreed that the written contract, which was set out in full, is the only contract existing between the parties; that such contract is without ambiguity or uncertainty; that the defendants are entitled to receive and retain the proceeds from railroad claims arising out of the shipment of the forty-five cars of lettuce; that reformation of the contract be denied; that an accounting between the parties be had; and that the defendants "be allowed their costs and that the same become a part of the memorandum of costs to be hereinafter, at the conclusion of this case, served and filed".

The plaintiff filed a notice of appeal from this so-called judgment. Thereafter, the defendants filed a cross-complaint naming as cross-defendants the plaintiff and its bonding company, and praying for an accounting and for a judgment for the amount which it might be found the plaintiff had collected on the railroad claims. After a motion to strike out the cross-complaint was denied, an answer was filed and a further hearing had upon the remaining issues. A set of findings of fact and conclusions of law was then signed and filed, in which the court recites that it had theretofore made and filed "findings of fact and conclusions of law and judgment respecting the construction of the contract" between the parties; that said interlocutory judgment had been entered and filed; that the matter had come on for trial on the remaining issues, including those raised in connection with the cross-complaint, and upon an order theretofore made that an accounting be had; and that the matter had been submitted. It was then found that the plaintiff was entitled to a return of $500 out of the original $5,000 deposit; that the plaintiff had not been damaged by the failure to deliver the other five cars; that the accounting disclosed that the plaintiff had received and collected the sum of $4,305.93 to which defendants were entitled; and that the defendants were entitled to judgment for the difference, $3,805.93, with interest. A "final judgment by the court after interlocutory judgment" was then signed and entered in which, after reciting that the remaining issues had been submitted, the previous order or judgment on the issue of the validity and meaning of the contract was set forth in haec verba, and judgment was awarded the defendants for the balance due them as given in the findings. In accordance with the prayer of the cross-complaint, this judgment was entered against both the plaintiff and its bonding company and both have appealed from the judgment, from an order denying a new trial, and from an order denying a motion to strike the cross-complaint.

The plaintiff, on its appeal, makes no attack upon the results of the accounting except as to the amounts received in settlement of the railroad claims which were awarded to the defendants. In this regard, the plaintiff contends that it should be given credit for these amounts, or that it should receive the benefit therefrom. In other words, the contention is that the proceeds of these claims should be treated as belonging to the plaintiff. It is argued that under general rules of law, applicable to consignors and consignees, the title to this lettuce remained in the defendants as consignors; that any loss or damage fell upon them; that any goods damaged in transit should be considered as not having been delivered to the plaintiff; and that if the defendants take the proceeds of the railroad claims the plaintiff is entitled to a corresponding return of the guaranteed payment which it advanced.

[1] It may be conceded that this would be the logical result, in such a situation, in the absence of a specific agreement between the parties. But there is no reason why the parties could not, by contract, provide otherwise. The court has here found that the plaintiff had guaranteed to the defendants a minimum return of $275 a car, with the further provision that in addition thereto they were entitled to collect and retain any amounts arising from claims for damages against the railroads. The terms of the contract are reasonably susceptible to the interpretation thus placed upon it by the trial court. This was virtually conceded by the plaintiff, it having asked to have the contract reformed in that respect on the ground that it had been so worded by reason of fraud or mistake. The court found against it on that issue and there is ample evidence that the intention of the parties was as expressed in the contract and as found by the court, and that this intention was clearly disclosed by the defendants and acquiesced in by the plaintiff at the time the contract was signed. This is simply a case where the contract of the parties, rather than the general rules of law, must be controlling.

The only other points raised by the plaintiff are that the court erred in refusing to strike the cross-complaint, and in trying and rendering judgment on the remaining issues, because it was without jurisdiction to take further proceedings after an appeal was taken from the judgment which was entered at the conclusion of the hearing on the issues as to the validity and interpretation of the contract.

[2-4] The first so-called judgment was merely a decision on preliminary questions, it having been stipulated that the trial of other issues should be deferred until those questions were decided. The first so-called judgment was not a final judgment and was not such an interlocutory judgment as is made appealable by the statute. Sec. 963, Code Civ.Proc. While that judgment interpreted the contract and denied a reformation thereof, it did not establish any certain indebtedness, and, on the other hand, it directed that an accounting be had and referred to the memorandum of costs which should be filed "at the conclusion of this case". It was purely an interlocutory order or judgment, the appeal therefrom was of no effect, the court retained jurisdiction to proceed with the other issues raised

in the action, and the giving of permission to file a cross-complaint was within the court's discretion. Clarke v. Baird, 98 Cal. 642, 33 P. 756. Since the first judgment was not a final judgment it follows that the order refusing to strike the cross-complaint was not an appealable order. While the procedure followed, in recording the court's decision on the preliminary issues originally submitted, was unnecessarily formal and perhaps irregular, the legal effect remains the same and no prejudice has resulted.

The appeal of the bonding company presents a different question. That company furnished to the plaintiff the bond required by section 1265 of the Agricultural Code (St.1933, p. 278). That section provides that any producer-consignor of farm products claiming to have been injured by the fraud or deceit of a commission merchant may bring an action upon the bond against both principal and surety. It also provides that where a commission merchant fails to pay for farm products consigned to him an action may be brought by the director of agriculture for the benefit of all consignors who have filed statements of their claims with the director.

The cross-complaint in the instant action, which brought in the bonding company as a cross-defendant, mainly sought to recover from the plaintiff the amounts collected by it upon the railroad claims, and to secure bills of lading and other papers necessary to enable the defendants to prosecute such further claims of that nature as the plaintiff had not yet acted upon. The only allegations in the cross-complaint relating to fraud and deceit on the part of the plaintiff were that the plaintiff had failed to render true accounts of sales and to make settlement thereon, and that it had made false charges for commissions "upon an alleged collection of claims". While the court found that these allegations were true there is no finding giving the respects in which the accounts of sales were not true, and no finding as to how much, if any, commission was improperly charged. The judgment against the bonding company is the same as that against the plaintiff, namely, for the exact amounts collected by the plaintiff upon the railroad claims, less the $500 which the plaintiff had advanced upon the five cars which were not delivered. In other words, the judgment is based upon the allegations of the cross-complaint which relate to the failure to turn over certain amounts in accordance with the contract, and not upon those which pertain to fraud and deceit.

[5-7] Essentially, this action was one arising out of a dispute as to the terms of the contract and, on defendant's part, one to recover certain amounts to which this contract entitled them. It was largely, if not entirely, tried upon that theory and judgment was entered accordingly. If it be assumed that the bonding company had any liability on its bond, in connection with the particular payments here in question, that liability, under the provisions of the statute, was one to be enforced by the director of agriculture in an action brought by him and could not be enforced in this action. While the cross-complaint contains allegations charging fraud and deceit on the part of the plaintiff it was incumbent upon the defendants and cross-complainants to prove that they were injured by such fraud and deceit. This they failed to do. The only evidence of such fraud and deceit relates to the manner in which certain accounts were made to the defendants, with disputed testimony as to what was the general practice of the trade in that regard. We are pointed to no evidence, however, which shows that the defendants were injured in this connection and, in fact, the evidence indicates that they actually profited thereby. Moreover, the court made no finding which, with any reasonable inference therefrom, would support the judgment against the bonding company, based upon the theory that the defendants had been injured by any fraud or deceit on the part of the plaintiff. It rather clearly appears that the bonding company has here been improperly charged with liability for the payment of amounts which an accounting has disclosed that the plaintiff had failed to pay over to the defendants, and to which they were entitled.

The purported appeals from the first judgment and from the various orders are dismissed. The judgment in so far as it is against the plaintiff is affirmed and in so far as it is against the cross-defendant, the Fidelity and Casualty Company of New York, is reversed.

We concur: MARKS, J.; GRIFFIN, J.

40 Cal.App.2d 123

WILLINGHAM et al. v. PECORA et al.

Civ. 2398.

District Court of Appeal, Fourth District, California.

July 12, 1940.

1. Appeal and error 🔑458(1)

The function of a "writ of supersedeas" is to stay proceedings in a lower court, and it is prohibitive in character and may be issued under proper circumstances to hold a case in statu quo pending an appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Supersedeas".

2. Stipulations 🔑14(12)

Where parties stipulated that writ of supersedeas might issue, the District Court of Appeal granted the writ staying the trial pending determination of appeal from order denying motion for change of place of trial.

Action by George Willingham and others against Philip Pecora, also known as Pehilipo Pecora, Mary J. Pecora, Joe Pecora, the Ace Freight Lines, and others, for damages alleged to have been sustained in an automobile accident. From an order denying a motion for change of place of trial on ground of convenience of witnesses, the named defendants appeal, and seek a writ of supersedeas staying the trial pending the appeal.

Writ of supersedeas granted.

William C. Ring and Fontana & Goldstone, all of Los Angeles, for appellants.

Brittain & Mack, of Los Angeles, for respondents.

MARKS, Justice.

This is an action to recover damages alleged to have been sustained in an automobile accident on Highway 99 in Kern County. Defendants Ace Freight Lines, Philip Pecora, Joe Pecora, Mary J. Pecora and Vernon Shearer moved the trial court to change the place of trial from Kern county to Los Angeles county on the ground of the convenience of the witnesses. This motion was denied and an appeal was taken from this order.

The trial court set the case for trial and proposed to try it before the appeal from the order was decided. The appealing defendants applied to this court for a writ of supersedeas staying the trial until the appeal was disposed of. This court issued an order to show cause why such a writ should not be issued. When the order to show cause came on for hearing respondents stipulated that the writ might issue as prayed for.

[1,2] The function of a writ of supersedeas is to stay proceedings in a lower court. It is prohibitive in character and may be issued under proper circumstances to hold a case in statu quo pending an appeal. 23 Cal.Jur. 984. As the parties have stipulated that the writ may issue we find no necessity for further examination of the merits of this proceeding.

It is ordered that the writ of supersedeas issue as prayed for.

We concur: BARNARD, P. J.; GRIFFIN, J.

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40 Cal.App.2d 109

MURPHY v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 11943.

District Court of Appeal, Second District, Division 1, California.

July 12, 1940.

1. Appeal and error 🔑1046(1)

Where, during progress of trial in action for injuries wherein evidence tended to show that mental impairment resulted from injuries, a friend would bring plaintiff into court at time of court recesses and while jury panel was passing from courtroom, and when court convened again would take plaintiff by arm and lead him into the corridor, denial of new trial on ground of "misconduct" was not error, where no prejudice resulted.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

2. Trial 🔑260(1)

The failure to give requested instructions was not reversible error, where other

instructions appeared to have sufficiently covered the general subject to the extent that likelihood of prejudice resulting from failure to give requested instruction was remote.

3. Damages ⚷130(3)

Verdict awarding 23-year-old man $20,000 damages for fracture of the skull over the left eye, generalized contusion of the brain, laceration of the left frontal region and behind the right ear, bruises over the face and extremities, swelling and bruises on the left eye, and the loss of two upper center incisor teeth, where there was evidence that injuries impaired mental faculties and caused change of personality, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Howard C. Murphy against the Department of Water and Power of the City of Los Angeles and another, for injuries sustained in an automobile collision. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Kenneth K. Scott and Wendell Mackay, Deputy City Attys., all of Los Angeles, for appellants.

H. Eugene Breitenbach and Henry L. Knoop, both of Los Angeles, for respondent.

DORAN, Justice.

Defendants appeal from a judgment based upon a verdict of the jury in favor of plaintiff, respondent herein, in an action to recover damages for personal injuries sustained in a collision between two automobiles.

The record reveals that on December 5, 1936, an automobile driven by Avery Parrish, an employee of the Department of Water and Power of the City of Los Angeles, acting within the scope of his employment, collided with an automobile driven by one Sherwood E. Meredith, in which automobile plaintiff Howard C. Murphy was a guest.

At the trial defendants stipulated to liability, leaving as the sole issue to be determined by the jury the extent of the injuries sustained by the plaintiff. The jury returned a verdict in favor of plaintiff in the sum of $20,000. This appeal is from the judgment entered thereon after defendants' motion for a new trial was denied.

At the time of the accident plaintiff was 23 years of age; he had been working as a jig builder at the Lockheed Aircraft Corporation in Burbank, California. The immediate results of the accident were a fracture of the skull over the left eye, generalized contusion of the brain, laceration of the left frontal region and behind the right ear, bruises over the face and extremities, swelling and bruises on the left eye and the loss of the two upper center incisor teeth.

During the trial evidence was introduced which tended to show that prior to the accident plaintiff had possessed a good mind and retentive memory, good manners, a pleasing personality, was energetic and alert, walked with a military posture and gait, spoke fluently and enunciated clearly, and was able to carry on a lengthy conversation without the lapse of thought; that since the accident plaintiff is suffering from impairment of his mental faculties and loss of memory, the loss of at least two-thirds of the sight of his left eye, his qualities and powers of speech have deteriorated, his gait is slovenly, social behavior uncouth, and that he has undergone a change of personality.

One of the grounds contained in defendants' motion for a new trial was as follows: "Irregularity in the proceedings in the trial by reason of misconduct on the part of plaintiff and his attorneys, and witnesses for the plaintiff, by which the defendants were prevented from having a fair trial in said action."

The charge of misconduct was based upon the allegations contained in affidavits filed by three investigators of the Department of Water and Power of the City of Los Angeles, in which it was alleged, in effect, that during the progress of the trial plaintiff was continually in the care of and accompanied by one Ben Loveless, a friend and a witness for the plaintiff, and that at the time of the court recesses and while the jury panel was passing from the court room and corridor, said Ben Loveless would bring plaintiff into the court room, and that when court convened again said Ben Loveless would take plaintiff by the arm and lead him into the corridor, in a manner indicating that plaintiff was childish or incompetent and that he required someone to care for him.

An affidavit was also filed by an employee of the Department of Water and

Power, who took moving pictures of plaintiff for a period of six weeks, in which affidavit it was alleged that during this period of observation affiant observed that plaintiff walked in an alert, erect and purposeful manner. (These moving pictures, incidentally, were exhibited to the jurors at the trial.)

One Glynn B. Johnston, a representative of an audit company, also filed an affidavit, in substance supporting a portion of the foregoing.

A joint affidavit of plaintiff's attorneys filed in opposition to the motion for a new trial, alleged in part as follows: That affiant and his associate counsel had caused plaintiff to be examined by four doctors and surgeons who had specialized for many years in the field of neuropsychiatry and brain injury; that each of said physicians and surgeons had advised affiant that plaintiff suffered from a deterioration of mental functions which would be permanent or from which a recovery was improbable; that plaintiff was never informed by anyone as to the conclusions of the doctors, and that at least two of the doctors had advised affiant that knowledge of their conclusions would be detrimental to the plaintiff and they requested that plaintiff be not allowed in the court room when they testified; that relying upon the advice of the doctors and believing that it would be to the best interest of the plaintiff to do so, affiant and his associate counsel determined to keep plaintiff out of the court room at all times when the trial of said cause was in progress, except at such times when his presence was actually required; that affiant requested Ben Loveless to remain with plaintiff during all times when he was kept out of the court room, and they requested him to do so in deference to plaintiff for the purpose of providing company for him during such time and to make certain that plaintiff would not return to the court room during the progress of the trial.

An affidavit of Ben Loveless, also filed in opposition to the motion for a new trial, in substance recited the reasons plaintiff was taken out of the court room, and denied any ulterior motive.

It should be noted in this connection that plaintiff denied that he was ever led around by Ben Loveless, or that he was unable to take care of himself. For example, plaintiff, when called as a witness by defendants under section 2055 of the Code of Civil Procedure, testified as follows:

"Q. (By Mr. Scott, defendant's counsel): I will ask you if it is true or not that Ben Loveless leads and guides you around the Casa del Norte Apartment where you live?

Mr. Knoop (Plaintiff's counsel): Well, there is no suggestion of anything like that in the testimony. There is no foundation for that question.

"The Court: I don't recall it.

"Mr. Scott: No, there isn't any foundation for that, but there is another condition that has been very apparent around this court room since this trial opened. I don't have to put an impeaching question under Section 2055 to this witness.

"Mr. Knoop: No, you don't have to, but you did.

"Q. By Mr. Scott: Has Ben Loveless during the trial of this case, Mr. Murphy, been kind of leading you around—carrying you around like this (indicating)? A. No.

"Q. Does he lead you around when you are out at your apartment? A. No.

"Q. You are able to take care of yourself, are you not? A. I think so."

The witness Ben Loveless also testified, upon cross-examination, to the same effect as follows:

"Q. (By Mr. Mackay, defendants' counsel): Do you have to walk around the block with him (plaintiff)? A. No, sir.

"Q. Do you have to hold him by the arm and lead him around any place? A. No, sir."

The trial court, after giving consideration to the conflicting affidavits, as heretofore noted, denied defendants' motion for a new trial.

Appellants contend on appeal, as urged on their motion for a new trial, that: 1. "There was prejudicial error in the misconduct of plaintiff in the presence of the jury panel which was calculated to and did prejudice and influence the jury in its verdict and prevented defendants from having a fair and impartial trial;" 2. That errors in law occurred at the trial, which were excepted to by the defendants; and 3. That the damages were excessive and appeared to have been given under the influence of passion or prejudice.

[1] With regard to appellants' contentions above mentioned, the trial court's judgment is expressed in the form of a memorandum opinion which, with relation to appellants' first contention, is as follows:

"I watched from the first the solicitude with which Ben Loveless took the arm of plaintiff and escorted him out of the court room. It appeared to me that the plaintiff shrank away each time Loveless took his arm, with a rather resentful attitude, and did not cooperate as he was apparently expected to do. After the pictures were shown, however, Loveless had the good sense not to attempt the act any more, and I am satisfied that the reaction on the jury was rather the opposite of what defendant thinks, and did not result in prejudice either for or against plaintiff or defendant." Whether the "reaction on the jury was rather the opposite of what defendant thinks" is beside the issue on appeal, although such belief properly could have been taken into account by the trial judge. It is evident, however, that the record abundantly supports the trial judge's conclusion that no prejudice resulted from the incident complained of, hence to conclude to the contrary, on appeal, would be unwarranted.

[2] Appellants' second contention which is based upon the court's failure to give certain instructions is not entirely without merit. Nevertheless other instructions appear to have sufficiently covered the general subject to the extent that the likelihood of prejudice resulting from the failure to give appellants' instructions is too remote to warrant a reversal of the judgment.

[3] As to appellants' third contention regarding excessive damages, it is sufficient to note that the facts relied upon to support the judgment herein, when compared with facts in analogous decisions, appear to be sufficient to sustain the judgment. In that connection the following quotation is appropriate: "* * * it is to be remembered that the judge who presided over the trial and at first hand heard the testimony of medical witnesses respecting the man's injuries was given the opportunity to consider the question of excessiveness of the award on the motion for a new trial. It is significant that he chose not to disturb it, and by his action in denying a new trial gave to it his approval. This fact, together with the facts developed by the evidence produced during the trial of the action, impels the conclusion that we are not warranted in disturbing the award." Hill v. County of Fresno, 140 Cal.App. 272, 290, 35 P.2d 593, 602. See, also, Conner v. East Bay Municipal Utility Dist., 8 Cal.App.2d 613, 47 P.2d 774, 48 P.2d 982; Hoffman v. Southern Pacific Co., 215 Cal. 454, 11 P.2d 387; Riggs v. Gasser Motors, 22 Cal.App.2d 636, 72 P.2d 172; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644; Machado v. Harm, 112 Cal.App. 748, 297 P. 626; Bowman v. Motor Transit Co., 208 Cal. 652, 284 P. 443.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: YORK, P. J.; WHITE, J.

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40 Cal.App.2d 94

MORRIS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12596.

District Court of Appeal, Second District, Division 2, California.

July 11, 1940.

1. Workmen's compensation 🔑1939

If there is substantial evidence to support the finding and order of the Industrial Accident Commission, the District Court of Appeal cannot substitute its views for those of the Commission and annul the award.

2. Workmen's compensation 🔑1939

Where findings of State Industrial Accident Commission are based upon reports of medical experts which are in substantial conflict, District Court of Appeal cannot disturb the findings and conclusions of the Commission.

3. Workmen's compensation 🔑1504

Conflicting testimony of medical experts as to whether injury received by assistant matron in hospital when bitten on right breast by an epileptic patient was a causative or precipitating factor of cancerous condition of assistant matron's right breast furnished sufficient support for order of State Industrial Accident Board denying compensation.

◆

Proceeding under the Workmen's Compensation Act by Lucy M. Morris, employee, opposed by the County of Los Angeles, a body politic and corporate, employer. To review an award in favor of employer by the Industrial Accident Commission of the State of California, the employee petitions for a writ of review.

Award affirmed.

Frank Desimone, of Los Angeles, for petitioner.

Everett A. Corten and Dan Murphy, Jr., Asst. Atty., both of San Francisco, for respondents.

PER CURIAM.

While petitioner was employed in January or February, 1935, as an assistant matron in a hospital operated by the County of Los Angeles she was bitten on the right breast by an epileptic patient. She was attended by Dr. Margaret Godfrey, who was then the resident physician at the institution. Petitioner lost no time from her work because of the injury. She retired from her work on December 1, 1938, not through disability, and has been paid retirement pension since that date by the County of Los Angeles. In May, 1939, she noticed a lump on the breast which had been injured, and in August, 1939, her physician, John S. Simms, diagnosed her condition as cancer. She thereafter applied to the Industrial Accident Commission for an award, claiming that the cancerous condition of her breast had been caused by the injury she received in 1935 when she was bitten by the patient. The Commission filed findings that: "The malignancy of the right breast, of which applicant complains, and which forms the subject matter of this proceeding, was neither caused nor aggravated by said injury". Petitioner now seeks to annul the award, claiming that this finding is not supported by the evidence.

The evidence most favorable to petitioner is found in the statement of her physician, Dr. Simms, in which he says: "While the etiology of carcinoma is unknown, yet many authorities believe that a single trauma to the breast is a definite predisposing factor. Since this lesion developed at the site of the injury, I believe that ths opinion applies to her case. * * * From our limited knowledge of the etiology of cancer I cannot state that the previous trauma was not a factor in its production". Dr. Godfrey wrote a letter from Australia, dated September 12, 1939, in which she stated: "I understand that she has developed a cancer of the right breast, and as any injury definitely predisposes to this condition this injury might well be the cause". Dr. W. H. Boyd, under date of November 18, 1939, made this statement: "Examination of Mrs. Lucy C. Morris on this date gives no indication of the cause of the formation of the carcinoma of the right breast which she says was removed. As to the probable cause of this growth I believe that our present knowledge of the cause of carcinoma is at present so limited that we can not rule out trauma as a possible factor in its formation. The history of a trauma such as the patient gives is sufficient to have caused damage to the breast tissue and I am therefore inclined to believe that the trauma may have played a part in the formation of the carcinoma." The employer's physician, Dr. C. K. Emery, under date of October 17, 1939, stated: "There was no indication that the cancer of the breast had any direct connection with the injury received in 1935. The coincidence of an injury followed by cancer is striking but an inconclusive event in the causation of a cancer, where many factors are probably involved. In the present case I am unable to say that the circumstances relating to the injury have any direct bearing on the subsequent development of the cancer".

The respondent Commission appointed Dr. O. N. Meland to examine the claimant and report to the Commission. In his report he stated: "What relationship existed between the trauma and the occurrence of her cancer is problematic. From our present knowledge of cancer of the breast and its experimental production, there has been no evidence put forward to show that a single trauma has ever been followed by cancer. * * * However, in this case, the time between the trauma and the occurrence of the tumor is so long that one cannot look upon it as a precipitating cause. Although an element of doubt exists, and the possibility may still be present, I do not believe that the injury was the causative or precipitating factor".

From the foregoing statements of the physicians it appears that the applicant's physician, Dr Simms, is of the opinion that petitioner's present condition was caused by the injury she received in the course of her employment. On the other hand, the employer's physician, Dr. Emery, was "unable to see that the circumstances relating to the injury have any direct bearing on the subsequent development of the cancer". The physician appointed by the Commission was of the opinion that the injury received in the course of the employment was not a "causative or precipitating factor". Of the other two physicians, one thought that the injury "might well be the cause", and the other, while stating that it might be a possibility, could not commit himself to any statement inferring that there was a relationship between the injury and the present condition of petitioner.

[1-3] If there is substantial evidence to support the finding and order of the Commission this court may not substitute its views for those of the Commission and annul the award. Hartford A. & I. Co. v. Industrial Accident Comm., 202 Cal. 688, 262 P. 309, 58 A.L.R. 1392. Where as here the findings of the Commission are based upon the reports of medical experts which are in substantial conflict the court may not disturb the findings and conclusions of the Commission. Brandon v. Industrial Accident Comm., 211 Cal. 341, 294 P. 1064. The report of Dr. Meland unquestionably presents a conflict in the evidence and furnishes sufficient support for the order of the Commission.

The award is affirmed.

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40 Cal.App.2d 54

ADOLPH RAMISH, Inc., v. BEHR et al.

Civ. 12680.

District Court of Appeal, Second District, Division 2, California.

July 9, 1940.

1. Time 🔑10(9)

Under the Code extending the time in which an act is to be performed by the number of holidays appointed by the President or Governor, appellants' time for filing a notice of appeal from judgment entered against them was not extended one day because George Washington's birthday occurred during 30-day period in which appellants might have filed notice of appeal, since George Washington's birthday is a holiday by virtue of an act of Legislature, and hence notice of appeal filed 31 days after order denying appellants' motion for new trial was not timely. Code Civ.Proc. §§ 12a(b), 939; Pol.Code, § 10.

2. Evidence 🔑65

Time 🔑10(1)

One is presumed to know the legal holidays prescribed by the Legislature and to accommodate his acts accordingly, but one is not presumed to know holidays appointed by the President or Governor, since holidays appointed by the President or Governor may be selected on short notice and vary according to exigencies of the circumstances. Code Civ. Proc. § 12a(b).

◆

Action by Adolph Ramish, Incorporated, a corporation, against Bertha L. Behr and Charles B. Behr. From a judgment for plaintiff, the defendants appeal. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

H. F. Poyet and Franklin B. MacCarthy, both of Los Angeles, for appellants.

Charles J. Katz and Alfred Gitelson, both of Los Angeles, for respondent.

McCOMB, Justice.

Respondent moves to dismiss this appeal upon the ground that it was not taken within the time permitted by section 939 of the Code of Civil Procedure and, therefore, that this court is without jurisdiction to entertain the same.

It is conceded that January 15, 1940, the judgment was entered from which the purported appeal was taken; January 26, 1940, notice of intention to move for a new trial was served and filed; February 20, 1940, an order denying appellants' motion for a new trial was made and entered; and March 22, 1940, appellants' notice of appeal to this court was served and filed.

[1] This is the sole question for us to determine:

Was appellants' time for filing a notice of appeal from the judgment entered against them extended one day under the provisions of section 12a, subsection (b) of the Code of Civil Procedure, because February 22, George Washington's birthday, occurred during the thirty-day period in which appellants might have filed a notice of appeal from the judgment rendered against them?

This question must be answered in the negative and is governed by the following principles of law:

(1) The time within which an act provided by law is to be done is computed by excluding the first day and including the last unless the last day is a holiday, in which event it is also excluded. Sec. 12, Code Civ.Proc.

(2) Where an act is required by law to be performed within a specified period of time, such period of time is extended by the number of days equal to the number of holidays (other than special holidays) appointed by the President or Governor which occur during such specified period. Sec. 12a, subsec. (b), Code Civ.Proc.

(3) February 22, Washington's birthday, is a holiday by virtue of an act of the legislature. Sec. 10, Pol.Code.

Applying the foregoing rules to the facts of the instant case, it appears that the notice of appeal in the present case was filed March 22, 1940, which is thirty-one days after the order denying appellants' motion for a new trial was made and entered in the trial court, thus being one day after the time permitted by section 939 of the Code of Civil Procedure.[1] This court is, therefore, without jurisdiction of the appeal, since appellants' time was not extended under the provisions of section 12a, subsection (b) of the Code of Civil Procedure, due to the fact that February 22d fell in the period within which appellants might have filed their notice of appeal. This holiday was not one appointed by the President of the United States or Governor of the State of California, but was a holiday by virtue of legislative enactment. Sec. 10, Pol.Code.

[2] There is a very sound reason for the foregoing distinction, which is that everyone is presumed to know the legal holidays prescribed by the legislature and to accommodate his acts accordingly, while holidays appointed by the President and Governor may be selected on short notice and vary according to the exigencies of the circumstances.

For the foregoing reasons the motion to dismiss the appeal is granted and the appeal is dismissed.

I concur: WOOD, Acting P. J.

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40 Cal.App.2d 89

In re HICKSON'S ADOPTION.
BROOKS v. HICKSON.

Civ. 12697.

District Court of Appeal, Second District, Division 2, California.
July 11, 1940.

1. Adoption 🔑13

In stepfather's proceeding for adoption of minor opposed by minor's father, proof by stepfather that father had willfully failed to pay for the care, support, and education of the minor, together with mother's consent to the adoption, did not make it mandatory upon court to grant the petition for adoption, but court could exercise its discretion in the best interests of the child. Civ.Code, §§ 224, 227.

2. Adoption 🔑3
Statutes 🔑225

Provisions of statute relating to adoption were required to be read together and to be strictly construed. Civ.Code, §§ 224, 227.

3. Adoption 🔑15

In stepfather's proceeding for adoption of minor opposed by minor's father, a wide discretion was reposed in trial judge, and his decision would not be disturbed by reviewing court in absence of a clear showing of an abuse of such discretion. Civ. Code, §§ 224, 227.

4. Adoption 🔑13

In stepfather's proceeding for adoption of minor, where mother consented to the adoption but father opposed it, evidence sustained implied finding that father had not willfully failed to provide for the minor, and denial of the petition for adoption was not an abuse of trial court's discretion. Civ. Code, §§ 224, 227.

5. Adoption 🔑14

In stepfather's proceeding for adoption of minor opposed by minor's father, probation officer's report, stating that "Written recommendation is respectfully waived pending the decision of the court on the allegations contained in the petition", was not a "favorable recommendation" which was a

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[1] If proceedings on motion for a new trial are pending, the time for appeal from the judgment does not expire until thirty days after entry in the trial court of the order determining the motion for a new trial or other determination in the trial court of the proceedings upon such motion.

statutory prerequisite to an order of adoption. Civ.Code, § 227a.

See Words and Phrases, Permanent Edition, for all other definitions of "Favorable Recommendation".

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Proceeding in the matter of the adoption of William Richard Hickson, a minor, by Merle S. Brooks, petitioner, the minor's stepfather, opposed by Joe Hickson, also known as Joseph Hickson, the minor's father. From an order denying the petition for adoption, petitioner appeals.

Affirmed.

Richard L. Gray and Kraft & Gray, all of Los Angeles, for appellant.

Amend & Amend and Joseph Hansen, all of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

A petition was filed in the superior court on July 21, 1939, by Merle S. Brooks seeking to adopt William R. Hickson, his stepson, who was born November 22, 1933. Petitioner has appealed from an order of the court denying the petition.

The father of the minor child, Joseph Hickson, the respondent herein, was divorced from the mother of the child on December 29, 1937, the interlocutory decree having been entered on December 24, 1936. The custody of the minor child of the parties, William R. Hickson, was awarded to the mother and respondent was ordered to pay to her through the court trustee the sum of $10 per week for the support of the child. On January 14, 1938, respondent remarried and at all times since has been living with his second wife. On April 10, 1938, the mother of the child married the petitioner herein and at all times since they have been living together as husband and wife.

Petitioner bases his prayer for adoption upon the allegation that respondent "for a period of more than one year immediately preceding the filing of this petition wilfully failed to pay for the care, support and education of said minor child, he having the ability to do so", and has filed herein the written consent of the mother of the child.

Petitioner relies upon section 224 of the Civil Code, which provides: "A legitimate child can not be adopted without the consent of its parents if living; provided, however, that after the custody of any child has by any judicial decree, been given to the mother, and the father for a period of one year shall wilfully fail to pay for the care, support and education of such child when able to do so, then the mother alone may consent to such adoption, but only after the father has been personally served with a copy of a citation requiring him to appear at the time and place set for the appearance in court under section 227 of this code * * *." Section 227 of the Civil Code provides in part: "The person or persons desiring to adopt a child, and the child proposed to be adopted, must appear before the court. The court must examine all persons appearing before it pursuant to this section, each separately, and if satisfied that the interests of the child will be promoted by the adoption * * * the court shall thereupon make an order awarding the custody of the child to the adopting parent or parents." No written findings were made, but at the conclusion of the hearing the court stated: "Gentlemen, to my mind, in order to take a child away from its natural parent ties the case must be strong and clear. That is my construction of the law. I am not satisfied, under all the circumstances, that there was, within the meaning of section 224, a clear attempt to wilfully fail to provide. It seems to me like that part of the difficulty has arisen from some misunderstandings in relation to the visitations and things of that kind with respect to the father; and I do not feel that it is sufficient to justify the court in breaking that strong natural tie of blood. Petition for adoption is denied." There is evidence in the record from which the court may have concluded that during the period of two years and four months before the filing of the petition the total earnings of respondent as the driver of a delivery truck amounted to only $1,825; that from this sum he was called upon to defray unusual expenses, such as doctor bills and those resulting from an automobile accident, in the sum of $200; that during this period he paid the mother of the child the sum of $123.50; that if respondent had made the payments required by the order of court there would not have been a sufficient sum remaining for him to pay his own living expenses; that respondent did in fact offer to pay directly to the child's mother a sum less than the amount ordered by the court, but that this was refused; that when respondent attempted to visit his child, as permitted by the divorce decree, he was impeded from doing so and ordered by petitioner to stay away; that petitioner had threatened the child's mother with desertion if the child and his mother accompanied respondent to a store to buy clothes; and that in addition to the cash actually paid respondent had bought an overcoat and shoes for the child in 1937 and had otherwise shown affection for him. We are satisfied that there is sufficient evidence to sustain the implied finding of the court that respondent had not wilfully failed to provide for his son.

[1-4] We cannot take the view of petitioner that proof on his part that respondent had wilfully failed to pay for the care, support and education of the child, together with the mother's consent thereto, made it mandatory upon the court to grant his petition for adoption. Section 224 of the Civil Code must be read in connection with section 227 of the Civil Code, both of which must be strictly construed. In re Newman, 88 Cal.App. 186, 262 P. 1112. In section 227 it is provided that the court shall make the order of adoption if it is satisfied that the interests of the child will be promoted thereby. The trial court, being solicitous to preserve the family relationship and to protect the rights of the child and of its natural parent, doubtless was of the opinion that the best interests of the child would not be promoted by the adoption. In such cases a wide discretion is reposed in the trial judge, and his decision should not be disturbed by a reviewing court in the absence of a clear showing of an abuse of such discretion. In re Fahlman, 84 Cal.App. 248, 257 P. 893. We see no abuse of discretion in the action of the trial court herein.

[5] The record discloses another reason why the order must be sustained. In section 227a of the Civil Code it is provided: "The probation officer in the county in which the action for adoption is pending shall make an investigation of each case of adoption by a step-parent. No order of adoption shall be issued by the court until after favorable recommendation thereon is made by such officer." A lengthy report was made by the probation officer of Los Angeles county concerning the situation of the various parties to this proceeding, which report closes with these words: "Written recommendation is respectfully waived pending the decision of the court on the allegations contained in the petition". The report cannot be construed as the "favorable recommendation" which by the code is made a prerequisite to the order of adoption.

The order is affirmed.

I concur: McCOMB, J.

WATKINS et al. v. NUTTING et al. *

Civ. 2532.

District Court of Appeal, Fourth District, California.

July 10, 1940.

Rehearing Denied Aug. 5, 1940.

Hearing Granted Sept. 6, 1940.

1. Automobiles ⚷159

Where collision between automobile and pedestrian who was crossing highway was imminent if pedestrian proceeded on his course, motorist was excused for failure to follow best possible course to avoid accident if motorist did those things which a reasonably prudent person would have done under similar circumstances.

2. Automobiles ⚷150, 160(3)

The driver of an automobile is bound to maintain a vigilant watch for other persons and vehicles using the highway.

3. Automobiles ⚷244(6)

In action against motorist for death of pedestrian who was killed when struck by automobile while crossing highway at a point other than an intersection or pedestrian crossing, evidence that motorist did not recall seeing automobiles traveling ahead of him on highway, or that he had passed such automobiles, and that motorist did not see pedestrian until within approximately 34 feet from pedestrian, supported inference that motorist was negligent.

4. Trial ⚷139(1)

Weight and sufficiency of evidence is addressed to jury in first instance.

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* Subsequent opinion 110 P.2d 384.

5. New trial 🔑70

On hearing of motion for new trial, based on insufficiency of evidence to support judgment, trial judge sits as a 13th juror, and it is his duty to judge weight and sufficiency of evidence and to draw his own conclusions therefrom and in so doing he may disregard jury's findings.

6. Appeal and error 🔑1005(4)

In reviewing trial court's action in denying a motion for new trial based on insufficiency of evidence to support judgment, District Court of Appeals cannot weigh evidence nor judge its preponderance, and it is only when there is no substantial evidence nor reasonable inference to be drawn from it that will support verdict and judgment and order denying motion for new trial that District Court of Appeal may interfere.

7. Automobiles 🔑160(4)

The right of a motorist to claim his right of way over a pedestrian crossing a highway at a point other than at an intersection or crosswalk is not absolute, in view of provision of Vehicle Code concerning duty of motorists to exercise due care for safety of pedestrians, and a pedestrian is not absolutely prohibited from so crossing a highway. Vehicle Code, §§ 87, 562, St.1935, pp. 99, 188.

8. Death 🔑58(1)

In action against motorist for death of pedestrian, where no witness had observed pedestrian's movements from time that pedestrian hesitated at edge of pavement to let third party's automobile pass until pedestrian again came into view back of third party's automobile, it was to be presumed that during such time pedestrian used ordinary care for his own safety and that pedestrian looked for approaching traffic from direction from which motorist was approaching. Vehicle Code, §§ 87, 562, St.1935, pp. 99, 188; Code Civ.Proc. § 1963, subd. 4.

9. Automobiles 🔑245(6, 72)

In action against motorist for death of pedestrian who was struck by automobile while crossing highway at a point other than an intersection or pedestrian crossing, where there was a presumption that pedestrian had taken some precautions for his own safety before leaving position of safety on edge of pavement, whether motorist was negligent and whether pedestrian was contributorily negligent were for jury. Vehicle Code, §§ 87, 562, St.1935, pp. 99, 188; Code Civ.Proc. § 1963, subd. 4.

10. Negligence 🔑67

In order for one to be relieved of contributory negligence, it is not sufficient that he observe conduct of others, but, after so observing, he must exercise reasonable care for his own safety.

11. Appeal and error 🔑1066
Trial 🔑253(4)

In action against motorist for death of pedestrian who was struck by automobile while crossing highway at a point other than an intersection or pedestrian crossing, where evidence indicated that pedestrian was contributorily negligent, an instruction that every person has right to presume that another will perform his duty and obey law, etc., was prejudicial against motorist where instruction omitted question of pedestrian's freedom from contributory negligence. Vehicle Code, §§ 87, 562, St.1935, pp. 99, 188.

12. Appeal and error 🔑1064(1)

In action against motorist for death of pedestrian where evidence showed that pedestrian was contributorily negligent, an instruction that a person is not contributorily negligent merely because he attempts to cross street when an automobile is approaching, and that a pedestrian crossing a highway at other than a marked crosswalk has a right to assume that those operating automobiles upon highway will operate them in a manner and at a speed customary, and as required by law at particular place, was prejudicial to motorist. Vehicle Code, §§ 87, 562, St.1935, pp. 99, 188.

13. Appeal and error 🔑790(3)

Where judgment for plaintiffs was reversed on defendants' appeal, codefendants' appeal from order granting plaintiffs' motions to strike codefendants' petition to have trial judge allot to codefendants a portion of damages recovered by plaintiffs and to strike codefendants' notice of motion to amend judgment by adding codefendants' names to those of plaintiffs would be dismissed, since issues raised by appeal had become "moot questions".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Questions".

14. Appeal and error 🔑612(2)

Where only record on codefendants' appeal was a so-called "supplemental clerk's transcript on appeal", which bore only the certificate of county clerk, record was insufficient to allow District Court of Appeal

to consider questions presented by codefendants' appeal.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Irene Guinevere Watkins and another, minors, by and through their guardian ad litem, Irene Watkins, and Irene Watkins, against Franklin P. Nutting and others for the death of Henry Cooper Pitney Watkins, who was struck by an automobile driven by defendant Franklin P. Nutting. From a judgment for plaintiffs for $20,000, defendants Franklin P. Nutting and the American Vineyard & Investment Company appeal, and from an order granting plaintiffs' motions to strike a petition filed by defendants Mildred Westra Ingalls and Mahlon Wilson Watkins concerning allotment of recovered damages and to strike such defendants' notice of motion to amend judgment by adding their names to those of plaintiffs, defendants Mildred Westra Ingalls and Mahlon Wilson Watkins appeal.

Judgment reversed and appeal of Mildred Westra Ingalls and Mahlon Wilson Watkins dismissed.

Ray W. Hays, of Fresno, for appellants Franklin P. Nutting and American Vineyard & Investment Co.

Ralph Robinson and Clyde E. Cate, both of Fresno, for appellants Mildred Westra Ingalls and Mahlon Wilson Watkins.

John D. Chinello and Rae B. Carter, both of Fresno, for respondents.

MARKS, Justice.

We have here two appeals. One is by Franklin P. Nutting and the American Vineyard and Investment Company from a judgment against them in the sum of $20,000 damages caused by the death of Henry Cooper Pitney Watkins, who was struck by an automobile driven by Nutting. The other is by Mildred Westra Ingalls and Mahlon Wilson Watkins from an order made after judgment.

We will first consider the appeal from the judgment. In this portion of the opinion, when the term "appellants" is used, it will refer to Franklin P. Nutting and the American Vineyard and Investment Company. These appellants maintain that the evidence is insufficient to support the judgment for two reasons: (1) That there is no evidence of any negligence on the part of Nutting; (2) that the evidence shows Watkins guilty of contributory negligence as a matter of law. A consideration of these questions requires a brief summary of the evidence.

The accident happened on Highway 99, south of the city of Fresno and about one-quarter of a mile south of the Santa Fe overpass and opposite a place of business known as La Boheme Cafe. It occurred at about four o'clock in the afternoon of March 7, 1938. It was raining, the roadway was wet and the visibility was only fair. The highway runs northwesterly and southeasterly.

The roadway over the overpass has four marked traffic lanes. South of the overpass it has three marked traffic lanes, each ten feet wide. There is an oiled shoulder nine feet in width on each side of the pavement. The La Boheme Cafe is about seventy-one feet westerly from the pavement.

Watkins was the driver of a truck, from which he delivered beer to the cafe. Shortly before the accident, after parking his truck, which was headed northerly, on the easterly side of the highway, he crossed the highway and entered the cafe. Later he left the cafe, and in recrossing the highway to return to his truck, was struck by the automobile driven by Nutting and killed.

There is little conflict in the evidence. There was no pedestrian crossing nor intersection at or near the scene of the accident. Besides the beer truck there were five other motor vehicles on the highway, four going southerly, the fifth coming northerly. Nutting in a Packard sedan, Joe Pinto in a Nash sedan, Rondy Evans in a Chevrolet sedan, besides a large Mohawk gasoline truck, were all traveling southerly on Highway 99. Sam Ragan, driving an automobile in the easterly traffic lane, was approaching from the south and was between one and two hundred yards southerly from the point of collision when Watkins was struck.

In the record the description of these vehicles starts with Joe Pinto driving his automobile over the overpass in the westerly traffic lane at a speed of between forty and forty-five miles per hour. The Mohawk gasoline truck passed him, on the overpass, and returned to the westerly traffic lane. Nutting next passed Pinto, on his left, traveling at about fifty miles per hour, and after traversing the overpass, passed the Mohawk gasoline truck on its left. He remained in the center traffic lane of the three-lane highway in order to pass the Rondy Evans automobile. Joe Pinto then drove into the center traffic lane to pass the Mohawk gasoline truck. He placed this truck in the right traffic lane about fifty yards ahead of him, Nutting in the center traffic lane about seventy-five or one hundred yards ahead of him, and the Rondy Evans Chevrolet in the right traffic lane about thirty-five yards ahead of the truck. He admitted that these distances were mere estimates and the testimony of other witnesses proved them to be inaccurate. No other witness mentioned seeing the Mohawk gasoline truck and there is no other evidence concerning it.

Fred Murphy, a passenger in the Rondy Evans Chevrolet, testified that Watkins left the La Boheme Cafe and proceeded at a rapid walk towards the highway; that he thought Watkins was going to walk into the right side of the Chevrolet; that Watkins hesitated before stepping onto the pavement to let the Chevrolet pass; that Watkins looked to the south; that he proceeded onto the highway but was obscured from view for the width of the car while passing back of it; that he looked back and saw Watkins near the left rear of the Chevrolet still walking easterly; that the Nutting car was between one hundred fifty and two hundred feet northerly in the center lane, probably nearer the latter distance. Murphy described subsequent events as follows:

"And Mr. Watkins started across the highway and he looked north one time and he seen this car, must have seen it, and just hesitated for a second, and then started in a fast walk. And just as—

"Q. Where was he when he hesitated? A. At the first—well, he just stepped into the center lane.

"Q. In other words, he just stepped into the center lane when he hesitated? A. Yes. And then he started—

"Q. Then he continued at a fast walk? A. Yes.

"Q. All right. A. And just as he reached the east lane or about the white line this car struck him.

"Q. And what part of the car? A. Well, it was the left bumper and fender struck him, threw him up in the air quite a little ways, and he fell. I was the first man to him, I think. I am sure I was."

Murphy's evidence was corroborated in many respects by others in the Chevrolet.

Nutting testified that after leaving the overpass he was driving southerly at a speed of between forty and forty-five miles an hour; that he thought he was driving in the right traffic lane until he turned into the center lane to pass the Rondy Evans Chevrolet; that he had no memory of seeing or passing the Joe Pinto Nash sedan nor the Mohawk gasoline truck; that he first saw Watkins when Watkins was near the westerly line of the center traffic lane and about two car lengths, thirty-four feet, distant from him; that he sounded his horn, applied his brakes, and swerved to his left; that Watkins proceeded easterly and when on or near the easterly boundary of the center traffic lane he either stopped, or stopped and stepped back; that he turned his car to his right but that the left end of his front bumper hit Watkins; that he stopped his car within about twenty feet; that at the time of the impact his automobile was traveling about fifteen miles per hour; that the accident happened in about one-half a second after he first saw Watkins.

Sam Ragan saw the actual collision and corroborated Nutting's evidence as to the movements of Nutting's car immediately before and at the time of the accident.

[1] Appellants argue that these facts do not disclose any negligence on the part of Nutting. They urge that he was driving at a lawful rate of speed at the place on the highway which the law assigned to him when passing another vehicle. They also urge that as soon as he became aware of Watkins' presence on the highway he did everything humanly possible to avoid the collision. We may concede the soundness of this argument under the facts which disclose the danger of the situation and that a collision was imminent if Watkins proceeded on his course. Under such circumstances the law excuses failure to follow the best possible course if the vehicle driver did those things which a reasonably prudent person would have done under similar circumstances.

[2,3] However, these concessions do not settle the question of his possible negligence. The law requires that a driver shall always maintain a vigilant watch for other persons and vehicles using the highway. Under the facts disclosed the jury might have concluded that Nutting failed

to perform this duty. For a time prior to the accident he seemed to be in a condition of mental abstraction and oblivion as to his conduct and surroundings. He had no recollection of driving in the center lane until he was attempting to pass the Rondy Evans Chevrolet, and mistakenly thought he had been driving in the westerly traffic lane. He had no recollection of the Joe Pinto Nash sedan nor of the large Mohawk gasoline truck being on the highway, and did not know that he had driven in the center traffic lane for a considerable distance nor that he had passed these vehicles. He did not see Watkins until he was within about thirty-four feet of him, although the passengers in the Chevrolet saw the Nutting automobile between one hundred fifty and two hundred feet distant when Watkins had passed the rear of the Chevrolet. From these facts the jury could draw the inference that Nutting should have seen Watkins walking across the highway when at least one hundred fifty feet northerly from the point of impact. Had he seen Watkins at that distance, Nutting could have avoided the collision by stopping his car, if necessary. It is evident from his testimony that he did stop it within about fifty-four feet after he actually saw Watkins. This evidence supports the inference drawn by the jury that Nutting was negligent in not seeing those objects ahead of him which were within the range of his vision, had he looked.

We have a much more difficult problem in considering the implied finding of the jury which absolved Watkins from the charge of contributory negligence. It seems to us there is a preponderance of evidence showing he was in fact guilty of contributory negligence.

[4, 5] It should be unnecessary to call attention to the rule that the weight and sufficiency of the evidence is addressed to the jury in the first instance. It is equally true that on the hearing of a motion for new trial, based on insufficiency of the evidence to support the judgment, the trial judge sits as a thirteenth juror. It is then his duty to judge the weight and sufficiency of the evidence and to draw his own conclusions therefrom. In so doing he may disregard the findings of the jury. Moyer v. Dresch, 2 Cal.App.2d 655, 38 P.2d 849; Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418; Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. In Hunt v. United Bank & Trust Company, 210 Cal. 108, at page 118, 291 P. 184, 188, the Supreme Court said: "If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict."

[6] The situation in the appellate court is entirely different. We cannot weigh the evidence nor judge its preponderance. It is only when there is no substantial evidence nor reasonable inference to be drawn from it that will support the verdict and judgment and the order denying the motion for new trial that we can interfere.

[7] Under the circumstances before us subdivision (a) of section 562 of the Vehicle Code, St.1935, p. 93 et seq., requires pedestrians crossing the roadway to "yield the right of way to all vehicles upon the roadway". Section 87 of the same code defines "Right of Way" as "the privilege of the immediate use of the highway". Subdivision (b) of section 562 of the Vehicle Code provides that: "The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." Because of this last provision it is apparent that the right of the automobile driver to claim his right of way over a pedestrian crossing a highway, other than at an intersection or in a marked cross-walk, is not absolute. By the same token it is equally true that a pedestrian is not absolutely prohibited from so crossing the highway.

In Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062, 1067, it was said: "The duty of a pedestrian to 'yield' the right of way while crossing a street other than a regular crosswalk, as imposed by section 562 of the Vehicle Code, St.1935, p. 188, may call for a higher degree of care upon the part of such pedestrian than would be applied to one crossing at a regular crosswalk, but the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law." In Varner v. Skov, 20 Cal.App.2d 232, 67 P.2d 123, 125, it was said: "Several of the points thus raised are based upon the contention that under section 131½ (c) [Sec. 562, Vehicle Code] of the California Vehicle Act the deceased was under the positive duty of yielding the right of way to the appellant and that that section necessarily prevents a recovery in this action. This contention is without merit * * *."

[8, 9] It must be remembered that this is an action for damages resulting from the death of Watkins and that no witness observed his movements from the time he hesitated at the edge of the pavement to let the Rondy Evans car pass until he again came into view back of the left rear corner of that car. Under such circumstances it must be presumed that, during such time, he used ordinary care for his own safety. Sec. 1963, subd. 4, Code Civ.Proc.; Geisler v. Rugh, 19 Cal.App.2d 738, 66 P.2d 671. It could be presumed that he looked to the north for approaching traffic and thus took some precautions for his safety before leaving a position of safety for one of danger. Under such circumstances the questions of negligence and of contributory negligence are of fact for the jury and not of law for the courts. White v. Davis, 103 Cal.App. 531, 284 P. 1086; Varner v. Skov, supra. It follows that we cannot hold Watkins guilty of contributory negligence as a matter of law.

At the request of plaintiffs the trial judge gave the following instruction: "Every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger by such other person provided he, himself, uses reasonable care to observe the conduct of such other person so far as such conduct may affect his own safety at the time."

[10] This instruction omits the important element of Watkins' freedom from negligence. The giving of a quite similar instruction was held to be reversible error in the case of McPherson v. Walling, 58 Cal.App. 563, 209 P. 209. It is not sufficient that Watkins observe the conduct of other persons. After so observing, he must exercise reasonable care for his own safety.

The trial court also gave the following instruction at the request of plaintiffs: "In this regard you are instructed that a pedestrian has a right to cross a public street or highway between crossings, and it cannot be said that a person is guilty of contributory negligence merely because he attempts to cross the street when an automobile is approaching. A pedestrian crossing a public street or highway at other than a marked cross-walk has a right to expect and to assume that those operating automobiles upon a public street will operate them in the manner and at the speed customary, and as required by law, at the particular place."

This instruction contains the same vice as the other, for it is only the one who is himself not negligent who can rely on the presumption that another will exercise due care. See, 10 Cal.Jur. sec. 35, page 596, and cases cited; 8 10-Year Supp., page 339, and cases cited. Any other rule would destroy the doctrine of contributory negligence. McPherson v. Walling, supra; White v. Davis, supra.

In Isham v. Trimble, 5 Cal.App.2d 648, 43 P.2d 581, 583, the court said: "'A motorist must at all times use due care to avoid colliding with another; he must be ever alert and watchful, so as not to place himself in danger, and, while he may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him.' Donat v. Dillon, 192 Cal. 426, 221 P. 193, 194; Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 189 P. 1025; Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471. 'One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another. * * * But reliance upon this presumption does not excuse one who is himself negligent.' Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53, 55; see, also, Holahan v. McGrew, 111 Cal.App. 443, 295 P. 1059."

[11, 12] The above-quoted instructions, and another with the same vice, bore on the important question of the contributory negligence of Watkins. To our minds this is the most important issue in this case. Where, as here, the preponderance of the evidence strongly points towards the contributory negligence of Watkins, it cannot be held that the erroneous instructions did not result in prejudice to appellants. In fact, they may very well have influenced the jurors by causing them to conclude that Watkins could not have been guilty of contributory negligence in going into the

roadway as he did. Under the facts of this case it should be tried again with the jury legally and properly instructed on all questions presented.

We will now consider the appeal of Mildred Westra Ingalls and Mahlon Wilson Watkins. In this portion of the opinion we will also use the term "appellants" when referring to these appealing defendants. They were the children of Watkins but Irene Watkins was not their mother. Both were of legal age when this action was filed. They were married and were not living with their father. The complaint alleged their relationship to Watkins and further alleged that they were joined as defendants because they refused to join as plaintiffs. Mahlon Wilson Watkins was personally served with process in Fresno county on October 13, 1938, and Mrs. Ingalls was served in Kern county on October 15, 1938. Their defaults were entered on order of the trial court on August 23, 1939.

The judgment in favor of plaintiffs in the sum of $20,000 was entered on September 14, 1939. On October 20, 1939, these appellants filed their petition to have the trial judge determine their pecuniary loss and allot to them a portion of the damages recovered, or in the alternative, that the pending motion for new trial be granted. This petition was supported by affidavits. On October 26, 1939, plaintiffs filed a notice of motion to strike the petition and affidavits from the record. On October 27, 1939, these appellants filed a notice of motion to amend the judgment by adding their names to those of plaintiffs. On November 2, 1939, plaintiffs filed a notice of motion to strike out the notice of motion and a supporting affidavit. Both motions to strike were granted. This appeal is from that order.

[13] As the judgment is to be reversed this appeal largely becomes moot. Before another trial these appellants may take such steps to protect any rights they may have as they may be advised are proper. They should first endeavor to set aside their defaults.

[14] These appellants have presented what is denominated a "Supplementai Clerk's Transcript on Appeal" as the only record on their appeal. It bears only the certificate of the county clerk. This record is insufficient to allow us to consider the questions presented. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748; Clark v. McCain, 107 Cal.App. 668, 290 P. 901; Guyot v. Cassab, 118 Cal. App. 742, 5 P.2d 912; Salinas v. Riverside Finance Co., 126 Cal.App. 675, 14 P.2d 1025; Mason v. Coalinga U. H. S. Dist., 31 Cal.App.2d 317, 87 P.2d 921; Clark v. Janss, Cal.App., 102 P.2d 768; Kwon v. Kwon, Cal.App., 102 P.2d 808.

The judgment is reversed. The appeal of Mildred Westra Ingalls and Mahlon Wilson Watkins from the order is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

15 Cal.2d 668

STEIN v. STATE BAR.

L. A. 17425.

Supreme Court of California.

July 18, 1940.

1. Attorney and client 🔑57

In disbarment proceeding where client had testified both upon direct and cross examination that attorney secured money from client for investment and that she would not have made a personal loan to him, sustaining objection to cross-examination question whether client knew that attorney had been separated from his wife and had incurred obligations for support of child and borrowed money from client for such purpose was not prejudicial error.

2. Attorney and client 🔑57

In disbarment proceeding upon an application for further hearing before Board of Governors of State Bar, the evidence proposed to be offered should be stated with particularity and its materiality and relevancy must clearly appear.

3. Attorney and client 🔑57

In disbarment proceeding, affidavit and application for hearing de novo before Board of Governors of the State Bar were insufficient where attorney made no explanation to board regarding why evidence was not introduced at original hearing before local committee and affidavit did not satisfy requirement that evidence proposed to be offered should be stated with particularity and its materiality and relevancy must clearly appear.

4. Attorney and client 🔑53(1)

In disbarment proceeding, local examining committee was entitled to know facts in connection with attorney's previous professional difficulties.

5. Attorney and client 🔑58

In considering the discipline to be imposed upon an attorney, it is proper for local examining committee or Board of Governors to consider attorney's past conduct in connection with charges pending against him for purpose of determining whether he is imbued with the essential qualities of integrity and honesty, or any bearing it may have upon his motive or otherwise upon the question of the measure of discipline to be applied.

6. Attorney and client 🔑53(2)

Evidence that attorney appropriated money of client to attorney's own use justified disbarment.

In Bank.

Proceeding by Gus Stein against the State Bar of California to review a recommendation that the petitioner be disbarred.

Petitioner disbarred.

Louis R. Baker, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, and Claude Minard, of San Francisco, for respondent.

EDMONDS, Justice.

The board of governors of The State Bar has recommended that the petitioner, an attorney at law, be disbarred, and the present proceeding was brought to review that determination.

The decision of the board followed a hearing before a local administrative committee upon the charge of appropriating the money of a client. The petitioner did not appear at this hearing but was represented by counsel. The committee found that some time after he met Pearl Garber, the complaining witness, he was employed as an attorney to probate the estate of her deceased mother. He also drew a will for her. Because of such employment the petitioner became acquainted with Miss Garber's affairs. He induced her to give him $730 to be invested in an oil enterprise upon representations that Harry J. Keeley, who occupied offices adjoining that of the petitioner, was then drilling a well and "she would get more than double her money in return". Keeley was not then drilling any well and he was not soliciting or accepting money from anyone.

Other findings are that the money was paid to petitioner in amounts ranging from $70 to $150 and was appropriated by petitioner to his own use. He agreed to deliver stock or other evidence of her interest in the oil well, but also stated that his personal notes were the best security for her investment and that it was not necessary that she receive any stock. The record shows that several notes in favor of Miss Garber were executed by the petitioner and delivered to her and that he repaid $80 of the amount received from her.

In another transaction, the petitioner obtained $7.50 from Miss Garber upon the representation that a bank was foreclosing upon the oil well and equipment in which her money was invested and that this amount was needed to file an injunction suit on her behalf. Subsequently, he requested $50 to place a keeper in charge of the oil well, but she refused to give him this amount. No suit was filed and petitioner appropriated the $7.50. Upon numerous occasions, Miss Garber requested the petitioner to account for the various sums of money paid to him and to furnish her with some security for her investment, but none of these requests was complied with.

Upon these findings the local committee recommended that the petitioner be disbarred. He then applied to the board of governors for leave to present additional evidence and for a hearing de novo. This application was denied, and the findings and conclusions of the local committee were adopted by a resolution which included the statement that the board in fixing the degree of discipline took into consideration the petitioner's past record, which included a public reproval administered in 1930.

Petitioner now contends that the board erred in not permitting a hearing de novo or allowing the presentation of additional evidence because the findings of the committee are not supported by the evidence; there is insufficient evidence to support either the findings or the conclusions; there is additional evidence available which is material to all of the issues; and the denial of the right to cross-examine the complaining witness constitutes prejudicial error, as does also the examiner's reference to the petitioner's previous citation by the board.

The findings objected to are relatively unimportant as they touch upon the main issues only incidentally and can properly be criticized only as including slight inaccuracies in statement. For example, the committee found that the petitioner was employed by Miss Garber to probate the estate of her deceased mother. The petitioner shows that her brother was the executor and argues that the legal services must have been rendered to him. Although this is technically correct, the testimony clearly indicates an employment of the petitioner because of his acquaintance with Miss Garber, and that she considered he was representing her in the probate proceedings.

The evidence which more directly concerns the petitioner's acts clearly shows, without any contradiction whatever, that the petitioner took Miss Garber's money under representations that it would be invested in an oil well. Her testimony in this regard is supported by that of Mr. Keeley, who testified that upon request of the petitioner, he had endorsed a note or notes made by the petitioner in favor of Miss Garber and also that upon Stein's request he telephoned Miss Garber and told her "everything was all right and the money would be forthcoming". His only explanation for doing this was that petitioner "was a jovial kind of boy and I thought he was all right".

[1] The petitioner's complaint that the cross-examination of Miss Garber was erroneously limited is based upon the committee's ruling sustaining an objection to the following question asked of Miss Garber: "Did you know that during this time Mr. Stein had been separated from his wife and he had incurred a number of obligations for the support of his child and borrowed money from you for this purpose?" The objection was sustained upon the ground that it was outside of the issues.

The petitioner now asserts that the question was asked to show that the money which Miss Garber gave him was to be used to pay these obligations. But in her testimony, both upon direct and cross-examination, she positively stated that the petitioner secured the money from her for investment and that she would not have made a "personal loan" to him. For example, the following question was asked her immediately after the criticized ruling: "Isn't it true that you knew Mr. Stein was not going to use this money to invest in an oil well?" Her reply was: "That I knew Mr. Stein was not going to use this money to invest in an oil well? Of course not, that is not true; that is what he took it from me for, that is what he was going to invest it for me for". In view of these and other answers given in response to questions which covered the entire scope of her dealings with the petitioner, the ruling complained of does not constitute prejudicial error.

In an affidavit filed in support of his application for a hearing de novo before the board, petitioner states that he had been under the care of a doctor for several months preceding the hearing and was then in ill health. For that reason, he alleged, he did not appear before the committee. He stated in his affidavit that because there had been a settlement between him and Pearl Garber relative to the promissory notes, he believed she would testify differently at the hearing. He also asserted that he could prove the money was loaned to him personally to pay, among other things, "expenses for boy's school creditors"; that he had made numerous interest payments of 10 per cent per month upon the notes; that he paid this high interest because he felt he was helping to contribute to Miss Garber's support and was desirous of helping her; and that although several of his notes had been paid by respondent's father, who advised her not to make further loans, she continued to give him money.

[2, 3] But the petitioner did not disclose who would testify to these facts. Furthermore, upon any application for a further hearing, the evidence proposed to be offered should be stated with particularity and its materiality and relevancy must clearly appear. The affidavit of the petitioner falls far short of these requirements. Also, the petitioner made no explanation to the board of governors why this evidence was not introduced at the original hearing before the committee. Although the petitioner was not then present, his attorney stated that it was the petitioner's desire that the hearing proceed without him. There was no request for a continuance nor any statement to the effect that counsel was surprised by any of the testimony given. Under these circumstances, the affidavit does not state any grounds for a hearing de novo.

[4, 5] Before the local committee, the examiner for The State Bar said that the petitioner had been cited in August, 1930, on a charge upon which a trial committee recommended disbarment. It was pointed out by the committee that this observation was outside the order to show cause, and it directed the attorneys to confine themselves to the issues. No further mention was made of the former proceeding although the committee was entitled to know the facts in connection with the petitioner's previous professional difficulties. For in considering the discipline to be imposed, it is proper for an examining committee, or the board of governors, to consider an attorney's past conduct in connection with the charges then pending against him for the purpose of determining whether he "is imbued with the essential qualities of integrity and honesty, or for any bearing it may have upon his motive or otherwise upon the question of the measure of discipline to be applied." Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920, 921.

[6] The recommendation of the board of governors being fully supported by the evidence, it is ordered that the name of Gus Stein be stricken from the roll of attorneys at law of this state.

We concur: SHENK, J.; CURTIS, J.; CARTER, J.

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15 Cal.2d 662

HAYES v. PIERCE et al.
HOME OWNERS' LOAN CORPORATION v. SAME.

HAYES v. HOME OWNERS' LOAN CORPORATION et al.

L. A. 16470, 16609.

Supreme Court of California.

July 17, 1940.

Rehearing Denied Aug. 15, 1940.

1. Judgment 🔑172

Defendants' tender to plaintiff's attorney of cashier's check, payable to plaintiff, for sum which trial court directed defendants to pay plaintiff as costs in order conditionally granting defendants' motion to set aside default and judgment thereon, and sending of check by registered mail, addressed to plaintiff at room near that of plaintiff in same building, after plaintiff's attorney had refused check, but within time limited by court order, was sufficient compliance with terms thereof, so as to authorize final order unconditionally setting aside default and judgment.

2. Trial 🔑14

Plaintiff was not entitled to relief from order denying his motion to vacate order setting cause for trial on ground that setting of cause for trial on certain date deprived plaintiff of time to which he was entitled to perfect his claim against estate of codefendant's intestate, and to file supplemental pleadings concerning claim, where plaintiff, when cause was set for trial, did not appear or apprise trial court of facts concerning claim, or ask for continuance, or for permission to file amended pleading.

3. Mortgages 🔑455

In mortgage foreclosure suit, cross-complaint raising no issue as to validity or priority of mortgage over cross-complainant's interest under contract to purchase mortgaged property from certain defendants in foreclosure suit but merely re-alleging matters in dispute in companion case between cross-complainant and such defendants and asking that foreclosure be postponed until after determination of the matters, was properly stricken as failing to state a cause of action, especially where cross-complainant had right to protect his interest by curing defaults and delinquencies leading to filing of foreclosure suit, but failed to do so.

4. Appeal and error 🔑449

Cross-complainant's appeal from order striking cross-complaint did not divest trial court of jurisdiction to determine issues raised by complaint and answer in mortgage foreclosure suit, or render judgment of foreclosure and subsequent proceedings void, since trial court had power to determine, as a matter of procedure, whether it would try issues raised by complaint and answer and leave issues formed by cross-complaint to be determined later or await action of a reviewing court to determine whether cross-complaint was well founded before proceeding with trial.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, and Joseph W. Vickers, Judges.

Proceedings, consolidated for hearing before the Supreme Court, by Jackson Hayes against Walter O. Ferguson and another for rescission of a contract to purchase realty, wherein, after the death of Walter O. Ferguson, James W. Pierce, as administrator of the estate of Walter O. Ferguson, deceased, was substituted as a defendant, and by the Home Owners' Loan Corporation against James W. Pierce, as administrator of the estate of Walter O. Ferguson, deceased, and others, to foreclose a mortgage, wherein defendant Jackson Hayes filed a cross-complaint against the Home Owners' Loan Corporation, and James W. Pierce, as administrator, and another. In the proceeding wherein Jackson Hayes was plaintiff, Jackson Hayes appeals from an order denying his motion to vacate an order setting aside a default judgment and an order setting the cause for trial, and in the proceeding wherein Jackson Hayes was cross-complainant, Jackson Hayes appeals from an order granting a motion to strike the cross-complaint.

Orders affirmed in both proceedings.

J. D. Sutherland and Jackson Hayes, both of Los Angeles, for Hayes.

James W. Pierce and Kathryn Ferguson, in pro. per.

Jerome Tucker Stewart, Ewell D. Moore, and Bruce Renwick, all of Los Angeles, for respondent Home Owners' Loan Corporation.

PER CURIAM.

These are companion cases which were consolidated for hearing before this court.

L. A. No. 16470: In this cause plaintiff has appealed from an order denying his motion to vacate two orders, one an order setting aside a default judgment and the other an order setting the cause for trial.

An action for rescission of a contract to purchase real property and for other relief was filed by plaintiff in 1935 against Walter O. Ferguson and Kathryn M. Ferguson, his wife. On January 7, 1936, a default judgment in the sum of $813.05 and costs was entered in plaintiff's favor. The facts which led to the entry of this judgment are stated in Hayes v. Pierce, 18 Cal.App.2d 531, 64 P.2d 728. On March 16, 1936, the property was sold by the sheriff to plaintiff for $300, and a $558.25 deficiency judgment was docketed.

On April 9, 1936, defendants moved to vacate the default. The court ordered the motion granted on condition that they pay plaintiff the sum of $27.50 within ten days, the motion otherwise to be denied. Defendants tendered the $27.50 to plaintiff, but the tender was refused, and on May 15th, the court made an order vacating the default. Plaintiff appealed from both the conditional order of April 9th and the final order of May 15th. The district court of appeal held that the appeal from the conditional order would have to be dismissed as that order was non-appealable, although it might be reviewed on the appeal from the final order, and it affirmed the final order. Hayes v. Pierce, supra.

Following this decision defendant Kathryn Ferguson moved that the cause be set for early trial. Her affidavit in support of the motion averred that her codefendant husband had died (James W. Pierce, administrator, being substituted as party defendant in his place), and that Home Owners' Loan Corporation, which held a first lien on the property, was threatening foreclosure. On April 16, 1937, the motion was granted and the cause set for trial May 3d.

Plaintiff endeavored to delay and obstruct the trial on the merits. On the morning of April 16, 1937, the day the motion last mentioned was granted, he filed a new superior court action, numbered 414611, against Pierce, administrator, and Kathryn M. Ferguson, concerning the same subject-matter, and claimed that trial of the present cause should not be had during its pendency. On April 27th he gave notice that on April 30th he would move to vacate both the order of May 15, 1936, setting aside the default judgment, and the order of April 16, 1937, setting the cause for trial. As ground for this motion he contended that defendants waived their right to have the default vacated by failing to renew the tender of the sum of $27.50 after the affirmance of the order of May 15, 1916; also that he intended to file a claim against the Walter O. Ferguson estate, and was entitled to time to establish it prior to trial of the cause. On April 30th the motion was heard and denied. The present appeal is from the order of denial.

[1] The first contention made by appellant is that defendants were not entitled to the benefit of the order of May 15, 1936, setting aside the default judgment, and were not entitled to have the cause set for trial, because they failed to either pay or renew tender of the sum of $27.50, as required by the conditional order of April 9, 1936. This claim is answered by the opinion rendered on the prior appeal, which sets forth facts which were held to constitute a sufficient compliance with the conditional order of April 9th, and to justify affirmance of the final order of May 15th setting aside the default. Hayes v. Pierce, supra. Moreover, it appears that the cashier's check for $27.50 which defendants tendered to appellant was finally deposited in the file of this cause in possession of the clerk of the court. There is no showing that appellant ever made any demand for it, although defendants state that he was advised in open court of the method which he might pursue in order to recover it.

Appellant's other contention is that the setting of the cause for trial on May 3d deprived him of the time to which he was entitled to establish and perfect his claim against the estate of Walter O. Ferguson, deceased, and to file supplemental pleadings herein with respect thereto. The claim was for the deficiency judgment of $558.25, with interest, entered after proceedings had on the default judgment, together with an alternative demand based upon rights alleged in the amended complaint herein and contingent upon final failure of reinstatement of the default judgment. It was filed by appellant on April 29th, at which time he knew that the cause had been set for trial on May 3d. On May 1st he wrote defendants that he would not appear at the trial for two reasons, first, because he did not recognize any right to trial on the merits, and second, because he had already filed the present appeal from the order denying his motion to vacate the order setting the cause. Neither reason concerned the status of the claim. When the cause was called on May 3d appellant did not appear and the trial proceeded without him. On the following day his claim was rejected on the ground that nothing was due him, and that the matter had been adjudicated the previous day. On May 7th a judgment was entered for defendants. Appellant moved to vacate this judgment but his motion was denied on July 3, 1937.

[2] Appellant was not prejudiced by the calling of the cause. He could have appeared, apprised the court of the facts with respect to the status of his claim, and asked either for a continuance or for permission to file an amended pleading. He did none of these things, but simply stayed away for other reasons. Hence the trial proceeded and judgment was entered for defendants. These facts fail to show wherein appellant has been injured, and they afford no basis for granting him relief in this proceeding.

The order here appealed from must be affirmed.

L. A. No. 16609: Events subsequent to those above related form the background of this proceeding. It appears that on June 16, 1937, Home Owners' Loan Corporation filed an action to foreclose its mortgage against the real property in question. It named as parties defendant the parties to cause L. A. No. 16470, i. e., Hayes, Pierce, administrator, and Kathryn M. Ferguson. Hayes filed a cross-complaint setting forth a complete chronological statement of the facts and proceedings which culminated in the trial of cause L. A. No. 16470, entry of judgment against him on May 7th, and denial of his motion to vacate that judgment. In addition he alleged the pendency of his above appeal in L. A. No. 16470, and also of his superior court action No. 414,611, and of his claim in the proceeding for probate of the Walter O. Ferguson estate. He asserted that the court was without jurisdiction to hold the trial of May 3, 1937, and again set up his demand for $27.50. He prayed, among other things, for the same relief sought by his appeal in L. A. No. 16470, for setting aside of the judgment of May 7, 1937, for consolidation of action No. 414611 with the cause alleged in the cross-complaint, and for postponement of the Home Owners' Loan Corporation foreclosure until after determination of the appeal in L. A. No. 16470, and of action No. 414,611.

On August 20, 1937, cross-defendant Pierce, administrator, moved to strike the cross-complaint, and the motion was granted. Hayes, the cross-complainant, appealed.

[3] The cross-complaint was properly stricken. It stated no cause of action against Home Owners' Loan Corporation and raised no issue as to the validity or priority of the mortgage. It merely realleged the matters arising out of the dispute between appellant and his vendors Ferguson, already the subject of litigation in cause L. A. No. 16470, superior court action No. 414611, and the Ferguson estate probate proceeding, and it prayed that the Home Owners' Loan Corporation foreclosure be postponed until after determination of these matters. The trial court properly concluded that this showing was not sufficient to justify a postponement.

Admittedly the obligation to Home Owners' Loan Corporation antedated the purported purchase by appellant of the property, and any interest which he might have acquired was subject to the lien. Appellant had the right to protect his interest by curing the defaults and delinquencies which led to the filing of the foreclosure action, but he failed to do so. In fact, he vacated the property and brought action L. A. No. 16470, for rescission of his contract of purchase. Meanwhile Home Owners' Loan Corporation was obliged to expend money for the payment of taxes, assessments, and fire insurance on the property in order to protect its security. Under these circumstances appellant was in no position to urge that he was entitled to a postponement of the foreclosure.

When the foreclosure action was called for trial on October 1, 1937, the court permitted the trial to proceed over appellant's objection and despite his filing of the present appeal from the order striking his cross-complaint. Judgment was rendered in favor of Home Owners' Loan Corporation and against Pierce, administrator, and Kathryn M. Ferguson, in the sum of $4,714.75, and costs, and sale of the property was ordered. The foreclosure sale was held on November 29, 1937, and the property purchased by the Home Owners' Loan Corporation for the full amount of the indebtedness due as of that date. A commissioner's deed was executed to it on December 9, 1938.

[4] Appellant contends that his appeal from the order striking his cross-complaint divested the court of jurisdiction to hear and determine the issues raised by the complaint and answer, and rendered void the judgment of foreclosure and all subsequent proceedings. The contention is without merit. The court had power to determine as a matter of procedure whether it should try the issues raised by the complaint and answer, and leave the issues formed by the cross-complaint to be determined later, or to await the action of a reviewing court to determine whether or not the cross-complaint was well founded, before proceeding with the trial. Klement v. Superior Court, 21 Cal.App.2d 456, 69 P.2d 869. In deciding that the trial should proceed, despite the pendency of appellant's appeal, the court exercised a wise discretion. This is particularly apparent in view of the determination made by this court of the appeal in L. A. No. 16470.

The orders appealed from are affirmed.

PEOPLE v. BUZZELL.

Cr. 4271.

Supreme Court of California.

July 17, 1940.

Rehearing Denied Aug. 15, 1940.

1. Criminal law ⚷572

Evidence sustained conviction for first-degree murder as against defense of alibi.

2. Criminal law ⚷1186(4)

In homicide prosecution, cross-examination of defendant as to possession of and asserted practice shooting with a sawed-off shotgun on day of homicide, after defendant had testified on direct examination as to his movements on day of homicide, did not require reversal as resulting in a "miscarriage of justice", where evidence established that defendant was the murderer, and possession and use of shotgun had been brought out on direct examination of one of defendant's witnesses. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

3. Witnesses ⚷268(10)

In homicide prosecution, cross-examination of defense witness and a companion of defendant, as to possession and use of a shotgun by defendant and his companions on day of homicide, was proper, where subject was opened on direct examination.

4. Witnesses ⚷372(2)

In homicide prosecution, cross-examination of defense witness as to length of time he had known defendant and places where he associated with him was relevant as to interest and credibility of witness and was not rendered improper because an answer required disclosure of witness' prior association with defendant in prison.

5. Witnesses ⚷268(10)

In homicide prosecution, cross-examination of defense witness as to nature of witness' conversation with defendant on day of homicide, after witness had testified generally as to activities on such day, and as to having seen and talked with defendant, was proper, and where it appeared on such cross-examination from voluntary statement of witness that defendant and his companions had asked witness if he had any old guns around, it was not improper for prosecution to pursue subject further in an endeavor to fully develop what there occurred.

6. Criminal law ⚷1186(4)

In homicide prosecution, cross-examination of defense witnesses as to prior felony convictions, the rulings in connection therewith, or argument of district attorney on the subject, did not result in a "miscarriage of justice", requiring reversal of conviction. Code Civ.Proc. § 2051; Const. art. 6, § 4½.

7. Criminal law ⚷829(13)

In homicide prosecution, refusal to instruct that evidence of defendant's prior conviction of a felony went only to his credibility as a witness and was not proof of his guilt of offense on which he was standing trial was not error, in view of other instructions.

In Bank.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Emory Buzzell was convicted of murder and attempted robbery, and he appeals.

Affirmed.

Rehearing denied; HOUSER, J., dissenting.

Martin & Harrah, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

CARTER, Justice.

In an information filed by the district attorney of Los Angeles county defendant was charged, in separate counts, with murder and attempted robbery. A prior conviction of robbery was also alleged. Defendant entered pleas of not guilty to each count but admitted the prior conviction. At the conclusion of the trial the jury found defendant guilty as charged, and inasmuch as the verdict finding him guilty of murder in the first degree was without recommendation the death penalty has been imposed. Defendant appeals from the judgment and order denying his motion for a new trial.

Upon such appeal defendant does not challenge the sufficiency of the evidence to support the verdicts. He concedes, and the evidence virtually dictates such concession, that one Victor Stilgenbauer, a druggist operating a drug-store at the corner of Eleventh and Valencia streets in the city of Los Angeles was shot in the head and fatally wounded at approximately 5:30 o'clock on the evening of March 23, 1939, as he pursued one of two men who had attempted to rob his store. The evidence establishing the foregoing briefly narrated facts is uncontradicted and defendant obviously makes no assault thereon. Neither does he challenge the sufficiency of the evidence identifying him as the perpetrator of the attempted robbery and the resulting homicide. However, he does contend that the identification evidence is not as positive or as definite as might be desired and that, therefore, certain errors allegedly committed by the trial court and urged by him upon this appeal assertedly assume magnitude and require a reversal. Prefatory to a consideration of the five assignments of error advanced by defendant, we shall briefly narrate the evidence tending to connect him with and to establish him as the perpetrator of the homicide.

A female employee of the drug-store positively identified defendant as the man who had entered the store between the hours of ten and twelve o'clock on the day preceding the homicide and had asked permission to use the telephone. After asking for change for the telephone defendant walked in the direction thereof but did not enter the booth provided therefor. While in the store defendant looked from one side to the other and appeared to examine the side door. His actions apparently aroused the employee's suspicions for she requested the now deceased owner to come from his living quarters in the rear into the store, which he did. In due time defendant left the store without any untoward happening.

An employee of a nearby market testified that he had seen defendant on the day prior to the homicide walking back and forth in front of and looking into said market "like a man who was sizing up the store". This witness also testified that shortly after 5:00 p. m. on the day of the homicide defendant came into the market where he worked and purchased cigarettes, whereupon defendant left and walked in the direction of the deceased's drug-store which was two doors removed. Shortly thereafter, as the witness left the market to go to the warehouse he noticed defendant and an unidentified man in front of and peering into the deceased's drug-store. This was shortly prior to the attempted robbery and homicide. One week following the homicide, the witness positively identified defendant in a police "show-up" as the man he had seen on the two days mentioned.

Because of his absence from the jurisdiction and pursuant to stipulation, the testimony of a magazine salesman given at defendant's preliminary hearing was read into the record. This witness had testified that he was in the drug-store at approximately 5:30 p. m. on the day of the homicide and that he was told by a man carrying a gun to get on the floor. The person so commanding was observed at the cash register by the witness. At that moment the offender fired a shot in the direction of the rear of the store. The witness heard a second shot and fired outside the store, undoubtedly the fatal shot for it is uncontradicted that the deceased was mortally wounded as he pursued a man down the street. As to the identity of the person he had observed rifling the cash register and who had fired the shot, the witness testified, "I could not say that I can positively identify, but he [the defendant] is the man whose picture I had in the back of my mind * * it must have been the same man * * * the man that I had a picture of in my mind came to me when I went to the lineup and saw Mr. Buzzell [the defendant] * * * it didn't take me long to pick him out * * * I immediately recognized him * * *."

The testimony of a second witness at the preliminary hearing was read into the record because of his absence from the jurisdiction and his presence in Alaska. The witness had testified that as he passed along the sidewalk in the company of a lady at approximately 5:20 p. m. on the day of the homicide he heard a shot in the deceased's drug-store; that the defendant, an unidentified man and the deceased ran out of the drug-store; that he (the witness) "took out after" them; that the deceased had a bottle in his hand and "this here bandit took and shot him in the right temple"; that in the police show-up he recognized defendant "as soon as I first saw him". This witness also testified that defendant was wearing tennis shoes at the time, and a police officer later testified that at the time of his arrest one week after the homicide defendant had a pair of tennis shoes in his possession.

Two other witnesses called by the prosecution, a newsboy on the street corner and a man who had been sitting in the window of his home at the time, were unable to say whether or not defendant was the person they had seen in or about the deceased's drug-store at the time of the shooting.

A customer in the store at the time testified that while he was "not positive" that defendant was the man who appeared in the drug-store and announced a "stick-up", he "looks similar to the man I saw".

[1] We need not further detail the evidence pointing to and identifying defendant as the perpetrator of a cold-blooded murder committed in the course of or while fleeing from the scene of an attempted robbery. The evidence in this and other particulars was ample. The defense was that of alibi. Defendant's principal witnesses in his attempt to establish his presence elsewhere on the day prior to and on the day of the homicide, when the prosecution witnesses had placed him in or near the deceased's drug-store, were two half-brothers with whom defendant lived and each of whom, like defendant himself, had suffered a prior felony conviction which, under section 2051 of the Code of Civil Procedure, served to impeach him as a witness. The testimony of other defense witnesses tending to place defendant and his roommates in an automobile some forty miles distant from the scene of the homicide is not wholly irreconcilable with the testimony of prosecution witnesses in view of the rapidity with which the modern automobile travels. Evidence of the prosecution tended to establish that the forty-mile gap could comfortably be traversed in an hour, and some of the defense testimony placed defendant and his companions at said removed place an hour or more prior to the commission of the homicide. These and other matters were for the jury to weigh and determine in its consideration of the cause. We cannot say that the conclusion reflected in its verdicts is without support in the evidence. Therefore, we pass to a consideration of defendant's five assignments of error.

[2] Defendant took the witness stand in his own defense in an effort to establish his alibi. During his direct examination he testified at some length as to his movements on the day of the homicide. At no time were any questions asked or statements made relative to the possession by him and his companions on that day of certain sawed-off shotguns. However, on cross-examination he was questioned, over objection, as to the possession of and asserted practice shooting with said sawed-off shotguns during the day of the homicide. Defendant and his companions admittedly had the guns in their automobile on that day and had fired them in target practice. But defendant urges that the trial court committed prejudicial error in permitting the cross-examination in this respect to go beyond the scope of the direct examination. The rule on this subject is so well settled that we need not here restate it or cite authorities in support thereof. In opposition to this contention the people urge that the cross-examination complained of and the evidence adduced thereby were material and pertinent to the activities and movements of defendant on the day of the homicide, a subject upon which he had testified in full on his direct examination. A liberal application of the rules of evidence tends to justify the challenged cross-examination on the theory advanced by the People. In People v. Rosenthal, 139 Cal.App. 42, 46, 33 P.2d 864, 866, it is stated that "Defendant having taken the stand and having testified concerning his movements on the day in question, was clearly subject to cross-examination as to such movements and as to his companions at a time just prior to the commission of the offense." However, whether or not this be so we fail to perceive wherein any prejudice could have resulted to defendant in view of the prosecution evidence pointing to him as the murderer and in view of the fact that the possession and use of the sawed-off shotguns had been brought out earlier in the trial during the *direct* examination of one of *defense* witnesses. Under all of the circumstances, the mere repetition of the matter, whether appropriate or not, could not have resulted in a miscarriage of justice within the meaning of section 4½ of article VI of the Constitution. People v. Hoffman, 199 Cal. 155, 162, 248 P. 504.

[3-5] Nor do we find any error in the rulings of the trial court with respect to the cross-examination of the defense witness Sang relative to the possession and use of said sawed-off shotguns by the trio on the day of the homicide. It was Sang, defendant's roommate and one of his principal alibi witnesses, who on di-

rect examination, as just above intimated, had earlier brought out in response to interrogatories by defense counsel that they had so possessed and used the sawed-off shotguns. The subject concededly having been so opened on direct examination of the witness could be fully explored on his cross-examination. We find no improprieties in such cross-examination nor in the rulings thereon. Nor do we find any error in the rulings on that phase of the cross-examination of said witness having to do with the length of time he had known defendant and the places where he had associated with him. Such cross-examination was relevant to the interest and credibility of the witness and was not rendered improper merely because an answer required disclosure of their prior association in prison. What has been said above with respect to the cross-examination of defendant relative to the possession of sawed-off shotguns is equally applicable to the somewhat similar cross-examination of the defense witness Revalle, a sixteen-year-old high school boy and half-brother of defendant's roommates and principal alibi witnesses. In other words, the error, if any, in the rulings on the cross-examination of this witness could not have been prejudicial. However, we cannot say that error there occurred. The boy had been called by the defense in furtherance of the alibi theory and on direct examination had testified generally as to his activities on the day of the homicide and as to having seen and *talked* with his half-brothers and defendant. It was therefore proper on cross-examination to inquire as to the nature of their talk or conversation. When it appeared on such cross-examination from the voluntary statement of the witness that the trio had asked him "if we had any old guns around", it was not improper for the prosecution to pursue the subject further in an endeavor to fully develop what there occurred.

[6] In his next two assignments defendant contends that the court below erred in assertedly permitting the prosecution, over objection, to go into the details of prior crimes committed by defendant and his two principal alibi witnesses. In short, it is urged that the prosecution was permitted to go beyond the point of showing prior conviction of a felony for impeachment purposes. As indicated earlier in this opinion, defendant and his two principal alibi witnesses were susceptible to impeachment by reason of the showing that they had suffered prior felony convictions. The occasional recurrence to the subject during their cross-examination, while perhaps repetitious and unnecessary, could not have caused any prejudice. Much of such cross-examination was intended to show the interest or bias of the witnesses, and the fact that it tended to disclose their association in prison as well as elsewhere did not, as stated under a prior assignment, render the same improper. We cannot say that the cross-examination, the rulings in connection therewith or the argument of the district attorney on the subject exceeded the bounds of propriety or resulted in a miscarriage of justice.

[7] In his final contention defendant urges that the court below erred in refusing to give a requested instruction to the effect that evidence of defendant's prior conviction of a felony went only to his credibility as a witness and was not proof of his guilt of the offenses on which he was standing trial. The trial court refused said instruction on the ground that the subject thereof was "covered by other instructions". A reading of the entire charge to the jury satisfies us that it was full and fair. In addition to the usual stock instructions covering the presumption of innocence, the degree of proof, the definition of reasonable doubt and the jury's duty to resolve dual interpretations of the evidence in favor of defendant's innocence, the court further charged the jury that "a witness may also be impeached by proof that he has been convicted of a felony" and, at defendant's request, that "A previous conviction of a felony does not necessarily destroy the credibility of any witness. * * * It is simply a circumstance of more or less weight which you are authorized to take into consideration in determining what credit shall be given to him with respect to his testimony". It is obvious that the court below thereby clearly informed the jury that evidence of a prior conviction suffered by any witness, whether he be the defendant or another, was a factor to be considered only in connection with the weight to be accorded to the testimony of said witness. In our opinion, the instruction properly confined the evidence of a prior felony

conviction to the credibility of the witness.

The judgment and order appealed from are, and each is, affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J; EDMONDS, J.

15 Cal.2d 673

ELLINGSON v. WALSH, O'CONNOR & BARNESON et al.

L. A. 17391.

Supreme Court of California.
July 18, 1940.

Rehearing Denied Aug. 15, 1940.

1. Landlord and tenant 🔑181

A tenant of realty is not liable for rent solely by reason of contract of lease.

2. Landlord and tenant 🔑12, 14, 117, 183

One may become a tenant at will or a periodic tenant under an invalid lease, or without any lease, by occupancy with consent, and such tenancies carry with them incidental obligation of rent, and liability therefor arises not from contract, but from relationship of landlord and tenant, the tenant being liable by operation of law.

3. Landlord and tenant 🔑182, 183

Where there is a lease, liability of tenant arising by operation of law to pay rent is not superseded by contractual obligation, and both liabilities exist simultaneously, and lease has a dual character with result that dual obligations arise from privity of contract and privity of estate.

4. Landlord and tenant 🔑208(2)

Where there is an assignment of a tenant's rights without any assumption of tenant's obligations by assignee, assignee is not liable on lease and is not bound by its contractual obligations, but if nonassuming assignee occupies leased premises he is liable for rent by reason of his tenancy and his obligation arising out of privity of estate continues, at least through period of his occupancy.

5. Landlord and tenant 🔑208(2)

Where a new tenant comes in without a written assignment of old tenant's rights, and takes over the possession of the old tenant with consent of lessor, new tenant is liable for rent, and such liability is not merely for reasonable value of use of premises, and entry and occupation by new tenant is under the lease, and, despite lack of contractual assumption of obligations of lease, new tenant is bound by covenant to pay rent in the lease which runs with land.

6. Partnership 🔑265

When defendant became a member of a partnership, the previous partnership was, in legal theory, dissolved and a new partnership came into being composed of old members and defendant.

7. Partnership 🔑237, 238

Where partnership to which property was leased was dissolved when defendant became a member thereof, and new partnership continued to occupy leased premises, such partnership and its members became liable for payment of rent, regardless of any lack of assumption of obligations of lease and it was immaterial whether new partnership was liable contractually on lease.

8. Partnership 🔑238

The section of the Uniform Partnership Act providing that a partner admitted into an existing partnership is liable for partnership obligations arising before his admission, but that such liability shall be satisfied only out of partnership property, does not determine nature of any particular obligation nor time when it may be deemed to arise, and does not attempt to interfere with general rules of contract or property. Civ.Code, § 2411.

9. Landlord and tenant 🔑183

A tenant's obligation, arising from occupation of premises, to pay rent is a "continuing obligation" and binds him continually throughout period of occupation.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Obligation".

10. Partnership 🔑238

Where defendant's obligation as a tenant to pay rent for property occupied by partnership arose after defendant's admission into partnership, immunity given by provision of Uniform Partnership Act that a partner admitted into an existing partnership is liable for partnership obligations arising before his admission, but that such liability shall be satisfied only out of partnership property, was not applicable to defendant, and hence defendant's personal assets could be reached to satisfy liability for rent. Civ.Code, § 2411.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to recover rent due under a written lease by G. E. Ellingson, as receiver of the First National Bank of Beverly Hills, a national banking association, against Walsh, O'Connor & Barneson, a copartnership, and others. From a judgment for plaintiff against all defendants, defendant Lionel T. Barneson appeals.

Affirmed.

Rehearing denied; HOUSER, J., dissenting.

Prior opinion, 95 P.2d 185.

Ackerman, Wayland & Mathews, of San Francisco, for appellant.

Rollin L. McNitt, of Los Angeles (Edythe Jacobs, of Los Angeles, of counsel), for respondent.

GIBSON, Chief Justice.

This is an action against a partnership and its members for rent due under a written lease. The case was submitted upon an agreed statement of facts. Judgment was rendered against the partnership and all general partners, and from this judgment Lionel T. Barneson, one of the general partners, appeals. Appellant admits his liability for rent, but contends that the obligation therefor arose before his admission to the partnership, and that under section 2411 of the Civil Code this liability must be satisfied only out of partnership property.

On October 4, 1929, the First National Corporation, as lessor, let the premises in question to Walsh, O'Connor & Company, a special partnership, as lessee, for a period of ten years, at a total rental of $66,000, payable in monthly instalments of various amounts. In September, 1930, the original lessor assigned the lease to the First National Bank of Beverly Hills, of which plaintiff is receiver. In December, 1930, the limited partnership of Walsh, O'Connor & Barneson was formed, and all of the rights of the original lessee were assigned to the new partnership, which thereafter occupied the premises and paid rent to the bank as lessor.

On April 21, 1931, H. J. Barneson withdrew as a general partner. On April 28, 1931, appellant Lionel T. Barneson was taken in as a general partner, and ever since has enjoyed all of the rights and privileges and assumed the obligations as a general partner of said partnership. In February, 1932, the partnership, pursuant to written consent obtained from the lessor, sublet the premises to a third party who was in possession all of the time for which rental is sought to be recovered. The sublessee paid rent to the partnership. During the period between April, 1931, and March, 1932, the partnership paid the full rent due under the lease to the lessor. The judgment herein is for rent claimed to be due for the period commencing March 1, 1932, and ending January 25, 1933, in the sum of $2374.13, after deducting certain credits and payments. The judgment was a general one against all defendants, with no proviso restricting its enforcement or satisfaction against appellant.

The issue in this case is not the liability of the partnership as such, nor the liability of its assets. There is no doubt whatever that the plaintiff may satisfy his claim against the partnership out of any of its properties. The sole question is whether the appellant's liability as an incoming partner may be satisfied by resort to his personal assets.

Section 2411 of the Civil Code (sec. 17 of the Uniform Partnership Act) provides: "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property." It is this section upon which appellant relies, and the interpretation urged by appellant is the sole basis of his case. Appellant contends that since the lease was executed before he became a partner, the obligation of the lease arose before his admission, and therefore his liability can only be satisfied out of partnership property.

[1-3] This contention would be sound if the only obligation of the partnership in this transaction was one which arose prior to appellant's admission to the firm. For example, if a promissory note had been executed by the partnership for a consideration then passing to it, the obligation would have arisen at the time of execution of the note and the case would plainly be within the statute. But appel-

lant's contention overlooks the fact that a tenant of real property is not liable for rent solely by reason of the contract of lease. Tenancies in property need not necessarily be created by valid leases. One may become a tenant at will or a periodic tenant under an invalid lease, or without any lease at all, by occupancy with consent. Such tenancies carry with them the incidental obligation of rent, and the liability therefore arises not from contract but from the relationship of landlord and tenant. The tenant is liable by operation of law. Where there is a lease the liability of the tenant arising by operation of law is not superseded by the contractual obligation. Both liabilities exist simultaneously. The lease has a dual character; it is a conveyance of an estate for years, and a contract between lessor and lessee. The result is that dual obligations arise,—contractual obligations from the terms of the lease, and obligations under the law from the creation of the tenancy. As it is sometimes expressed, there are dual obligations arising from "privity of contract" and "privity of estate". See Samuels v. Ottinger, 169 Cal. 209, 211, 146 P. 638, 639, Ann.Cas. 1916E, 830.

[4, 5] This dual character of the obligations of a tenant may be illustrated by an assignment of the tenant's right without any assumption of the obligations by the assignee. The assignee who does not assume is not liable on the lease, that is to say, is not bound by its contractual obligations. But the non-assuming assignee who occupies the premises is liable by reason of his tenancy, and his obligation, arising out of privity of estate, continues at least through the period of his occupancy. Likewise, where the new tenant comes in without even a written assignment, but takes over the possession of the old lessee with the consent of the lessor, he is liable for rent. The liability in such case, as in this case, is not merely for the reasonable value of the use, as would be the case where the tenancy was one at will. The entry and occupation here is under the lease, and despite the lack of contractual assumption of the obligations of the lease, the successor to the original lessee is bound by the covenant to pay rent in the lease, which runs with the land. See Bonetti v. Treat, 91 Cal. 223, 229, 27 P. 612, 14 L.R.A. 151; First National Bank v. Aldridge, 33 Cal.App.2d 485, 490, 92 P.2d 674; Baker v. J. Maier & Zobelein Brewery, 140 Cal. 530, 534, 74 P. 22; Treff v. Gulko, 214 Cal. 591, 7 P.2d 697; see 4 So.Cal.L.Rev. 350.

[6, 7] Under the above principles, the first partnership, which did not include appellant as a member, was bound by these dual obligations; that is, having expressly assumed the obligations of the lease, it was bound in contract and also by reason of its tenancy. When appellant became a member, the first partnership was, in legal theory, dissolved and a new partnership came into being composed of the old members and appellant. This second partnership did not expressly assume the obligations of the lease, but it occupied the premises. Whether it was liable contractually on the lease is immaterial; it became liable for rent as a tenant. Strangers coming in with consent and occupying the premises would be liable; tenants would be liable even if there were no lease at all; and this second partnership and all its members were liable regardless of any lack of assumption of the obligations of the lease. If this were not true, then the second partnership could have been ousted despite its asserted right to occupy the premises under the existing lease. No one has suggested that the admission of appellant as a partner would have permitted the lessor to terminate the lease. But if the new partnership could not be ousted, it was a tenant and was liable for rent. And with respect to the liability of a tenant during this period, appellant's position is identical with that of any other member of the new partnership formed when he entered the old association.

[8-10] The only remaining question is whether the section of the Uniform Partnership Act, quoted above, has changed the rule. Appellant's theory is that he, as a member of the second partnership, may receive the benefits of years of occupancy under the lease, but that his personal assets cannot be reached in satisfaction of liability therefor if the lease was executed before he became a member of the partnership. The statute, however, neither contemplates nor accomplishes any such result. The provision refers simply to "obligations of the partnership arising before his admission." The statute does not determine the nature of any particular obligation, nor the time when it may be deemed to arise. It does not attempt, in other words, to interfere with the gen-

eral rules of contract or property. Under the general law the obligation of a tenant arising from occupation of the premises is a continuing one; that is, it arises and binds him continually throughout the period of his occupation. This obligation on the part of appellant first arose when the new partnership, of which he was a member, occupied the premises as a tenant. It follows that his obligation as a tenant arose after his admission to the partnership and the immunity given by section 2411 does not apply.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; CARTER, J.; EDMONDS, J.

15 Cal.2d 640

PEOPLE v. SMITH.

Cr. 4293.

Supreme Court of California.

July 16, 1940.

1. Homicide ⚷253(3)

Evidence pertaining to question of premeditation warranted conviction of defendant, accused of shooting wife, for first degree murder.

2. Homicide ⚷232

In homicide cases, express evidence of deliberate purpose to take the life of another is not necessary, but it is sufficient if facts and circumstances surrounding commission of offense reasonably warrant inference of such deliberate purpose.

3. Criminal law ⚷554

In homicide prosecution, jury was not required to accept such portions of evidence as might have tended to show lack of premeditation when weighed against other evidence adduced to the contrary, but was justified in accepting such portions of defendant's testimony as appealed to jury, and in rejecting those portions the jury did not believe.

4. Homicide ⚷14(2)

In homicide prosecution, appreciable space of time between intention to kill and act of killing need not exist, but intention and act may be as instantaneous as successive thoughts of the mind.

5. Criminal law ⚷748, 1159(5)

The question of degree of crime is one exclusively for determination of jury, and jury's conclusion in that respect will not be disturbed if supported by any substantial evidence.

6. Criminal law ⚷564(1)

In homicide prosecution, uncontradicted evidence of two witnesses that crime was committed in Stanislaus county was sufficient to prove venue.

7. Homicide ⚷236(1)

In homicide prosecution, evidence *held* to show that cause of death of deceased was gunshot wound.

8. Criminal law ⚷413(1)

In homicide prosecution against husband accused of killing wife, husband's letters to wife, written several days prior to killing, were remote and had no bearing on husband's state of mind at time of killing, and exclusion of letters on ground that they were self-serving, and hence inadmissible, was proper.

9. Criminal law ⚷438

In homicide prosecution against husband accused of killing wife, admission of four photographs showing wife's body as it appeared from different angles shortly after killing was within trial court's discretion and was not error, where condition of body shortly after killing had been described by several witnesses.

10. Homicide ⚷311, 340(1)

Instruction that jury's discretion to fix penalty of defendant, found guilty of first degree murder, at life imprisonment or death was not arbitrary and should be employed only if satisfied that lighter penalty should be imposed, and that jury should return first degree murder verdict without recommendation as to penalty if evidence did not show extenuating circumstances, was not error, and alleged conflict with other instructions that jury was free to act according to their own judgment in fixing penalty was not prejudicial to defendant.

◆

In Bank.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Thomas B. Smith was convicted for first degree murder. The verdict returned by the jury was without recommendation, and the court pronounced judgment of death, and an automatic appeal followed.

Affirmed.

Vernon F. Gant and Francis Halley, both of Modesto, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and Leslie A. Cleary, Dist. Atty., and William Zeff, Deputy Dist. Atty., both of Modesto, for respondent.

PER CURIAM.

After trial was had on an indictment which was returned by the grand jury of Stanislaus county, defendant was convicted of the crime of murder of the first degree. He had entered a double plea of not guilty and not guilty by reason of insanity, but later withdrew the latter plea. As the verdict which was returned by the jury was without recommendation, the court pronounced judgment of death against defendant. An automatic appeal from such judgment is now before this court.

The victim of defendant's crime was his wife, Grace Smith, who was thirty-two years of age. The crime was charged as having been committed on July 31, 1939. The parties had been married about ten years prior thereto. As a result of the marriage they had three small children, two girls and a boy, aged seven, five and three years, respectively. For some time prior to July 31, 1939, the parties had been having marital difficulties and, on or about July 10, a divorce action had been brought by the wife. As an outgrowth of that action a restraining order had been issued by the court, directed to defendant, by the terms of which he was precluded from disposing of certain property in his possession and prohibited from entering the premises occupied by his wife and children. At the time of the commission of the homicide, the deceased Grace Smith was living with the three children on a small ranch owned by her and located near the town of Hughson, California. Defendant was living at Crows Landing, California. He was fifty-nine years of age, and for several years prior to July, 1939, he had been employed as a section foreman by the Southern Pacific Railroad Company. It appears that on or about July 26 of that year defendant was discharged from the Southern Pacific Hospital in San Francisco where he had submitted himself for observation and medical treatment. For the next few days and until July 30, defendant moved about considerably from one place to another in the vicinity of Stockton and Modesto. On the day following his discharge from the hospital, at Stockton he procured some $500 belonging to him and which he had theretofore left for safekeeping with an acquaintance in that city; on the same day, he arranged for a leave of absence from his employment; and, on July 28, after one unsuccessful attempt in that regard he succeeded in borrowing a pistol-grip .410 gauge shotgun, stating at the time that he was going to the mountains for a few days "on a hunting trip". On July 29, he went to Modesto and talked to the attorney whom he had engaged to represent him in the divorce proceedings. The following day in the early morning he left a handbag, in which he was carrying the gun, together with some personal effects, in the Square Deal saloon in Modesto, and went to the home of Mr. and Mrs. Crank, who were friends of defendant and his wife, and whose home was located on the outskirts of that city. The testimony showed that he spent several hours of that day at the Crank home and, according to the testimony of Mr. Crank, defendant talked a great deal about his domestic difficulties and complained about the restraining order that had been issued against him in connection with the divorce proceedings. Later in the day, on defendant's insistence that he do so, Mr. Crank, accompanied by his wife, went to the ranch home of Grace Smith to ask her if she would release the restraining order. During the period of time they were absent on that mission, defendant went to the Square Deal saloon in Modesto and procured his handbag containing the gun, purchased a pint of whiskey and spent some time talking to different persons. He also made several visits to the Square Deal bar, at which times he had a "few drinks of beer", and on one such occasion he endeavored to learn from the bartender where he could exchange some .12 gauge shotgun shells—which defendant was then carrying in his pocket—for .410 gauge shells. Then, taking his handbag and the bottle of whiskey, he went back to the home of Mr. and Mrs. Crank who, on their return from the Smith ranch informed him that his wife had refused to consider the lifting of the restraining order, but that she had said she would meet defendant at her attorney's office in Modesto on the following day, July 31, when, in accordance with arrangements theretofore known to defendant, a hearing with regard to the restraining order was scheduled to take place. Defendant spent the evening at the Crank home, and during the course of the evening each of the two men had a drink of whiskey from the pint bottle which defendant had purchased in the afternoon. About 11:30 that night defendant—having been invited to spend the night—went into the back yard of the Crank premises to a bed which was located under a tree, and which Mrs. Crank had prepared for his use. The evidence indicated that he did not occupy the bed, but that at approximately midnight he removed the gun from the handbag and, concealing it on his person, walked to the business district of the city of Modesto—consuming the remainder of the pint of whiskey on the way—and went to the Square Deal saloon, where he had a drink of beer and purchased two tins of aspirin, He testified that he then took four aspirin tablets, purchased another pint of whiskey and started to walk back toward the Crank residence; that he had walked but a short distance when he was given a ride in an automobile which was proceeding in the direction in which he was walking; that he did not alight at the place where he should have alighted to go to the Crank home but remained in the automobile until he reached a point near the town of Empire (which lies east of Modesto and in the general vicinity of the Smith ranch), where he left the automobile and proceeded to walk southward in the direction of the ranch home of Mrs. Smith; and that by shaping his route partially through fields and an orchard, he approached the ranch premises from the rear. On his arrival at a shed near the house, in accordance with his testimony, he took several more aspirin tablets and drank all but a small portion of the remaining whiskey (having drunk from the bottle and taken previous doses of aspirin on his way to the Smith home). And although defendant testified that he thereupon went to sleep, that when he awoke it was daylight and he then entered the house through the rear door,—from evidence of his footprints, together with a quantity of wood shavings found on the ground under the fig tree which was located at the rear of the premises, it appeared that defendant spent at least a portion of that interval of time occupied in "whittling", and that while under the tree he was practically concealed by its lowhanging branches.

At approximately 8 o'clock that morning, the two younger Smith children ran from the house and, according to the testimony of Mrs. Willis who lived across the road from the Smith ranch, the five-year-old girl exclaimed that her father had shot her mother. A few minutes thereafter, on entering the Smith home Mrs. Willis found the deceased lying on the floor near an ironing board, apparently unconscious and bleeding. It was discovered a short while later that she had a gunshot wound in her back near the left side. She died about 8:30 o'clock a. m. The pistol-grip gun which defendant had carried on his person to the Smith home lay on the floor near the body. One empty cartridge shell was found lying on the floor, another empty shell in the gun, and a pint bottle containing a small amount of whiskey of the brand purchased by defendant also lay nearby.

The evidence showed that defendant had remained in the Smith house but a few moments, that on his way out of the house he deposited in the mail-box a document in his own handwriting which was in the nature of a will, and that he then walked along the road about a quarter of a mile southward to the home of Mr. and Mrs. Brazil. He had a brief conversation in the yard of the Brazil home with Mr. Brazil (who had died prior to the trial) following which the latter immediately hurried away in his automobile. Soon thereafter Mrs. Brazil found defendant lying on the ground outside the house groaning and repeating his wife's name. He then arose and in reply to her inquiry as to what had happened he told Mrs. Brazil that he had just killed his wife and that he had tried to kill himself but that something "went wrong". (Subsequent events proved that at that time defendant had a gunshot wound in his abdomen.) Mrs. Brazil then walked to the Smith ranch accompanied by the seven-year-old daughter of the Smiths who had arrived at the Brazil home a few moments before defendant's arrival—the child having called, as was her custom, to obtain the morning supply of milk and to return a watchdog which belonged to the Brazils but which was loaned to Mrs. Smith at night and returned to the Brazil home each morning. After Mrs. Brazil's departure defendant proceeded to walk down the road in a direction opposite to the Smith home and toward the town of Hughson. He was apprehended along the way by a deputy sheriff who, on learning that defendant had been wounded, immediately proceeded to take him by automobile to a hospital in Modesto. The deputy sheriff testified that on the way to the hospital defendant stated to him in effect that he had been having family troubles and was "trying to end it all". Shortly after his arrival at the hospital defendant made a full and voluntary statement, in the presence of a deputy district attorney, a deputy sheriff and a shorthand reporter, in which he stated that he had just shot his wife and himself, and with considerable show of feeling complained of the fact that his wife had filed an action for divorce against him, and of her refusal to remove the restraining order.

At the trial, in addition to other evidence adduced by the prosecution, from which to a large extent the foregoing recital of facts is taken, the deposition of Mrs. Crank was introduced, in which she testified that about a week prior to the commission of the homicide, in discussing his marital difficulties defendant stated in her presence that he "ought to have killed her [his wife] long ago". However, the husband of Mrs. Crank, who assertedly was present on that occasion, testified that he did not remember hearing defendant make such a statement.

It was the theory of the prosecution that, in view of all the circumstances hereinbefore set forth, the jury was entitled to conclude that prior to the date of the commission of the homicide defendant had conceived the plan to kill his wife and to that end he had procured the gun on July 28; that some time in the afternoon or evening of the day preceding the commission of the offense he had procured shells to fit the gun; that thereafter by a circuitous route, and in the night-time, he had made his way to the home of his wife, where he lingered in the back yard until morning, and that after the watchdog had been taken away he entered the house, with the gun in his possession, and shot his wife in the back as she stood at the ironing board.

As opposed to that theory and in support of the contention of the defense that premeditation was not shown, defendant's testimony was as follows: That on the night preceding the commission of the homicide, he retired to the bed prepared for him in the back yard of the Crank home; that he found he could not sleep and decided to go to the business district of Modesto to procure some aspirin tablets; that he did not intend to go to the Smith ranch; that he took the gun with him because he had on his person a large sum of money; that on his return following his purchase of the aspirin and whiskey and after he had accepted the ride in the automobile he became engaged in a conversation with the driver of the car, and that instead of alighting at the point on the highway nearest the Crank home he "kept going" through inadvertence; that he alighted from the automobile near the town of Empire with the intention of going into the country near the town of "Le Grande" (La Grange) for the purpose of locating an area suitable for hunting and trapping which he contemplated doing later in the fall, but that, finding himself in the neighborhood of the Smith ranch, "on a sudden impulse" he decided to go there and sleep in the barn until morning, and then see his wife and children, obtain some equipment in connection with a fraternal order of which he was a member, and from there proceed on his journey "up in the hills". Defendant further testified that on the morning of July 31, when he entered the ranch home of his wife, she was standing at an ironing board pressing some wearing apparel; that he exchanged friendly greetings with her and the two small children who were in the room with her; that as he stood beside her at the ironing board they had some conversation and he asked her to have the restraining order removed; that she replied that she did not think she should do so; that she then "mumbled something", and that he remembered nothing more until he awakened a few days later in the hospital. Defendant testified that he had suffered lapses of memory on former occasions, and he gave testimony to the effect that after he had left the hospital in San Francisco on July 26, on two different occasions during the ensuing three days he had found himself in a town or a place without any recollection of having arrived there. His adult daughter by a former marriage also testified that about a year previous to the time of the trial and while she was residing in defendant's home he returned from his work one evening and "flew into a sort of fit", beat her and threw her on the floor, and that the next morning he appeared to remember nothing of those circumstances. However, on cross-examination the daughter testified that defendant had struck her on other occasions.

[1-5] Appellant contends that the verdict is not supported by the evidence; that the only evidence which tended to show premeditation was purely circumstantial, and that such evidence was as consistent with a theory of second degree murder as with that of murder of the first degree. In that regard appellant contends that, even if proof of the commission of a homicide was established, a portion of the testimony given by him tended to show that the crime amounted to no more than second degree murder. Under the state of the record, it may not be conceded that the only evidence pertaining to the question of premeditation was purely circumstantial, but even if such had been the case it would not necessarily follow that the verdict was in that respect without evidentiary support, since in homicide cases it is not necessary that there be express evidence of a deliberate purpose to take the life of another. It is sufficient if the facts and circumstances surrounding the commission of the offense reasonably warrant an inference to that effect. People v. Dale, 7 Cal.2d 156, 159, 59 P.2d 1014; People v. Campos, 10 Cal.App.2d 310, 315, 52 P.2d 251; People v. Mahatch, 148 Cal. 200, 202, 82 P. 779; People v. Smith, 25 Cal.App.2d 241, 244, 77 P.2d 277. The evidence referred to by appellant as tending to show that the crime amounted to no more than second degree murder was a portion of the statement made by him at the county hospital, as hereinbefore referred to, which particular portion was to the effect that he had not theretofore planned to shoot his wife when he entered the Smith home on the morning of July 31, but that while talking to her at that time he became so provoked by her attitude that, acting suddenly and on the spur of the moment, he shot her. Appellant argues that premeditation would not be shown where a crime was committed under those circumstances, and that in such case the crime would amount to no more than second degree murder. But the jury was not required to accept such portions of the evidence as might have tended to show lack of premeditation, when weighed against other evidence adduced to the contrary. The jury was justified in accepting such portions of defendant's testimony as appealed to it, and in rejecting those portions it did not believe. People v. Shaver, 7 Cal.2d 586, 595, 61 P.2d 1170. In addition, it is settled that there need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. People v. Donnelly, 190 Cal. 57, 210 P. 523; People v. Aranda, 12 Cal.2d 307, 83 P.2d 928. Moreover, the question of the degree of the crime is one exclusively for the determination of the jury and its conclusion in that respect will not be disturbed when there is any substantial evidence to support it. People v. Rico, 180 Cal. 385, 181 P. 663; People v. Mahatch, 148 Cal. 200, 82 P. 779; People v. McNeer, 14 Cal.App.2d 22, 57 P.2d 1018; People v. Wells, 10 Cal.2d 610, 76 P.2d 493.

[6] Appellant's contention that the venue was not proven is without merit. Proof that the crime was committed in Stanislaus county was established by the uncontradicted evidence of at least two witnesses.

[7] Likewise untenable is the contention that there was no proof of the cause of death of the deceased. No evidence was even sought to be introduced to show that her death resulted from any cause other than the gunshot wound. Under all the circumstances hereinbefore detailed it cannot seriously be contended that the deceased met her death from causes other than the firing of the bullet into her body.

[8] Appellant also contends that the court erred in excluding from evidence four letters written by him to the deceased at different periods between July 19 and July 23, 1939. The letters were found among the effects of the deceased after her death. They were offered in evidence for the purpose of showing the state of mind of defendant with regard to his wife and family, and that he entertained a feeling of affection and concern toward his children and the deceased. The letters were written several days prior to the homicide and their exclusion on the ground that they were self-serving, and hence inadmissible, was not improper. See People v. Chin Hane, 108 Cal. 597, 604, 41 P. 697; People v. Pahner, 10 Cal.App.2d 294, 301, 51 P.2d 1143; People v. Allen, 166 Cal. 723, 730, 137 P. 1148; People v. Prather, 120 Cal. 660, 664, 53 P. 259; People v. Huntington, 8 Cal.App. 612, 621, 622, 97 P. 760; Wharton's Crim.Evid., 11th Ed., vol. 1, p. 791; Hatfield v. Commonwealth, 236 Ky. 754, 34 S.W.2d 241, 243. Moreover, in view of the respective dates of the said letters they were remote and had no bear-

ing on the state of defendant's mind at the time of the homicide.

[9] Next it is urged by appellant that the court erred in permitting an excessive number of photographs of the body of the deceased to be received in evidence. They were four in number and they showed the body of the deceased as it appeared shortly after the homicide, when photographed from different angles. The condition of the body shortly after the homicide had been described by several witnesses, and the photographs merely portrayed facts which the jury was entitled to have placed before it. They possessed evidentiary value and tended to clarify the evidence theretofore presented by several witnesses concerning the position of the body in its relation to the gun and the other pertinent objects found on the floor after the homicide. The admission in evidence of the photographs was within the trial court's discretion, and clearly was not erroneous. People v. Shaver, 7 Cal.2d 586, 592, 61 P.2d 1170. See, also, People v. Gomez, 209 Cal. 296, 300, 286 P. 998; People v. Burkhart, 211 Cal. 726, 732, 297 P. 11; People **v.** Sisson, **1** Cal.2d 510, 511, 36 P.2d 116; People v. Goodwin, 9 Cal.2d 711, 714, 72 P.2d 551; People v. Rogers, 163 Cal. 476, 480, 126 P. 143. And in the light of the foregoing authorities the small number of photographs which were shown to the jury could not have prejudiced appellant's rights.

[10] Appellant further contends that conflicting instructions were given to the jury with respect to the exercise of its discretion in fixing the penalty. His contention is that although two of such instructions were correct in that they told the jurors that with regard to that question they were "entirely free to act according to your [their] own judgment", another instruction which the court gave in that respect was contrary to that language. The instruction last referred to is as follows: "The Penal Code invests the jury in a criminal case for murder with the discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows beyond all reasonable doubt the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder of first degree, and leave with the law the responsibility of affixing the punishment."

Appellant contends that by that instruction the jurors were told, erroneously, that their discretion is not an "arbitrary one" and that it is to be employed only when they are satisfied that the lighter penalty should be imposed. But in the case of People v. Gosden, 6 Cal.2d 14, 30, 56 P.2d 211, 219, it was said, "The exclusive right of the jury in a criminal case to fix the punishment of a defendant found guilty of murder in the first degree either at life imprisonment or by death, is not an arbitrary right to be exercised by it without reference to or independent of the evidence in the case." See, also, People v. Rogers, 163 Cal. 476, 483, 126 P. 143; People v. Reid, 193 Cal. 491, 496, 225 P. 859; People v. Wolfgang, 192 Cal. 754, 762, 221 P. 907. Appellant objects in particular to the language used in the latter part of the instruction here complained of, that is, "If the evidence shows beyond all reasonable doubt the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder of first degree, and leave with the law the responsibility of affixing the punishment." However, in the Gosden case it was pointed out that in both the Rogers and Wolfgang cases, last above cited, an instruction which contained substantially the same language as that used in the latter part of the instruction here objected to was held not to have been erroneous. Likewise, the holding in the case entitled People **v.** Goodwin, 9 Cal.2d 711, 715, 72 P.2d 551, 553, is to the same effect. In that case, with regard to a contention on the part of the appellant that the district attorney had erred in his closing address to the jury by stating that "the penalty for murder of the first degree is capital punishment, unless there are circumstances of mitigation * * *", the court said: "In a number of cases it has been held not to be erroneous for the trial court to instruct the jury, in substance, that the lighter sentence should be recommended only in the event mitigating circumstances were found to exist." It thus appears that in the instant case the particular instruction objected to was not erroneous and that appellant suffered no detriment by the giving of the assertedly conflicting instructions—particularly where the language of two of them was more liberal in scope than that of the more specific instruction last discussed.

On a review of the entire record, it is the conclusion of this court that the verdict and judgment are supported by the evidence, that appellant was accorded a fair trial, and that no prejudicial error was committed.

The judgment is affirmed.

40 Cal.App.2d 132

In re FLINT'S ESTATE.

MacKAY et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 6469.

District Court of Appeal, Third District, California.

July 16, 1940.

Hearing Denied Sept. 12, 1940.

1. Wills 🔑806

Where testator anticipates that his estate might be insufficient to pay all legacies in full and provides for abatement in certain order, testator's expressed intention governs.

2. Wills 🔑806

Under will providing that, if requirements for creating trusts for wife and sister-in-law made it impossible to fully satisfy other bequests, they should be ratably decreased to extent found necessary, testator, in effect, designated bequests for the maintenance of his wife and sister-in-law as preferred legacies which he desired to be first paid after debts and expenses of administration had been met, and all other legacies were placed in one group regardless of kinship or nonkinship, and, assets of the estate being insufficient to pay all other bequests in full, such bequests were properly ratably decreased. Civ.Code, § 1357, subd. 5; §§ 1361, 1362; Probate Code, § 161, subd. 5.

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge.

Proceeding in the matter of the estate of Motley H. Flint, deceased, wherein the Security-First National Bank of Los Angeles filed a petition for distribution, contested by Katharine F. MacKay and others. From a decree of distribution, Katharine F. MacKay appeals.

Affirmed.

Mitchell, Johnson & Ludwick, of Los Angeles, for appellant.

Frank R. Sachse, of Los Angeles, for respondent.

William L. Kuehn, of Los Angeles, for legatees William B. Stringfellow and Agnes Stringfellow.

Albert E. Marks, of Los Angeles, for contestants and legatees Alice Schwerin and Adbul Maljan.

Elmer J. Walther, of Los Angeles, for legatee Al Malaikah Temple, A. A. O. N. M. S.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

Katharine F. MacKay has appealed from a portion of the final decree of distribution which was rendered in the estate of Motley H. Flint, deceased. The court found that upon the termination of the trusts which were created in favor of Katharine B. Flint, the sister-in-law, and Gertrude Cottrell Flint, the widow of the deceased, the residue thereof should be applied to the payment of general legacies bequeathed to the appellant, Katharine F. MacKay, a niece of the testator, and to several non-kindred legatees, and that if the assets of the estate were insufficient with which to pay all of said general legacies in full, then said funds should be applied pro rata to the payment of the legatees "in the proportion that each of such legacies bears to the total of such legacies". The appellant contends that under section 1361 of the Civil Code, as it existed at the time of the death of the testator, the court should have first directed the payment in full of her legacy, before non-kindred legatees were permitted to participate therein.

Motley H. Flint died testate in Los Angeles July 14, 1930, leaving surviving him a widow, a sister-in-law and one niece. Upon application therefor, the will and three codicils thereto were admitted to probate, and the Security-First National Bank of Los Angeles was appointed and qualified as executor.

The estate was appraised at the sum of $470,365.90. There was expended for payment of debts, taxes and costs of administration the sum of $409,099.60, leaving a balance on hand of only $61,266.60, including cash in the sum of $19,584.53. The will created a trust fund for the benefit of Katharine B. Flint, the sister-in-law of the testator, from the net income of which she was to be paid $200 each month during her lifetime. A trust fund of $50,000 was also set apart for the maintenance of Gertrude Cottrell Flint, the widow of the deceased, during her lifetime. In addition to the previously-mentioned bequests, the will provided for ten general legacies aggregating the sum of $252,500. All of these general legacies were for the benefit of non-kindred of the testator except the first two, both of which were in favor of the appellant, Katharine Flint MacKay, daughter of a deceased brother of the testator. She was given $25,000 absolutely, and a trust fund was directed to be created in her favor for the additional sum of $50,000. None of the general legacies were paid. The assets of the estate were insufficient with which to pay any of them. With respect to the payment of these general legacies, the thirteenth clause of the third codicil to the will provides: "In the event that the requirements for filling the trusts for my mother, my wife and my sister-in-law shall make it impossible to fully pay and satisfy the other bequests contained in said last will and the codicils thereto, *it is my wish that they shall then be ratably decreased to the extent found necessary.*"

The mother of Motley H. Flint died before his demise. The other legatees survived him, and they are now living.

At the time of the death of Motley H. Flint in 1930, section 1361 of the Civil Code provided, under the heading "Legacies how charged with debts": "Legacies to husband, *widow, or kindred of any class* are chargeable only after legacies to persons not related to the testator."

Section 1362 of the Civil Code then provided: "Abatement takes place in any class only as between legacies of that class, *unless a different intention is expressed in the will.*"

In accordance with the intention of the testator expressed in the previously-quoted thirteenth clause of the third codicil, the court provided in the final decree of distribution with respect to the abatement of the general legacies at the deaths of Katharine B. Flint and Gertrude Cottrell Flint and the termination of their trusts, in the event of a lack of funds with which to pay the legacies in full, that: "(c) Upon the death of Katharine B. Flint, the corpus and any undistributed income of said trust, or in the event Katharine B. Flint does not survive Gertrude Cottrell Flint, then upon the death of Gertrude Cottrell Flint, the corpus and any undistributed income of said trust for the benefit of said Gertrude Cottrell Flint and any other assets of said estate not hereinafter specifically described, to the extent the same may be necessary to fully pay said legacies, are hereby distributed to the following general legatees *in the proportion that each of such legacies bears to the total of such legacies.*"

From the preceding quoted portion of the decree of distribution Katharine F. MacKay, who is the only next of kin to whom general legacies were given, has appealed. She contends that the court erred in decreeing that the residue of the estate upon termination of the trusts created for the benefit of Katharine B. Flint and Gertrude Cottrell Flint shall be distributed to the general legatees "in the proportion that each of such legacies bears to the total of such legacies". The appellant asserts that since she is the only *kindred* of the testator among the general legatees that all of the remaining debts and obligations of the estate must be first paid from the general legacies to those who are strangers and not kindred of the deceased.

Construing the application of section 1361 of the Civil Code, as it existed at the time of the death of the testator, the appellant asserts that: "Upon the death of Gertrude Cottrell Flint and Katharine B. Flint, the corpus and any accrued income of these trusts and any other assets of the estate not specifically described in the order should first be devoted to the payment in full of the $50,000.00 general legacy to Katharine F. MacKay in trust, and the $25,000.00 to Katharine F. MacKay absolutely before resort may be had to said assets for the payment of any of the other general legacies."

The decree of distribution properly held in accordance with the intention of the testator expressed in his will that if the assets of the estate are insufficient to fulfill the trusts established in favor of his wife and his sister-in-law, the general legacies shall then be decreased ratably. Clearly the legacies bequeathed to the appellant, Katharine F. MacKay, and the non-kindred of the testator are classified as general legacies. Sec. 1357, subd. 5, Civ.Code, now sec. 161, subd. 5, Probate

Code. The last-mentioned legatees, therefore, all belong to the same class. Section 1362 of the Civil Code, as it existed at the time of the death of the testator, provided that "Abatement takes place in any class only as between legacies of that class, *unless a different intention is expressed in the will.*" In the present case the testator clearly expressed his intention by saying all *"other bequests* * * * shall then be ratably decreased", that all general legacies to his kindred and non-kindred legatees should be reduced pro rata in the event that the assets of the estate proved to be insufficient to pay in full the bequests in trust to his widow and his sister-in-law together with all other general legacies. That express request of the testator is therefore controlling. 28 R.C.L. p. 302, sec. 282; 101 A.L.R. 704, note. In 28 Ruling Case Law, at page 303, it is said in that regard: "The testator has control over the order of abatement by showing his wishes clearly in his will, either by express words, or by indirection."

[1] The rule is stated in the caption to the note on that subject found in 101 A.L.R. at page 704, as follows: "When the chances of deficiency are anticipated and provided for by the express terms of the will, the directions of the testator in such regard, as interpreted by the court from a consideration of the abatement provision in connection with all the other pertinent provisions of the will, will govern, and the loss be borne by those upon whom testator places it."

Likewise in 34 A.L.R. at page 1253 numerous cases are cited in support of the statement that: "In all instances where it appears from the will that the testator anticipated that his estate might be insufficient to pay all legacies in full, and provided for abatement in a certain order, that intention, as expressed, governs."

[2] Having specifically provided in his will that the general legacies should be reduced pro rata, without regard to the kinship of the legatees, if the funds were insufficient to pay them in full, we must assume Motley H. Flint, the testator, did not desire to make any distinction between the appellant and the non-kindred legatees in that regard. The only reasonable construction of the disputed clause of the codicil is that the testator thereby designated the bequests for the maintenance of his wife and his sister-in-law as preferred legacies which he desired to be first paid after debts and expenses of administration had been first met. All other legacies are placed in one group, regardless of kinship or non-kinship. With respect to abatement, these other legatees are all to be treated alike. If the assets of the estate are insufficient to pay all of these "other bequests" in full, after the legacies to the wife and sister-in-law are first satisfied, then each of the *other* legacies are to be "ratably decreased".

The testator's wish, so expressed in the will, is therefore controlling.

That portion of the decree of distribution from which this appeal was perfected is affirmed.

We concur: TUTTLE, J.; PAULSEN, Justice pro tem.

DRILLON v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 2559.

District Court of Appeal, Fourth District, California.

July 18, 1940.

Hearing Granted Sept. 16, 1940.

1. Evidence 🔑47

The District Court of Appeal could take judicial notice of rules promulgated by the State Horse Racing Board under authority of statutes. Code Civ.Proc. § 1875; St. 1933, p. 2046, as amended.

2. Workmen's compensation 🔑309

The right of employee to quit his work before completion, and the equal right of employer to so discharge his employee, are necessary incidents of "employer and employee relationship," and absence of these rights negatives such a relation and points to that of "independent contract."

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee Relationship" and "Independent Contract".

3. Workmen's compensation 🔑338

A jockey employed by race horse owner to ride a single race was an "independent contractor" and not an "employee" within scope of compensation act, in view of

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* Subsequent opinion 110 P.2d 64.

rules of State Horse Racing Board requiring a jockey, once engaged by an owner, to ride in race in which owner's horse is entered and precluding jockey from terminating arrangement under severe penalties. St.1933, p. 2046, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor" and "Employee".

Original proceeding by E. Drillon to review an award of the Industrial Accident Commission, in favor of Claude Hooper.

Award annulled.

Whelan & Whelan, of San Diego, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

MARKS, Justice.

This is an original proceeding in which petitioner seeks to have annulled an award made against him by the Industrial Accident Commission in favor of Claude Hooper. The sole question for decision is whether Hooper was an independent contractor or an employee of Drillon.

Hooper was injured on August 22, 1939, while riding a horse owned by E. Drillon, in a race on the track at Del Mar, California.

Hooper was regularly employed by Senator Jack Metzgar on a monthly salary to exercise his horses and to ride some of them in races. The contract permitted Hooper to ride other horses than those owned by Metzgar when services to others did not interfere with the duties of his regular employment.

During the season of 1939, E. Drillon was racing horses on the Del Mar track. Claude Hooper was a jockey, licensed by the California Horse Racing Board under an act of the legislature, Stats.1933, p. 2046, which was ratified at an election held on June 27, 1933. This act has been amended. See Stats.1935, p. 1586, p. 1943; Stats.1937, p. 67, p. 2292; Stats.1939, p. 2006.

[1] The rules of the California Horse Racing Board were adopted and promulgated under authority of the above statutes. Among other things they govern contracts between owners and jockeys and the relations between them. We may take judicial notice of these rules. Sec. 1875, Code Civ.Proc.; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175; Wood v. Kennedy, 117 Cal.App. 53, 3 P.2d 366; Young v. Boy Scouts, 9 Cal.App.2d 760, 51 P.2d 191.

Drillon engaged Hooper to ride the horse Pomposa in a race held on August 22, 1939. Pomposa stumbled, Hooper was thrown and injured. He had not ridden for Drillon before and in this race was acting in the capacity of a "free lance" jockey.

Hooper testified that Drillon gave him instructions on how to ride Pomposa in the race. In his testimony we find:

"Mr. Drillon gave me orders and told me how to ride the horse.

"Q. All right.

"Mr. Meyers: Were you acquainted with the horse previous to this race? A. No, I never rode the horse before or had known him.

"Q. Did you know anything about the horse's habits or characteristics or how he should be ridden to the best advantage? A. No.

"Q. Had you ever been on the horse before? A. No, never. * * *

"Q. All right. What did Mr. Drillon tell you when you came down to the paddock? A. Well, he told me, his exact words, I can't remember, because that is too far back.

"Q. I thought I understood you to say to the Commissioner that when you were there in the paddock, ready to mount the horse, that Mr. Drillon told you to let the horse run his own race to the last quarter of a mile and then do the best you could? A. Yes, and then to hit him three or four times, and if he didn't run for the whip, then to hit him no more.

"Q. Is that all you remember Mr. Drillon telling you, now? A. Yes, that is all."

Hooper also testified that he and the other jockeys received $25 for riding a winner and $10 for riding a loser in any flat race. This is in accordance with the provisions of rule 278 of the Horse Racing Board. He also testified that the stewards could prevent him from riding in any race and that, "The stewards at any time at all if Mr. Drillon went in there and said, 'I don't want this boy to ride this horse,' and the stewards could take me off his horse, if that is what you want to know." He further testified that before each race a track official collected for each "free lance" jockey in that race the minimum fee of $10; that on each Saturday the turf club paid him the total fees collected for the races in which he had ridden during the preceding week.

Respondents urge that the foregoing evidence clearly supports the finding of the commission that Hooper was an employee of Drillon because the latter had the right to and did direct the former as to the manner in which he should handle the mount in the race.

Petitioner urges with equal sincerity that the instructions given by Drillon were general in their terms and had as their purpose the result to be accomplished, that of winning the race, and not the method, in its particulars, of riding the horse by which that end was to be accomplished. He urges that it was impossible for him to exercise such control over Hooper when riding in the race because there was no way in which he could communicate directions to the jockey.

While instructions were given Hooper, they were not nearly so specific as those given an independent contractor who undertakes to erect a building under well-drawn and detailed plans and specifications. The instructions given here might be construed as merely acquainting Hooper with the characteristics of the horse he was about to ride, to enable him to ride an intelligent and, if possible, successful race. When so construed the instructions bore on the results to be accomplished more than upon the means of accomplishing them. Further, the fact that Hooper was to be paid $25 in case he won the race and only $10 in case he lost, would indicate that the owner was relying on his skill and ingenuity as a rider to bring the horse in a winner, as a jockey cannot rely entirely on prior instructions to meet every emergency that suddenly changing conditions present during a race. If a jockey were required to ride as an automaton according to prior instructions, there would be no sound reason for giving him a reward for winning, for it would be the horse, not the horse and jockey, that would win the race.

On the other hand, the fact that the owner has no available means of communicating instructions to the jockey during the actual running of a race cannot be controlling here. It is the question of the right of control, not the exercise of that right that must assist in determining the relation of the owner and the jockey.

However, there are factors other than the right of control, or its absence, that are important in determining whether Hooper was Drillon's employee or an independent contractor. They are the right of Drillon to discharge Hooper and the right of Hooper to refuse to ride without invoking penalties for breach of contract.

Counsel for the Industrial Accident Commission advises us that he has been informed by the secretary of the California Horse Racing Board and officials of the Tanforan race track that the rules have been interpreted "to mean that only the jockey who actually rides the horse is entitled to the fee and that a jockey who does not actually ride is entitled to nothing, although he may have an agreement to ride and may have reported to the track and waited in readiness to ride". Be that as it may, we must examine the racing rules to determine, if we can, the right of the owner to refuse to let a jockey he has engaged, ride a race, and the right of a jockey thus engaged, to refuse to ride. Hereafter we will refer to the several "Rules of Racing adopted by the California Horse Racing Board" by the rule number only.

Rule No. 122 provides that all jockey fees shall be received by the clerk of the course. Rule No. 158 provides that no free lance jockey shall be weighed out for any race until his fee for a losing mount in such race shall have been so deposited or guaranteed and the failure to make such deposit or guarantee "shall declare the horse out of the race". Rule 149 provides that any change of jockey "shall be exhibited by the Clerk of the Scales upon the notice board". Rule 292 provides as follows: "When an owner or trainer shall discharge a jockey, groom or attendant, he shall, upon demand of the employee give a written statement of discharge setting forth the cause thereof. Upon refusal to do so the owner or trainer may be fined or suspended."

We have been cited to and find no rule which in so many words provides just what the clerk of the course must do with the jockey fee deposited with him, in case the engaged jockey is not permitted by the owner to ride. It may be inferred from rule 292 that the discharge of a jockey may not be capricious.

The rules governing the duties of the jockey, when once engaged to ride, are much more specific. Rule 279 provides as follows: "All jockeys shall register with the Racing Secretary the name of an agent who is authorized to accept mounts for them. Jockeys will be bound by acceptance of mounts by agents so named." A jockey must report to the scale room one hour before the time of his race, shall weigh out from that room unless excused by the stewards and shall not leave the scale room, except to ride in a race, until all his engagements for the day have been fulfilled. "No one but jockeys, attendants and officials shall be permitted in the Scale Room or Jockey Room." Rule 274. Rule 281 provides as follows: "If a jockey, engaged for a certain race or for a specified time fails or refuses to abide by his agreement, unless excused by the Stewards, he shall be fined or suspended; and if a jockey refuses to ride a horse on the order of the Stewards he shall be reported to the Racing Board."

It is clear from the foregoing rules that a jockey, once engaged by an owner, is required to ride in the race in which the owner's horse is entered, under pain of much more severe penalties than that of damages for breach of contract. He does not have the right to terminate his engagement. The right to quit is one of the incidents of the relation of employer and employee. He is bound by his contract to ride and cannot break it without subjecting himself to punishment. This is an incident of independent contract and negatives the theory of employment. If the jockey is bound by contract it would seem to follow that the owner also should be considered so bound, if there is no rule to the contrary. We have failed to find any such rule.

[2] The right of the employee to quit his work before completion, and the equal right of the employer to so discharge his employee, are necessary incidents of the relation of employer and employee. The absence of these rights negative such a relation and point to that of independent contract. See Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820; Bohanon v. James McClatchy Pub. Co., 16 Cal.App.2d 188, 60 P.2d 510; Batt v. San Diego Sun Pub. Co., 21 Cal.App.2d 429, 69 P.2d 216; Los Flores School Dist. v. Industrial Acc. Comm., 13 Cal.App.2d 180, 56 P.2d 581.

[3] As there is no evidence in the record indicating in the slightest degree that Hooper had the right to quit his engagement and refuse to ride, and as all of the evidence is to the contrary, we must conclude that the relation between Drillon and Hooper was that of independent contract and not that of employer and employee. Because Hooper was not an employee, the Industrial Accident Commission had no jurisdiction over the case and had no power to make the award in question here.

Respondents rely upon the cases of Moore v. Clarke, 171 Md. 39, 187 A. 887, 107 A.L.R. 924, and Pierce v. Bowen, 247 N.Y. 305, 160 N.E. 379, as controlling and requiring us to hold that Hooper was an employee of Drillon. The first-cited case cannot be distinguished factually (except as to racing rules) from the instant case. We are not able to determine whether or not there were in effect, in Maryland, rules similar to those in force here. We regard those rules controlling as establishing the fact of independent contract which may distinguish the instant case from those just cited.

The award is annulled.

We concur: BARNARD, P. J.; GRIFFIN, J.

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40 Cal.App.2d 137

PEOPLE v. KING.

Cr. 400.

District Court of Appeal, Fourth District, California.

July 16, 1940.

Rehearing Denied July 30, 1940.

Hearing Denied Aug. 15, 1940.

1. Criminal law ⚷511(4)

In prosecution for grand theft from the person, evidence that defendant was only one of group who knew where victim carried his wallet, that defendant asked victim to go outside, that wallet was taken from victim in scuffle that started as soon as defendant and victim went outside of building, and that victim's wallet was found next day on ground near a bar to which defendant drove immediately after the scuffle, sufficiently corroborated testimony of defendant's companions if they were deemed accomplices. Pen.Code, § 1111.

2. Larceny ⚷65

Evidence supported conviction of grand theft from the person.

3. Criminal law ⚷511(1)

It is not necessary that evidence corroborating testimony of accomplice should go so far as to establish by itself, without aid of testimony of accomplice, that defendant committed the offense charged. Pen.Code, § 1111.

4. Criminal law ⚷511(1)

Independent evidence corroborating testimony of accomplice may consist of contradictory statements made by accused or his silence in the face of accusatory statements, or false statements made with respect to matters connected with the commission of the crime. Pen.Code, § 1111.

5. Criminal law ⚷511(2, 3)

The entire conduct of accused may be looked to for circumstances corroborating testimony of an accomplice, and, if therefrom his connection with the commission of the crime may be fairly inferred, the corroboration is sufficient. Pen.Code, § 1111.

6. Criminal law ⚷351(1), 391

Where defendant makes no attempt, by his own testimony or otherwise, to contradict, explain, or deny any of the circumstances established against him, jury is entitled to consider those circumstances in determining defendant's guilt.

7. Criminal law ⚷1160

Before verdict of a jury which has been approved by trial court can be set aside on appeal upon ground of insufficiency of evidence to support it, it must be made clearly to appear that upon no hypothesis is there substantial evidence sufficient to support conclusion of trial court.

8. Criminal law ⚷721(1)

District attorney's reference in his argument to defendant's exercising of his constitutional right not to testify was authorized under statute providing that failure of defendant to explain or to deny his testimony or any evidence and the facts in case against him may be commented on by counsel. Pen. Code, § 1323.

9. Criminal law ⚷1037(1)

Where at no time during argument was any objection made by defendant to remarks of district attorney, appellate court would not consider claim as to misconduct of district attorney in his arguments.

10. Criminal law ⚷957(1)

Jurors are disabled to impeach their verdict by any means, whether it is by affidavit or by testimony or by extrajudicial statements, except only in cases provided by statute.

11. Criminal law ⚷1134(2)

The District Court of Appeal would not consider remarks allegedly made by juror to defendant's counsel after trial offered for purpose of showing that jury had been guilty of prejudicial misconduct, since jurors are disabled to impeach their verdict by any means.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

James Floyd King was convicted of grand theft from the person, and he appeals.

Affirmed.

Hearing denied; **CARTER, J.**, dissenting.

Joseph K. Coady, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant and one Bob Jarvis were charged jointly in an information with the crime of grand theft from the person of one Melvyn West. The jury acquitted Jarvis and convicted King. King appealed from the judgment and an order denying his motion for new trial.

The points relied upon by appellant for the reversal of the judgment and order are (1) that the verdict is contrary to the law and evidence; (2) that the court erred in deciding questions of law arising during the course of the trial; (3) that the district attorney was guilty of prejudicial misconduct in his argument to the jury; and (4) that the jury was guilty of prejudicial misconduct.

On March 23, 1940, appellant was seated in a chop suey parlor on Grand avenue in Buena Park. West came in at approximately 10 o'clock that night and sat on a stool next to appellant at the bar and ordered a bottle of beer for appellant, Harold Milbrant and Bob Jarvis, who had come in with him. West paid for the beer with a bill from his purse or wallet, which he took from his hip pocket. West had previously worked with appellant and a conversation began. At appellant's suggestion he and West then went through a side door that led out of the building toward a toilet outbuilding about 30 feet distant. As West and appellant went out of the side door and down the steps a scuffle started in which West was knocked down and shoved around. Appellant's two companions appeared on the scene and became involved in the scuffle. Appellant, Jarvis and Milbrant were arrested. The charge against Milbrant was dismissed at the preliminary examination, and he subsequently testified for the prosecution at the trial. According to the testimony of Milbrant, during the scuffle King pushed West around. Soon thereafter appellant placed a wallet under Milbrant's arm for a second, then went around in back of Milbrant and took the wallet out from under his arm. He further testified that he saw the wallet later in appellant's possession, after they had gone from the building. Appellant drove away in a car to another bar with his two companions after the scuffle and was gone for about an hour. He then returned to the chop suey parlor alone. West was still there and accused appellant by saying: "You know what you done" and started an argument. Appellant made no reply and tried to pretend that he did not know West. This was testified to by the woman who operated the bar. The wallet was found by a Mr. Allerd the following day on the ground near another bar where the appellant had gone after the scuffle. The testimony is undisputed that the amount in the wallet when it was taken was $22 and that $5 was hidden among the identification cards of West and was still in the wallet when it was found. The appellant did not take the stand at the trial, but his wife testified that appellant was at home all during the evening in question. The woman who operated the bar and several others who were there testified that they saw appellant and that he was present and involved in the affair. While it is true no one testified having seen the appellant take the wallet from West, West testified that he felt the wallet being taken from his hip pocket in the scuffle.

Appellant now argues that the evidence is insufficient to show theft from the person and that Jarvis and Milbrant were accomplices, and that there was no evidence connecting him with the offense charged other than their testimony; that their testimony in this regard was not corroborated and was conflicting and should be disregarded, citing section 1111 of the Penal Code; People v. Kempley, 205 Cal. 441, 271 P. 478; and People v. Hoagland, 138 Cal. 338, 71 P. 359.

Independent of the testimony of Jarvis and Milbrant, the evidence clearly shows that appellant was the only one who had previously sat at the bar with West; that appellant was the only one of the group who saw West pay for the beer from his wallet and who, therefore knew where West carried his wallet. Furthermore, it appears that appellant was the one who asked West to go outside, and the wallet was taken from West in a scuffle that started just as soon as West and appellant went outside of the side door of the building; that after the scuffle, appellant drove to another bar about a mile away and it was near this second bar that the wallet was found the next day lying on the ground not far from the curb; that after remaining at the second bar for an hour appellant returned to the chop suey parlor and was alone; that West was still there when appellant returned; that West immediately accused appellant as heretofore stated; that appellant tried to pretend that he did not know West.

Milbrant testified that he did not at any time take or plan to take the wallet from West's pocket but that he saw the wallet in the possession of the appellant on two different occasions, once during the scuffle, when he heard West accuse appellant of taking his wallet, and at a later time in the car, when he saw the appellant with the wallet in his hand. Milbrant further testified that he accused the appellant of having the wallet, to which accusation appellant made no reply.

[1-7] Assuming only for the purpose of argument that Milbrant and Jarvis were accomplices, we are fully convinced that there is ample independent corroboration of their testimony, and that the evidence is sufficient to support the verdict. It is not necessary that the corroborating evidence should go so far as to establish by itself, without the aid of testimony of an accomplice, that the defendant committed the offense charged. The independent evidence may consist of contradictory statements made by the accused or his silence in the face of accusatory statements, or false statements made with respect to matters connected with the commission of the crime. The entire conduct of the accused may be looked to for corroborative circumstances and if therefrom his connection with the commission of the crime may be

fairly inferred the corroboration is legally sufficient. People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; People v. Negra, 208 Cal. 64, 280 P. 354; People v. Martinez, 19 Cal.App.2d 599, 66 P.2d 161. Where the defendant makes no attempt, by his own testimony or otherwise, to contradict, explain or deny any of the circumstances established against him, the jury is entitled to consider those circumstances in determining his guilt. People v. Wiezel, Cal. App., 104 P.2d 70; People v. Schneider, 36 Cal.App.2d 292, 98 P.2d 215; People v. Waller, 14 Cal.2d 693, 96 P.2d 344. The trial court fully reviewed the evidence taken at the trial before denying the appellant's motion for a new trial. Before the verdict of a jury which has been approved by the trial court can be set aside on appeal upon the ground of insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467.

Appellant next claims prejudicial error in a remark by the court in reference to the nature of the article placed by appellant under Milbrant's arm. We have reviewed the testimony in this respect, together with the court's remark, and we see no merit to this complaint.

[8, 9] Appellant next contends that the district attorney was guilty of prejudicial misconduct in his opening argument before the jury wherein he stated that "the evidence is ample to find Mr. King and Mr. Jarvis both guilty of grand theft from the person", and in his closing argument he said "I make no recommendation, frankly, as to Mr. Jarvis, but I submit to you that King is guilty beyond a reasonable doubt in his whole conduct here and in the exercise of his constitutional right not to testify. Take that for what it is worth. * * * So I submit the case to you, * * * and ask that you find Mr. King guilty of grand theft from the person * * *. As to Mr. Jarvis, I make no recommendation to you." The appellant argues that the district attorney "about faced" in his opening and closing argument; that such conduct prejudiced appellant, as shown by the jury's verdict. It is likewise argued that the district attorney's reference to appellant's constitutional right not to testify, taken into consideration with all the other statements, was highly prejudicial; that "the only reason King didn't go on the stand was not because of any sense of guilt in this case, but because of two prior charges of several years ago * * * and to which he had entered pleas of guilty". The comments above mentioned are fully authorized under section 1323 of the Penal Code, wherein it is provided that the failure of the defendant to explain or to deny his testimony or any evidence and the facts in the case against him may be commented on by counsel. At no time during the argument was any objection made by appellant to the remarks of the district attorney. Under these circumstances an appellate court will not consider a claim as to the misconduct of counsel in arguments unless objection is so made. People v. Fleming, 166 Cal. 357, 377, 136 P. 291, Ann.Cas. 1915 B, 881; People v. Harris, 219 Cal. 727, 28 P.2d 906.

[10, 11] Appellant next complains of claimed remarks made by a juror after the trial, and asks this court to consider those remarks on appeal. Appellant states in his brief that his counsel talked with one of the jurors after the trial and she informs him that one of the other jurors, whom she thought was a former police officer in Orange county, "stated that King had been convicted twice" and that she was "coerced into a hurry-up verdict because some of the jurors didn't wish to be late for dinner".

In presenting this argument to the trial court on the motion for new trial, counsel for appellant stated: "I realize that an affidavit attacking their own verdict would be out of place" and proceeded to relate the above-mentioned conversation to the trial court as a ground for the granting of a new trial. Appellant's counsel's conception of the law was correct, for it is well settled that jurors are legally disabled to impeach their verdict by any means, whether it be by affidavit or by testimony or by extrajudicial statements, except only in the cases provided by statute. People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186. The facts in the instant case do not come within the exception.

The judgment and order are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

40 Cal.App.2d 186

PEOPLE v. HENRY.

Cr. 3346.

District Court of Appeal, Second District, Division 1, California.

July 18, 1940.

Hearing Denied Aug. 16, 1940.

Criminal law ⚿1182

A conviction for violating section of penal code relating to crimes against children was not disturbed for alleged insufficiency of evidence or claimed errors in rulings on admission of evidence or for failure to give certain instructions. Pen.Code, § 288.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Henry was convicted for violating section 288 of the Penal Code, relating to crimes against children, and he appeals.

Affirmed.

Gladys Towles Root, and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

DORAN, Acting Presiding Justice.

The defendant and appellant, William Henry, was charged in an information filed by the district attorney, in counts I and II thereof with the violation of section 288 of the Penal Code, and in count III with the violation of section 288a of the Penal Code. The jury found defendant guilty of counts I and II as charged, and not guilty as to count III.

This appeal is from the judgment of conviction and from the order denying defendant's motion for a new trial.

The defendant, a single man 44 years of age, operated a plunge, or swimming pool, in the town of El Monte, California. The alleged acts constituting the offenses occurred in the dressing rooms adjacent to the plunge. The victims of the offenses were two boys, one thirteen years of age and one seventeen years of age; with regard to the older boy, the alleged acts had occurred over a period of eight or nine years.

It would serve no purpose to describe the alleged acts. It is sufficient to note that they are typical of such offenses.

At the time of his arrest, the defendant, when informed of the charge, denied his guilt but offered as an explanation of the charge that he had examined the boys with the view of aiding them in the way of hygiene and cleanliness, which attitude and proffered explanation are also typical.

Appellant disputes the sufficiency of the evidence, and makes claim of errors of the trial court in its rulings on the admission of evidence and as to certain questions on cross-examination, and for failure to give certain instructions.

Without going into further detail it is sufficient to state that, from a careful and complete review of the entire record, the appeal is wholly without merit.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

I concur: WHITE, J.

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40 Cal.App.2d 171

MARYLAND CASUALTY CO. v. LIPSCOMB et al.

Civ. 11375.

District Court of Appeal, First District, Division 2, California.

July 18, 1940.

1. Bankruptcy ⚿435

Where, after defendant obtained discharge in bankruptcy, action was commenced against defendant to recover loss paid by plaintiff under contractor's bond insuring faithful performance of subcontract by defendant, defendant, by failing to plead discharge prior to judgment for plaintiff and by failing to attempt to obtain relief from judgment, which was entered about ten months after commencement of action, until more than three years after commencement of action, "waived" defense of discharge and right to relief under statute concerning right of a bankrupt to apply, upon proof of discharge, to court in which a judgment has been entered against him for an order directing that judgment be discharged. Code Civ.Proc. § 675b.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

2. Bankruptcy ⚷433(7)

If a judgment against a debtor who had obtained discharge in bankruptcy was based upon a debt incurred after discharge, statute concerning right of a bankrupt to apply, upon proof of discharge, to court in which a judgment has been rendered against him for an order directing that judgment be discharged was inapplicable to debtor's proceeding for relief from judgment. Code Civ. Proc. § 675b.

3. Bankruptcy ⚷425

If debt upon which judgment was entered against debtor was incurred before, but not listed or discharged in debtor's bankruptcy proceedings, debtor was not entitled to cancellation of judgment under statute concerning right of a bankrupt to apply, upon proof of discharge, to court in which a judgment has been rendered against him for an order directing that judgment be discharged. Code Civ.Proc. § 675b.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the Maryland Casualty Company against E. C. Lipscomb and another, individually and as copartners doing business under the firm name and style of Lipscomb & Dutton, and Lipscomb & Dutton, a copartnership, to recover a loss paid by plaintiff under a contractor's bond. From an order denying his motion to cancel and discharge a final judgment entered for plaintiff, defendant E. C. Lipscomb appeals.

Affirmed.

Sanders, La Motte & Kahn, of San Diego, for appellant.

Liggett & Liggett, of San Diego, and Donald Seibert, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from an order denying his motion to cancel and discharge a final judgment.

The motion was made pursuant to section 675b of the Code of Civil Procedure, which was added by amendment to the Statutes in 1935, and which reads in part: "At any time after one year has elapsed, since a bankrupt was discharged from his debts, * * * he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him * * * for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record * * *."

Appellant argues that the debt upon which the judgment was founded was the same debt that was adjudicated in the bankruptcy proceedings. It must be assumed that the trial court did not agree with this contention. In March, 1927, respondent wrote a contractor's bond in favor of a contractor to insure faithful performance by Lipscomb and Dutton of their subcontract. In 1929, the contractor obtained judgment against Lipscomb and Dutton for breach of that contract. In June, 1930, Lipscomb was adjudicated a bankrupt. He listed the contractor as a creditor under his judgment. He did not list respondent as a creditor under the bond, but as a creditor for the bond premium only. In March, 1931, Lipscomb obtained a discharge. In December, 1931, the respondent herein paid the loss under its bond to the original contractor and, in December, 1935, commenced this action against Lipscomb and Dutton to recover its loss. Judgment was entered for respondent in October, 1936. The motion which is the subject of this appeal was made in December, 1938.

It would serve no purpose to mention the grounds urged by appellant or to discuss any of them at length. The appeal is clearly without merit and fails to present any substantial question of law.

[1-3] If when this action was filed in 1935 the appellant deemed it was an attempt to recover a judgment concerning a debt which had been discharged in the bankruptcy proceedings, it was his duty to plead such discharge prior to judgment, and his failure to do so is a waiver of the defense. Harrell v. Hoagland, 18 Cal. App.2d 721, 64 P.2d 953; Holmes v. Justice's Court, 19 Cal.App.2d 362, 364, 65 P. 2d 820; Tuttle v. Scott, 119 Cal. 586, 51 P. 849. Respondent does not concede that the debt was discharged in the bankruptcy proceedings. The loss under the contractor's bond was not paid until after the discharge. This action was brought to recover what respondent had lost through appellant's default. If the judgment was based upon a debt incurred after the discharge, then section 675b has no applica-

tion. If the debt was incurred before, but not listed or discharged in the bankruptcy proceedings, then appellant has no right to a cancellation under the code section. The trial court was entitled to infer that appellant waived all claim to relief under the statute when he voluntarily failed to plead discharge, and made no claim for any relief for a period of more than three years following the commencement of the action.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

40 Cal.App.2d 167

GARCIA et al. v. CONRAD et al.
RODRIGUEZ et al. v. SAME.
Civ. 11274.

District Court of Appeal, First District, Division 2, California.
July 18, 1940.

Rehearing Denied Aug. 17, 1940.
Hearing Denied Sept. 16, 1940.

1. Automobiles ⇨244(6, 40, 50)

Evidence warranted denial of recovery for deaths of pedestrians who were struck by automobile which defendants were using, while pedestrians were crossing highway, on ground that defendants were guilty of no act of negligence, or that accident was unavoidable, or that pedestrians were guilty of contributory negligence in crossing highway.

2. Appeal and error ⇨930(1)

On appeal from judgment on verdict for defendants, District Court of Appeal would assume that portions of evidence most favorable to defendants were believed by jury.

3. Automobiles ⇨246(58)

In actions for deaths of pedestrians who were struck by automobile while crossing highway, instructions relating to contributory negligence of pedestrians were not error where there was some evidence from which jury might have inferred contributory negligence.

4. Trial ⇨252(2)

Where there is some competent and substantial evidence tending to support an issue, the party raising the issue is entitled to instructions presenting his theory.

5. Appeal and error ⇨1067

In actions for deaths of pedestrians who were struck by automobile while crossing highway, refusal to instruct that vehicle on roadway divided into three or more lanes should be driven as nearly as practical within a single lane and should not be moved from such lane unless movement could be made with safety, was not prejudicial, where there was no evidence that automobile was moved from lane in which it was traveling except for express purpose of attempting to avoid injury to pedestrians.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Actions by Ma Elisa Garcia and others, minors, by Jovita Garcia, their guardian ad litem, and Jovita Garcia, individually, and by Manuela Rodriguez and another, minors, by Victoria L. Rodriguez, their guardian ad litem, and Victoria L. Rodriguez, individually, against William Hunt Conrad and others, for damages for deaths of two men who were killed when struck by an automobile. From the judgments, the plaintiffs appeal.

Affirmed.

Edward E. Pencevich and Hugh Allen, both of San Francisco, and Richard Dolwig, of South San Francisco, for appellants.

Gregory, Hunt & Melvin and Bronson, Bronson & McKinnon, all of San Francisco, and James T. O'Keefe, Jr., of Redwood City, for respondents.

NOURSE, Presiding Justice.

The plaintiffs have appealed from the judgments and verdict adverse to them in two consolidated actions for damages. They are the two widows and the surviving children of two men who were killed when struck by a motor vehicle operated by the defendant Conrad.

The collision occurred at about 2:45 a. m. on the Bayshore Highway where it passes through the city of South San Francisco. At that point the highway is 100 feet wide consisting of four paved traffic lanes each 10 feet wide, and two macadamized shoulders, each 30 feet in width and connecting with the sidewalk curbing on each side of the highway.

There was no eyewitness to the collision who could tell just how and where it occurred. From the testimony of those called, and from all the inferences and presumptions which the defendants summon in support of the verdict, the facts and circumstances surrounding the collision are: defendants Conrad and Dyer were using the automobile belonging to defendant Alexander with the special permission of the owner; they had been in San Francisco for dinner and had several drinks of liquor; Dyer was asleep as they approached the city of South San Francisco, and Conrad was driving; the night was dark; it had been raining, and the pavement was wet and dark; the deceased had taken their wives to a picture show, left them at one of the homes while the two men went to town for drinks. (Both sides emphasize the drinking incidents of the others and seek to minimize that of their own. The reasonable conclusion from all the testimony is that the two defendants had done their drinking early in the evening, that they were sober at the time of the collision, and that the police officers who arrived soon after the accident found no evidence of intoxication upon them. On the other hand, the deceased apparently started their drinking about the time the defendants stopped theirs. The evidence disclosed that, as they left a tavern, one was intoxicated and that the attending physician found a strong odor of alcohol upon the deceased as he was attending them in the hospital. A reasonable deduction from all the evidence upon this subject is that the defendants had sobered before the accident, that the deceased were intoxicated at the time, and that this condition of the deceased was a material factor in the causes of the accident.)

The story of the accident in brief is: The defendants were driving south on a broad highway at between 35 and 45 miles an hour, the deceased were walking across the highway, though there is no evidence whether they were going from the east or from the west. They were not at a cross-walk or at a street intersection; they wore dark clothes; the pavement was dark and poorly lighted at that point; Conrad did not see them in time to avoid a collision; he apparently turned his wheel sharply to the left, striking the deceased with the left front headlight and tossing them to the right of the main central portion of the highway. One body was lying 25 feet north of the intersection with Miller avenue and 20 feet from the curb, the other lay about 36 feet south of Miller. Some 200 feet farther south from Miller avenue is Grand avenue at which intersection with Bayshore there was an electric traffic device to control the use of the intersection.

[1, 2] Upon this evidence the appellants raise the first question: "Was the evidence sufficient to justify the verdict?" The answer must be in the affirmative because the jury might well have inferred from this evidence that the defendants were guilty of no act of negligence, that the accident was unavoidable, or that the deceased were guilty of contributory negligence in crossing the highway at the point and in the condition indicated in the evidence. All the argument addressed to this point by appellants relates to the reasonableness of the jury's conclusion rather than to the lack of evidence to support it. The uncertainty of the evidence relating to the speed of the vehicle might have led the jury to believe that speed had nothing to do with the accident, and that the driver was operating the car in a manner such as other men would have done at the same time and under the same circumstances. The evidence referred to in the statement of facts is sufficient in itself to sustain the verdict if the portions most favorable to respondents were believed by the jury, and on this appeal we must assume that this was done.

[3, 4] Secondly, appellants complain of the instructions relating to contributory negligence. The argument is that there was no evidence of contributory negligence upon which the instructions could be based. Eleven separate instructions are thus criticized, no one of which states an incorrect rule of law on the issue of contributory negligence. The burden of appellants' complaint is that the repeated reference to the issue was prejudicial because it emphasized it to the jury when there was no evidence to support it. It is here that appellants make their error. The evidence is not all one way, and such as there is is not uncontroverted. It should be restated that there was no evidence to show that the deceased were attempting to cross the highway from east to west or from west to east. If they had entered the highway from the westerly curb in the face of an oncoming car with its headlights plainly visible, the jury might well have inferred that they were negligent. It might also have concluded that a rea-

sonable man would have made use of the regular crossing instead of attempting to cross between intersections. But, aside from any conjectures as to what the jury might have inferred or concluded, we are confronted with the direct answer to the point raised—that, since there was some evidence from which the jury might have inferred contributory negligence, there was no error in the instructions. To the contrary, the settled rule is that when there is some competent and substantial evidence tending to support an issue, the party raising it is entitled to instructions presenting his theory.

[5] Appellants complain of the refusal to give their proposed instruction reading: "You are instructed that whenever any roadway has been divided into three or more clearly marked lanes for traffic, a vehicle shall be driven as nearly as practical within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

As an element of their claim of negligence in the operation of the vehicle, appellants proved by a witness who passed the respondents at a point about a block ahead of the place of impact that they were then in the outer or westerly lane of the highway proper. No other testimony was offered for a change from that lane to another. Testimony was given that after the collision the bodies lay upon the shoulder of the highway, and that the vehicle showed injury to the left front headlight. From this the appellants argue that the vehicle must have been driven on the shoulder. But respondents point out that it is just as reasonable to assume that the operator turned suddenly to his right to avoid hitting the men, and cite sufficient evidence to support their theory. We can find no prejudice in refusing to give the proposed instruction because there is no evidence of any character which tended in any manner to prove that the vehicle was moved from the lane in which it was traveling except for the express purpose of attempting to avoid injury to the deceased.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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40 Cal.App.2d 129

PEOPLE v. HARRIS.

Cr. 3360.

District Court of Appeal, Second District, Division 1, California.
July 16, 1940.

1. Criminal law 🔑535(2)

Slight or prima facie proof is all that is necessary to establish the corpus delicti sufficient to authorize admission of confession.

2. Criminal law 🔑535(2)

In prosecution for receiving money to be used as a wager, evidence was sufficient to authorize admission of defendant's verbal admission to officer that defendant had been taking bets for some time and that he was working for some one else, even if the admissions amounted to a confession.

3. Gaming 🔑98(1)

Evidence was sufficient to sustain conviction for receiving money to be used as a wager upon the result of a horse race. Pen. Code, § 337a, subd. 3.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Harry L. Harris was convicted of receiving money to be used as a wager upon the result of a horse race, and he appeals.

Affirmed.

Chotiner & Chotiner and Joe Orloff, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DORAN, Acting Presiding Justice.

Defendant and appellant, Harry L. Harris, was charged in an information filed by the district attorney, in count I thereof, with the violation of subdivision I of section 337a of the Penal Code, which is in effect "engaging in bookmaking", and in count II with the violation of subdivision 3 of the same code section, that is, the receiving of money to be used as a wager upon the result of a horse race.

At the trial in the superior court a jury was duly waived by the defendant and, by stipulation, the cause was submitted upon the transcript of the evidence adduced at the preliminary hearing, and the exhibits introduced therein. The defendant was adjudged guilty as charged in both counts of the information. A motion for a new trial was made and granted as to count I and denied as to count II. Plaintiff, the People, gave oral notice of appeal from the order granting the motion for a new trial as to count I, which appeal was subsequently dismissed by stipulation of counsel for the respective parties.

Defendant appeals from the judgment rendered, and from the order denying the motion for a new trial as to count II.

The transcript of the evidence adduced at the preliminary hearing revealed the following: On March 25, 1940, at about 1 o'clock p. m., police officer Guy Wilkinson was in the vicinity of Third street and Broadway, in Los Angeles. He observed the defendant moving from one side of the street to the other. Several men approached the defendant and the latter took a scratch sheet from his pocket and showed it to these men and was seen to make notations. The officer noticed one of the men, whose name he did not obtain, look at a scratch sheet that defendant showed to him. This individual handed a dollar bill to the defendant, who then crossed the street and approached the entrance of an office building. Using a telephone located in the entrance, defendant dialed a number and the officer heard him say: "I want a parlay on 864 to 888, $1 to win." The officer placed the defendant under arrest. A scratch sheet was found in defendant's possession, and officer Wilkinson checked thereon the numbers which he had heard the defendant give over the telephone. No. 864 was the number given to a horse named Moonish running in the fourth race, and No. 888 was a horse named Potranco running in the fifth race, at Oaklawn Park on that day. The officer identified a piece of paper with notations thereon which he also obtained from the defendant's possession, and stated that it was an "A B C betting marker" used by bookmakers in recording bets, the columns thereon indicating win, place and show.

Officer Wilkinson further stated that he had had a conversation with the defendant in the presence of another officer named Ginder, and, over objections of the defendant on the ground that the corpus delicti had not been established, testified to the following: "I asked him (defendant) how long he had been taking bets around there and he said for some time, and that he was working for someone else and got paid by the day."

On cross-examination officer Wilkinson testified that at the time he saw the unidentified third person hand the dollar bill to the defendant, he (the officer) was across the street and that he could not hear what was being said by them. The officer did not see the defendant make any memorandum of the bet at that time, nor while the defendant was crossing the street or while he was at the telephone. The officer also could not tell from an examination of the A B C betting marker who the person was who made the bet, nor could it be determined whether the notations which he saw the defendant make, prior to the time he was handed the dollar bill, were made on this sheet or on another piece of paper. The officer stated that the scratch sheet contained markings thereon such as were commonly used by bookmakers in marking the rundown winners.

No evidence was offered on behalf of the defendant either at the preliminary examination or at the trial in the superior court.

Appellant contends, in effect, that the court erred in admitting evidence of a confession prior to the proof of the corpus delicti; and, that the evidence was insufficient to support the judgment.

[1, 2] Neither contention can be sustained. It is well settled that slight or prima facie proof is all that is necessary to establish the corpus delicti. People v. Hudson, 139 Cal.App. 543, 34 P.2d 741. Assuming that the verbal admissions of the defendant amounted to a confession, in the light of the record evidence thereof was admissible.

[3] The record reveals that the evidence, as a matter of law, is sufficient to support the judgment.

For the foregoing reasons the judgment, and the order denying the motion for a new trial as to count II, are, and each of them is, affirmed.

I concur: WHITE, J.

40 Cal.App.2d 193

PEOPLE v. BUSBY.

Cr. 1722.

District Court of Appeal, Third District, California.

July 19, 1940.

1. Criminal law 🔑427(2)

Before acts and declarations of a coconspirator, made out of the presence of accused, can be admitted in evidence, the existence of the conspiracy must be proved by independent evidence.

2. Criminal law 🔑423(2)

Acts and declarations of coconspirator, made out of the presence of accused, to be admissible, must be in aid and furtherance of the common purposes or design of the conspiracy.

3. Criminal law 🔑427(2)

Where prima facie case of conspiracy was not established by independent evidence, admission of testimony consisting of acts and declarations of alleged coconspirator, made out of the presence of accused, was improper.

4. Prostitution 🔑4

In prosecution for child stealing, testimony that an apartment maintained by a coindictee was a house of prostitution was admissible to prove accused's guilt of charge of abduction for the purpose of prostitution. Pen.Code, §§ 278, 315.

5. Criminal law 🔑391

In prosecution for child stealing, jury had right to consider fact that accused did not take stand in his own defense. Pen. Code, § 278.

6. Criminal law 🔑1134(8)

Where jury found accused guilty of child stealing and abduction and new trial was granted as to count charging abduction, evidence erroneously admitted could be considered only in the light of its application to the count charging child stealing. Pen. Code, §§ 267, 278.

7. Criminal law 🔑1186(4)

In prosecution for child stealing and abduction, where evidence as to charge of child stealing was so uncontradicted that jury could have reached no other verdict than that of guilty, admission of testimony that house maintained by a coindictee was a house of prostitution which supported count charging abduction as to which new trial was granted did not result in "miscarriage of justice" and was not reversible error. Pen.Code, §§ 267, 278; Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

8. Criminal law 🔑730(7)

In prosecution for child stealing, prosecutor's argument that experience has shown and that it was a recognized fact that young girls of the age of prosecutrix are taken for special and specific clientele did not constitute prejudicial misconduct, where court instructed jury that it should not accept any facts from prosecutor's argument, and that jury's opinion should be formed from testimony.

9. Criminal law 🔑1166½(12)

Trial judge's remarks to jury after trial of accused on substantive charge of child stealing and before trial on issue of insanity that there were many features of the case particularly disagreeable and "I really do appreciate your assistance in the matter and the intelligence shown by the jury is of a very high order and I appreciate that, also", after which judge commented that the trial of the issue of insanity, to be tried on following day, would be more pleasant to try and that it was simply a question of not guilty by reason of insanity, did not constitute reversible error as tending to minimize importance of insanity issue, where even accused's experts refused to pronounce accused insane. Pen.Code, § 278; Const. art. 6, § 19.

10. Criminal law 🔑1166½(12)

Where evidence on the issue of insanity which is to be tried after trial on substantive charges is exceedingly close and a miscarriage of justice has occurred, trial judge's comment that jury's verdict on substantive charges was intelligent is reversible error.

11. Criminal law 🔑656(9)

Under constitutional provision permitting trial judge to comment upon the evidence, in a proper case, the trial judge may express an opinion as to the guilt of the accused. Const. art. 6, § 19.

12. Criminal law 🔑624

Separate trials on substantive charges and insanity issue constitute but a single trial.

13. Criminal law 🔑311

The burden of proving sanity is on the prosecution but the burden is met in the first instance by the presumption of sanity which the law raises and which must prevail until it is overcome.

14. Criminal law ⚿331

Requirement that accused prove insanity at the time of the commission of the crime by preponderance of the evidence does not shift the burden of proof of sanity from the people to the accused, but only shifts the burden of introducing evidence, and declares the amount of evidence which accused must produce to overcome presumption of sanity and show his insanity.

15. Criminal law ⚿778(7)

Instruction requiring accused to prove defense of insanity by preponderance of the evidence was not erroneous as misleading the jury to believe that burden of proof was on accused.

16. Criminal law ⚿911, 1156(1)

The discretion of the trial court to grant a new trial is very broad and will not be disturbed by a reviewing court except for an abuse of discretion.

17. Criminal law ⚿935(1)

Where there was little substantial evidence to support jury's verdict of guilty in prosecution for abduction, granting of a motion for new trial was proper. Pen.Code, § 267.

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Merle Busby, Sally Stanford, and Dorothy Heber were accused under an amended indictment containing four counts of child stealing, abduction, conspiracy to commit child stealing and conspiracy to commit abduction, and defendants Stanford and Heber were granted separate trials. The jury found Merle Busby guilty of child stealing and abduction, and that he was sane at the time of the offenses, and from a judgment following the jury's verdict on the count for child stealing and from an order denying motion for new trial, Merle Busby appeals, and the State appeals from an order granting a new trial as to the count charging abduction.

Affirmed.

Leo R. Friedman and Ernest Spagnoli, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

HAWKINS, Justice pro tem., delivered the opinion of the court.

Appellant, Merle Busby, Sally Stanford and Dorothy Heber were jointly accused under an amended indictment containing four counts, the first count charging a violation of section 278 of the Penal Code (child stealing), the second count a violation of section 267 of the Penal Code (abduction), the third count conspiracy to commit child stealing, and the fourth count conspiracy to commit abduction.

All defendants entered pleas of not guilty to all counts and appellant Busby entered an additional plea to all counts of not guilty by reason of insanity.

Defendants Stanford and Heber were granted separate trials.

At the trial of appellant Busby, before a jury, on the substantive charges, verdicts were returned finding him guilty on counts I and II and not guilty on counts III and IV. The same jury found that appellant Busby was sane at the time of the commission of the offenses charged in counts I and II. Appellant Busby's motion for a new trial was denied as to count I and granted as to count II.

Busby appeals from the judgment following the jury's verdict on count I and from the order denying his motion for a new trial.

Subsequently the state appealed from the order granting a new trial as to count II.

While there are actually two appeals to be considered, the word "appellant", for purposes of convenience, will be used hereafter only to designate the appellant Merle Busby.

The following facts are undisputed:

The girl here involved, hereinafter referred to as Evelyn, without the knowledge or consent of her parents, left Livingston, California, on September 13, 1939, with appellant, accompanied him to San Francisco and later to Oregon, where both were arrested by officers approximately ten days after they left Livingston.

Prior thereto Evelyn lived in Livingston with her parents. She had an aunt named Pauline Andrews and an uncle, Secondo Forgnone, who lived on his ranch about four miles from Livingston.

Appellant had a sister, Sally Stanford, who lived in San Francisco, where the People claim she operated a house of prostitution. With her lived Dorothy Heber.

Prior to the commission of the alleged offenses, Secondo Forgnone had met Dorothy Heber through a "lonesome club". After meeting Forgnone, Dorothy spent some time on his ranch at different times, helping him with the housework and preserving fruit. She induced Forgnone to give appellant a job on the ranch, where he received his room and board, but little, if any, money.

Appellant was twenty-eight years old. Evelyn was fourteen at the time the offenses were alleged to have been committed.

Secondo Forgone also visited Dorothy in San Francisco and there met Sally Stanford. Both Dorothy Heber and appellant became more or less acquainted with the family of the girl before her disappearance.

Evelyn testified:

That she first met appellant, known to her as Merle Desmond, on her uncle Forgnone's ranch in August, 1939; that appellant wanted to put her in a girls' school at Belmont, California; he said his sister Sally would take care of her and that she would have a car and a pony later; that on September 13, 1939, appellant borrowed a car, met her on a country road, drove to a secluded spot and unsuccessfully attempted to attack her sexually.

She further testified that he induced her to meet him later the same day at a stage depot; that she did so, leaving a note to her parents, saying she would be back later. He induced her to take a Greyhound bus to Delhi, near Merced, and he followed on a Santa Fe bus, picked her up at Delhi, bought her ticket and took her to San Francisco. From the depot at San Francisco they walked by a place which he said was one of Sally's places. It had pictures in front which he said were to disguise it. He said he wanted to see Sally. He left her at a refreshment stand and was gone about fifteen minutes. When he came back he said Sally had received two telephone calls from Livingston and they couldn't go to any of Sally's places. They remained in San Francisco five nights, sleeping together in different hotels and apartments. One day, after he had left her alone for some time, he said he had phoned Sally, who told him Evelyn's father had telephoned and that if they caught her they were going to put her in a detention home, and that he was not going to telephone Sally any more because her line was tapped, but that if they became separated or he was arrested he told Evelyn to telephone Sally.

On September 18th he borrowed a car and told her they were going to Oregon, and that he would put her in a school there. They traveled about a day and a half, sleeping in the car; they ran out of gas at Cave's Junction, Oregon, and stayed overnight in a cabin at a camp ground. He left the car in a garage and they walked on for six days, sleeping together overnight at various places. Toward the last he called on some people he knew, but read in a newspaper about their disappearance and that Sally was in jail. He then said they should go to Mexico, where he would marry a rich woman he knew and he could pass her off as his daughter. Evelyn stated she was afraid that if she returned to California she would be put in a detention home, so she agreed to go to Mexico with him.

The last night in Oregon they camped in the woods, when the officers arrested them and took them back to Merced.

Pauline Andrews, the aunt of Evelyn, and an Emma Thompson testified that they went to San Francisco at the suggestion of Dorothy Heber, who said that perhaps Evelyn was in love with appellant and it might be better to let him marry her. On September 18th they went twice to the Stanford place in San Francisco and talked with both Sally Stanford and Dorothy Heber. They were first told that they should not have come there, that they should know what kind of place it was. On their second visit they were admitted after ringing the bell three times as directed by Dorothy Heber. They were told by Sally and Dorothy that officers had been all over the place, that Sally had been looking for appellant and Evelyn, that appellant was no good, had been in scrapes before and had cost Sally a lot of money, that he would show up when he was broke, that Sally had been caused plenty of trouble by his escapades and it had already cost her five thousand dollars, that Evelyn couldn't marry him as he was already married, that Sally was running a high-class house of prostitution and that she wouldn't have Evelyn in her place. They were also told by Dorothy Heber that they would have to stay there several days, that they were locked in and she had the key, but they "sort of forced their way" out, and eventually went back to their hotel.

Officers Jerry Desmond and M. M. Morse testified that they called at the Sally Stanford house on September 14th, and were told by Sally she did not know where Evelyn or her brother was, but that appellant had been there about two days previously and had borrowed ten dollars, which he said he needed to buy a uniform so he could take a job in Modesto, that he was infatuated with a little sixteen-year-old girl in Livingston and Sally understood he wanted to marry her, that her brother came again on September 13th and borrowed two dollars and that he never brought any girl to her place.

On his appeal from the substantive charges appellant contends:

(1) That the court erred in admitting in evidence the testimony of Pauline Andrews and Emma Thompson.

(2) That the court erred in admitting the testimony of witnesses Desmond and Morse.

(3) That the court erred in admitting evidence as to the character of the Sally Stanford premises in San Francisco.

(4) That the prosecuting attorney was guilty of prejudicial misconduct in his argument to the jury.

[1, 2] Within the limitations hereinafter expressed, the first contention is sound. Respondent claims that this testimony was admissible as consisting of acts and declarations of co-conspirators. But before acts and declarations of a co-conspirator, made out of the presence of the defendant, can be admitted in evidence, the existence of the conspiracy must first be proved by independent evidence. Furthermore, the acts and declarations must be in aid and furtherance of the common purposes or design of the conspiracy. People v. Linde, 131 Cal.App. 12, 20 P.2d 704; People v. Lorraine, 90 Cal.App. 317, 265 P. 893. Timely objection to the introduction of this evidence, as well as the testimony of witnesses Desmond and Morse, was made by counsel for appellant.

The People assert that at least a prima facie case of conspiracy was established by circumstantial evidence, by proving certain isolated facts, such as the placing of appellant upon the Forgnone ranch, the flight of appellant and Evelyn to San Francisco, the character of the premises operated by Sally, and the fact that appellant did visit Sally in San Francisco, and no doubt intended to take Evelyn there, temporarily at least, if his sister would permit it. But the sum total of the facts and circumstances revealed by the evidence are insufficient to produce, at most, more than a mere suspicion of guilt on the conspiracy charges.

[3] A prima facie case of conspiracy was not established and the bulk of the testimony of these witnesses was improperly admitted.

For identical reasons the second contention of appellant must be sustained so far as the acts and declarations of the alleged co-conspirators are concerned.

[4] Appellant's third contention is that reputation evidence was admitted erroneously to prove that the Stanford apartment was a house of prostitution, claiming that such evidence is only admissible in prosecutions under the provisions of section 315 of the Penal Code. The weight of authority is to the contrary. 9 Cal.Jur. 574; Demartini v. Anderson, 127 Cal. 33, 59 P. 207. This evidence was admissible in an attempt to prove defendant guilty of the charge laid in count II, to-wit: Abduction for the purpose of prostitution.

Appellant complains that the admission of all of the foregoing testimony was exceedingly harmful to him and that it constitutes reversible error. He urges that the story told by Evelyn is so fantastic and improbable that the jury might not have believed it had they not been prejudiced by some of the facts brought out by said testimony, and in particular, the following facts: That Busby was no good, that he had been in trouble before and had cost his sister a lot of money, and that his sister, Sally, was, in fact, the keeper of a house of prostitution. There is no merit in this contention. The girl's testimony shows a few minor discrepancies, such as usually mark the honest witness, but through its long rambling maze it carries conviction.

Furthermore, it is corroborated in many important particulars: By the testimony of the ticket sellers who sold the tickets on the bus, by the testimony of one James Di Bartolo, who saw appellant take the Santa Fe bus on September 13th and to whom appellant stated that he was going to San Francisco and that if Forgnone or any of the family asked for him to say he had not seen him; by the testimony of the stage driver who drove the runaways to San Francisco; by the testimony of the hotel clerk in a San Francisco hotel that a couple answering their description stayed there the night of September 13th; by the testimony of the man from whom appellant borrowed the car for the Oregon trip, on a pretext of temporary use; by the testimony of two witnesses at Cave's Junction, Oregon, both of whom saw appellant with a girl there on September 19th, and one of whom heard her asking to be returned to California while appellant wanted to take her to Mexico; by the testimony of Sheriff Cornell of Merced county as to appellant's admission of having taken Evelyn to the particular hotel in San Francisco, and by expert testimony as to the condition of the linen in the cabin at Cave's Junction, Oregon, and medical testimony as to the condition of the girl.

[5] The jury also had the right to consider the significance of the fact that appellant Busby never took the stand in his own defense.

[6] The jury having acquitted on counts III and IV and the trial judge having granted a new trial as to count II, the evidence erroneously admitted must be considered only in the light of its application to count I.

[7] In a close case there is little doubt that the admission of this evidence might be held to be reversible error, but in the instant case the evidence as to count I is so uncontradicted and so overwhelming that if appellant had been pictured by the evidence as a paragon of virtue, the jury could have reached no other verdict. The admission of this evidence has not resulted in any miscarriage of justice and was not reversible error. Cal.Const. art. VI, Sec. 4½.

There is no merit in appellant's fourth contention. The remarks of the prosecuting attorney which were assigned as misconduct are as follows: "This is something I hate to have to say; it is a regrettable situation, but it is true, and experience has shown it, and there isn't an experienced law enforcement officer in the state of California, the United States, or in the world, or any place, who doesn't recognize the fact, and it is a fact, that young girls of this age are taken for a special and specific clientele. It is regrettable, but they pay money for it and it is an actual fact."

[8] Counsel for appellant assigned the remarks as misconduct, asked the court to instruct the jury to disregard them and to declare a mistrial; whereupon the court ruled as follows: "The request to declare a mistrial will be denied. The record may show the assignment of error and the court will again instruct the jury not to accept any facts from the argument of counsel and if he states any facts that witnesses have not testified to, you are to form your opinion from the testimony produced here."

The remarks may be classed as rhetorical embellishment which overstepped the bounds of propriety, but considered in connection with the remarks of the trial judge and limiting their application to the offense as charged in count I, they may not be regarded as prejudicial misconduct.

Appellant further makes the following contentions:

(1) The court erred in commending the jury on finding defendant guilty of the substantive charge.

(2) The court erred in its instructions as to the burden of proving insanity.

The language of the court complained of in the first contention is as follows: "I usually thank every jury, but I want to particularly thank you because this was a very difficult case to try. There were many features of it particularly disagreeable and I really do appreciate your assistance in the matter and the intelligence shown by the jury is of a very high order and I appreciate that, also."

These remarks were made by the trial judge at the conclusion of the trial on the substantive charges and before the trial of the insanity issue. The court then ordered the jury to come back on the following Thursday and the following colloquy ensued:

"A Juror: Do we have to come back again?

"The Court: Yes, but the issue will be more pleasant to try. It is simply the question of not guilty by reason of insanity. You are discharged—excused, rather, until Thursday morning at 10:00 o'clock. It is a long while to Christmas, you will have days to shop."

Appellant contends that the language of the court expressed approval of the jury's verdict and had a tendency to minimize the importance of the insanity issue. As authority they cited People v. Pokrajac, 206 Cal. 259, 274 P. 63, where somewhat similar comment made by the trial judge was held to be reversible error.

[9, 10] Our legislature has seen fit to provide for separate trials on substantive charges and the issue of insanity. In so doing it must be assumed that it believed that our juries would have sufficient intelligence to know which issue they were trying. In an ordinary case, to say that a trial judge's comment that the jury's verdict on the substantive charge was "intelligent" would be understood by the jury to mean that the judge thought the defendant was sane, is to ascribe to the jury a lack of ability to understand the issues or to follow the instructions of the court. It is only in a case where the evidence on the issue of insanity is exceedingly close and a miscarriage of justice has occurred that such a comment could be held to be reversible error. People v. Pokrajac, supra, is just that kind of case. There the death penalty had been made mandatory by the verdict of the jury before it had had opportunity to hear testimony as to the mental condition of the defendant. The evidence on the insanity issue was conflicting and the facts and circumstances surrounding the commission of the offense were such as to make it appear probable that the defendant was insane at the time.

In the instant case appellant's own expert witness refused to pronounce him either medically or legally insane. The two cases can be distinguished in other essential particulars.

[11] Furthermore, since the Pokrajac case was reported, the amendment to the California Constitution, permitting the trial judge to comment upon the evidence, has gone into effect. Cal.Const., art. VI, sec. 19. It has been held that this right of comment even permits a trial judge, in proper cases, to express an opinion as to the guilt of the defendant. People v. Ottey, 5 Cal.2d 714, 56 P.2d 193.

[12] The fact that the trial judge's remarks were made before the trial on the insanity issue rather than during its progress, gives rise to no distinction as the trial on the substantive charges and the insanity issue constitute but a single trial. People v. Troche, 206 Cal. 35, 273 P. 767.

The jurors were fully and correctly instructed as to the effect that they were the sole and exclusive judges of the effect and value of evidence and of credibility of witnesses. The remarks of the trial judge did not constitute reversible error.

The second contention of appellant in reference to the insanity issue is not tenable.

The instructions complained of were given at the People's request and read as follows:

"In this case the defendant Merle Busby is presumed to be sane. This presumption may be overcome by evidence to the contrary, the burden of proof being on defendant. In other matters the accused has only the burden of raising a reasonable doubt in the minds of the jurors. If, in this case, the presumption of sanity has not been overcome by a preponderance of all the evidence, it is your duty to find the defendant to have been sane on said date."

"The court instructs the jury that you are not to consider whether or not the defendant is insane at the present time, but you are to consider him as now sane; a person charged with a crime cannot be legally tried for such crime unless he be sane at the time of the trial. The defendant has presented the issue to you that at the very time of the alleged commission of the offenses, he was insane. The burden of proving his insanity at that time rests upon him, because the law presumes he was then sane."

Appellant claims that the trial court committed reversible error in instructing the jury that the burden of proof was on the defendant to establish his insanity and in support of his position he cites People v. Hickman, 204 Cal. 470, at 477, 268 P. 909, at page 912, 270 P. 1117.

[13, 14] It is true, as urged by appellant, that the burden of proving sanity is on the prosecution, but that burden "is met in the first instance by the presumption of sanity which the law raises and which must prevail until it is overcome. The rule relating to the defense of insanity does not shift the burden of proof from the People to the defendant, but only shifts the burden of introducing evidence and declares the amount or quantum of evidence which he must produce to overcome the presumption and show his insanity." People v. Hickman, supra. The court also gave an instruction in conformity with the law as stated in People v. Hickman.

[15] The question is highly academic and "is of little practical importance so long as the defendant's plea must be established by a preponderance of all the evidence". People v. Bradshaw, 5 Cal.App. 2d 528, 43 P.2d 317. It is unreasonable to assume that the giving of this instruction misled the jury to the prejudice of defendant.

[16, 17] Little need be said in reference to the appeal of the People from the order granting a new trial as to count II. There is very little substantial evidence in the record to support the jury's verdict. The discretion of the trial court to grant a new trial is very broad and will not be disturbed by a reviewing court except for an abuse of discretion. People v. Canfield, 173 Cal. 309, 156 P. 1046; People v. Cesena, 18 Cal.App.2d 727, 64 P.2d 732.

The action of the trial court in granting the motion for a new trial was proper.

The judgment and the orders appealed from are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

40 Cal.App.2d 143

PEOPLE v. WARD et al.

Cr. 1729.

District Court of Appeal, Third District, California.

July 17, 1940.

1. Robbery 🔑24(1)

Evidence showing that defendant planned and participated in robbery of his own mistress by means of trickery supported conviction of robbery of second degree. Pen. Code, § 211.

2. Criminal law 🔑511(4)

In prosecution for robbery against defendant whose alleged accomplice entered defendant's apartment and robbed defendant's mistress, evidence that defendant and alleged accomplice had been friends and associates for eight years or more, that they were both ex-convicts, that they met and conferred on early morning before robbery occurred and again after robbery, that defendant deceived mistress about reporting robbery to police officers, and that defendant failed to disclose alleged accomplice's identity when he was first confronted with alleged accomplice by officers, constituted sufficient "corroboration" of alleged accomplice's testimony. Pen.Code, §§ 211, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

3. Criminal law 🔑511(2)

Evidence corroborating testimony of an accessory to a crime is adequate if it tends to connect defendant with commission of offense, although, standing alone, it would be entitled to little weight. Pen.Code, § 1111.

4. Criminal law 🔑511(3)

In considering weight of evidence corroborating testimony of an accessory to a crime, the entire conduct of the accused in connection with the offense may be considered. Pen.Code, § 1111.

5. Criminal law 🔑722(3)

In prosecution for robbery against defendant whose alleged accomplice entered defendant's apartment and robbed defendant's mistress, district attorney's reference in his argument to defendant and alleged accomplice as old friends who had served time together in state prison was warranted by evidence.

6. Criminal law 🔑722(3)

In prosecution for robbery against defendant whose alleged accomplice entered defendant's apartment and robbed defendant's mistress, district attorney's reference in his argument to defendant's debauchery and treachery toward his mistress merely expressed district attorney's construction of the evidence, and did not constitute reversible error.

7. Criminal law 🔑720(6)

In prosecution for robbery against defendant whose alleged accomplice entered defendant's apartment and robbed defendant's mistress, district attorney's assertion in his argument that he had no doubt that these two men had conceived many other crimes for which they had not been apprehended merely amounted to an inference reasonably drawn from evidence of criminal records and conduct of defendant and alleged accomplice, and did not constitute reversible error.

8. Criminal law 🔑1037(2), 1055

Where defendant failed to except to challenged statements of district attorney in

his argument, and trial court was not asked to instruct jury to disregard them, and it was not apparent that effect of such statements, if erroneous, could not be overcome or removed by proper instructions, defendant could not complain of prejudicial misconduct for first time on appeal.

9. Robbery ⚷15

In prosecution for robbery against defendant whose alleged accomplice entered defendant's apartment and robbed defendant's mistress, where it appeared that defendant planned and helped to execute the robbery, it was not necessary that defendant himself should have personally resorted to force or that he should have acted in a manner to create fear on part of owner of property, but the force and fear exercised by accomplice would be imputed to defendant. Pen.Code, § 211.

10. Criminal law ⚷829(1)

Trial court did not err in rejecting instruction requested by defendant, where rejected charge was fully covered by other instructions which were given to jury.

11. Criminal law ⚷786(7)

In prosecution for robbery against defendant whose alleged accomplice entered defendant's apartment and robbed defendant's mistress, defendant's requested instruction that untruthful statements of defendant as to identity of person who committed robbery were insufficient upon which to sustain a conviction was properly refused as misleading, where defendant knew accomplice and must have recognized him as perpetrator of the crime. Pen.Code, § 211; Code Civ. Proc. § 2061, subd. 3.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Homer C. Ward and others were charged with robbery, and, from judgment convicting named defendant of robbery of second degree, named defendant alone appeals.

Affirmed.

Homer C. Ward, in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants were jointly charged under section 211 of the Penal Code with robbery committed on February 4, 1940, by feloniously taking from the person and immediate presence of Mae Fashbaugh her Elgin wrist watch, one platinum diamond ring and another gold ring containing a black stone. In a second count of the information the defendants were also charged with burglary. The second count was dismissed. Before the time of trial Parkinson pleaded guilty to the charge of robbery. He was called as a witness in behalf of the prosecution and testified against the appellant. The jury disagreed with respect to the guilt of Williamson, but rendered a verdict finding the appellant, Homer C. Ward, guilty of robbery of the second degree. His motion for a new trial was denied. A judgment of conviction of robbery of the second degree was entered against the appellant and he was sentenced to imprisonment at Folsom for the time prescribed by law. From that judgment and from the order denying a motion for new trial this appeal was perfected.

It is contended the verdict and judgment against the appellant are not supported by the evidence chiefly for the alleged reason that the testimony of Parkinson, the accomplice, is not adequately corroborated as required by section 1111 of the Penal Code. It is also asserted the court erred in its rulings upon the introduction of evidence in the course of the trial, and in refusing to give to the jury certain instructions which were offered by the appellant. Finally, the district attorney is charged with prejudicial misconduct in his argument to the jury.

[1] The verdict and judgment are adequately supported by the evidence. The record leaves little doubt that the appellant and Parkinson planned to rob Mae Fashbaugh in the exact manner in which the crime was perpetrated. Parkinson and Ward were old friends, associates and ex-convicts. The defendants Ward and Williamson had been rooming together with Mae Fashbaugh, a waitress, at an apartment house in Sacramento for several months. Parkinson roomed with another associate at a hotel in the same city. The appellant and Parkinson had been acquainted for more than eight years. They frequently met at the Bartenders' Union and elsewhere. About 4 o'clock on the morning of the robbery, the appellant and Williamson left their apartment and met Glenn Parkinson at the Bartenders' Union where they drank

and conversed together. The evidence did not satisfy the jury that Williamson participated in the plan to perpetrate the robbery, and the jury failed to convict him of the charge. But Williamson corroborated the fact that he and the appellant met Parkinson there at that time, and that Ward and Parkinson then conversed together for about twenty minutes. Parkinson testified that Ward then told him he had a girl in his apartment who had just "knocked off somebody for a lot of stones", and advised him to go to the apartment and steal the jewelry. The robbery was then carefully planned between them. Ward handed Parkinson his key to the apartment, and he and Williamson returned to their rooms where they arrived about fifteen minutes ahead of Parkinson. Mae Fashbaugh was then asleep in a bed in appellant's apartment. When Parkinson arrived at about 5 o'clock that morning, he rang the outside doorbell. Williamson went downstairs and admitted him. Parkinson followed him upstairs into the bedroom where Ward stood awaiting them. Williamson testified that Parkinson had his right hand thrust into his side coat pocket which protruded as though it contained a revolver. The witness claimed to have seen a shiny object in that pocket. Parkinson was not masked. Ward, who had known him intimately for years, could not have failed to recognize him. Parkinson gruffly informed the occupants of the room that he meant business and commanded them to "stick-em-up". They promptly obeyed the order and the men stood with their hands elevated while Parkinson stripped the rings from the woman's fingers. Parkinson then pocketed a wrist watch which he found on the mantel, and, threatening to shoot anyone who attempted to follow him, he left the room and went to the Royal Club.

Ward and Williamson simulated surprise at Parkinson's arrival and conduct. Neither of them disclosed his identity. The woman was an innocent victim of the plot. She directed Ward to notify the police officers of the robbery. Ward advised her not to tell the landlady about the incident. He claimed that he was acquainted with an officer and that he would immediately go to police headquarters and report the robbery. He promptly left the apartment, but failed to report the crime. He first went to Parkinson's room at the hotel in search of his confederate. Finding his roommate asleep, he awakened him, and upon inquiry he was told that Parkinson had not been in his room that night. Ward then left and went to the Royal Club, where he found Parkinson. A taxi driver who took Ward to that club testified that he saw both defendants at that resort. Ward demanded that he be shown the jewelry. Parkinson handed him the rings, one of which he dropped on the floor. That ring was found after considerable search. They quarreled over the disposition of the plunder. After several drinks were consumed, they parted and Ward returned to his apartment. He told Mae Fashbaugh that he had notified the officers of the robbery and that they would soon arrive to make an investigation. He did not tell her who the man was that perpetrated the robbery. He then lay down on the bed and went to sleep.

When Mr. Ward awoke, Mae Fashbaugh told him the officers had not arrived. He pretended to fume over their neglect, but finally reluctantly consented to accompany her to the police office. When they arrived he first assumed to be angry because they had failed to respond to his request to investigate the crime. They emphatically denied that he had ever reported the robbery. He first told them that he had personally visited their office to report the crime, but upon critical examination he finally admitted that he did not personally visit their office but insisted that he did report the affair over the telephone. After a careful examination of their records the officers positively denied that any report of the robbery had been made to their office by telephone or otherwise. After an investigation the three defendants were arrested and jointly charged with the robbery. On the morning of the trial Parkinson pleaded guilty and told the entire story on the witness stand. He summed up his story by saying that "He (Ward) told me what to do, and I went up and did it."

The jury disagreed with respect to the guilt of Williamson. Ward was found guilty of robbery of the second degree. From the judgment which was accordingly rendered and from the order denying a new trial he has appealed. There is no reasonable doubt of the guilt of the appellant as charged. Ward evidently planned and participated in the robbery of his own mistress by means of trickery.

[2] The evidence of the accomplice, Glenn Parkinson, is adequately corroborated by numerous circumstances fulfilling the requirement of section 1111 of the Penal Code. The evidence from witnesses other than Parkinson, shows that he and the appellant were friends and associates for eight years or more. They were both ex-convicts. They met and conferred together in the Bartenders' Union on the early morning before the robbery occurred. They met at the Royal Club after the robbery and discussed the affair. Ward deceived his mistress about reporting the robbery to the police officers. He told her not to inform the landlady regarding the affair. After the robbery Ward went to the room of Parkinson in search of his confederate. When he was informed he had not been in his room that night, he sought and found him in the Royal Club where they quarreled over the disposition of the jewelry. Ward failed to report the robbery until his mistress forced him to go with her to police headquarters for that purpose. He had been intimately acquainted with Parkinson for several years. He was confronted by Parkinson in the bedroom. Parkinson was not masked and yet Ward failed to disclose his identity. When he was first confronted with Parkinson by the officers, he denied that he was the robber who perpetrated the crime. These and many other circumstances disclosed by the record adequately meet the requirements of section 1111 of the Penal Code.

[3, 4] It is true that evidence corroborating the testimony of an accessory to a crime, which merely creates a suspicion of the defendant's guilt, is insufficient to fulfill the requirements of section 1111 of the Penal Code. But it is adequate for that purpose if it tends to connect him with the unlawful commission of the offense, even though, standing alone, it would be entitled to little weight. In considering the weight of such corroborating evidence the entire conduct of the accused in connection with the offense may be considered. People v. Yeager, 194 Cal. 452, 473, 229 P. 40; People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907; People v. Nikolich, 93 Cal.App. 356, 269 P. 721; People v. Tibbitts, 35 Cal.App.2d 669, 672, 96 P.2d 812. In the present case, the conduct of the appellant, as above related, furnishes strong evidence of his guilt.

[5-7] We are of the opinion the challenged statements of the district attorney, which were uttered in the course of his argument to the jury, do not constitute reversible misconduct. Moreover, the appellant failed to object to any of these statements at the trial of the case and the court was not requested to instruct the jury to disregard them. The arguments of counsel are not included in the transcript on appeal. The challenged statements of the district attorney which are quoted in appellant's opening brief appear to be reasonable inferences drawn from the evidence adduced. For instance, the reference to Ward and Parkinson as old friends who had served time together in state prison was warranted from the acknowledged fact that they had been friends and acquaintances for over eight years, and that both of them had served time in state prison. For the purpose of impeachment, the appellant was asked and conceded that he had been previously convicted of second degree robbery. The argument complained of could not have been prejudicial. The reference to the appellant's debauchery and treachery toward his mistress, Mae Fashbaugh, merely expresses the district attorney's construction of the evidence. The evidence clearly shows that she was living in his apartment as his mistress. His conspiracy and participation in the robbery of his own mistress certainly merited the condemnation with which the district attorney characterized the transaction. The other assertion that the prosecuting officer had no doubt in his mind "that these two men, Ward and Parkinson, conceived many other crimes", for which they had not been apprehended, merely amounted to an inference reasonably drawn from the evidence of their criminal records and conduct. The appellant himself called Parkinson "an ex-convict". The very language employed in the alleged statement shows that the district attorney did not declare as a fact that they had "conceived many other crimes". He merely said that from their conduct in this transaction he "had no doubt" they had conceived other crimes for which they had not been apprehended. The jury must have known that was merely the speculation of the district attorney. We do not commend such extravagant statements in the course of arguments to juries, but under the circumstances of this case, we are satisfied it was neither prejudicial nor reversible error.

[8] Since the appellant failed to except to those challenged statements, and the court was not asked to instruct the jury to disregard them, he may not complain of prejudicial misconduct on that account for the first time on appeal. The authorities are uniform to the effect that unless it is apparent that the effect of challenged prejudicial statements to a jury cannot be overcome or removed by proper instructions, they may not be reviewed on appeal in the absence of timely objections thereto and proper requests for the court to instruct the jury to disregard them. People v. Swenson, 28 Cal.App.2d 636, 641, 83 P.2d 70; Rogers v. Foppiano, 23 Cal.App.2d 87, 95, 72 P.2d 239; 24 Cal. Jur. 746, § 29; 8 Cal.Jur. 621, § 602. It has been said that a defendant may not silently sit and listen without protest to improper argument against him, speculating on the hope of receiving a favorable verdict, and then, for the first time, on appeal, assign the statements as reversible error.

A motion for diminution of the record to incorporate the argument of the district attorney in the transcript in this case was denied, for the reasons that it did not appear the appellant had objected to the challenged statements at the trial and that he failed to ask the court to instruct the jury to disregard them. Not only were the statements mere reasonable deductions to be drawn from the evidence, but, if they be deemed to be erroneous, it does not appear their effect upon the jury would not have been removed by proper instructions to disregard them. They do not constitute reversible error.

[9] We find no error in the rulings of the court upon the introduction of evidence during the trial of the case. The appellant has failed to direct our attention to any such rulings which we deem to have merit. Under that heading he asserts there is an absence of evidence that the appellant personally performed any act constituting an exercise of "force" or which had the effect of creating "fear". The evidence clearly shows that the jewelry was forcibly taken from the owner by Parkinson by means of fear. It was not necessary that the appellant himself should have personally resorted to force or that he should have acted in a manner to create fear on the part of the owner of the property, since he planned and helped to execute the crime of robbery. The force and fear exercised by Parkinson, under the circumstances of this case, is imputed to the appellant.

[10] The court did not err in rejecting the instruction offered by the appellant to the effect that "circumstances of suspicion" are insufficient upon which to base a verdict of conviction. This proffered instruction was directed toward the alleged lack of evidence corroborating the testimony of the accomplice to the crime. It is a well-known principle that an accused person may not be convicted upon mere surmise or suspicion. It is also true that evidence corroborating the testimony of an accomplice, under section 1111 of the Penal Code must amount to more than mere suspicion. The rejected charge was fully covered by other instructions which were given to the jury. For instance, the jury was specifically told the testimony of an accomplice should be "viewed with distrust"; that corroboration of an accomplice "is not sufficient if it merely shows the commission of the offense or the circumstances thereof"; that a defendant is presumed to be innocent until the contrary is proved "beyond a reasonable doubt"; that to establish the guilt of a person by circumstantial evidence, it must be consistent with his guilt and "inconsistent with any reasonable theory of his innocence, and must show his guilt beyond a reasonable doubt"; that "this case is to be tried only on the evidence which is before you, *and not on suspicions*", and that "if you entertain a reasonable doubt as to the guilt of the defendant, *you should vote for acquittal*". It was therefore not error to reject the instruction offered by the appellant.

[11] The appellant offered an instruction which was refused, to the effect that "untruthful statements * * * as to the identity of the person" who committed the robbery, are insufficient upon which to sustain a conviction. That charge is an incomplete statement of the law and it is misleading. It was properly rejected. The appellant knew Parkinson and must have recognized him as the perpetrator of the crime. The deliberate concealing of the identity of that man was a material fact tending to show the guilt of the appellant. If the appellant wilfully swore falsely regarding the identity of Parkinson, the jury would be required to distrust him in all of his testimony. Sec. 2061, subd. 3, Code Civ.Proc.; 8 Cal.Jur. 352, sec. 392.

Finally, the appellant complains of the refusal to give an instruction offered by him that, "The law does not permit you to indulge in *speculation or conjecture,* but permits the drawing of such inferences only as may be reasonable." This instruction was sufficiently covered in the charge which was given to the jury, as follows: "The law will not permit jurors to be governed by mere sentiment, *conjecture,* sympathy, passion or prejudice. *A verdict founded upon * * * conjectures would be a false verdict."* It was therefore not error to reject this proffered instruction.

We are satisfied the appellant received a fair and an impartial trial, and that there was no miscarriage of justice in his conviction of robbery of the second degree.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

* * *

40 Cal.App.2d 187

PEOPLE v. TORP.

Cr. 1732.

District Court of Appeal, Third District, California.

July 18, 1940.

1. Embezzlement 🔑30

Any legally recognizable interest is sufficient to sustain an averment of ownership in indictment for grand theft. Pen.Code, §§ 484, 952.

2. Indictment and Information 🔑110(13, 15, 18)

While the crimes of larceny, embezzlement and obtaining money under false pretenses still retain their specific elements as far as proof is concerned, notwithstanding consolidation of such crimes under charge of grand theft, they may, under statute, be set forth in words of the enactment or in any words sufficient to give accused notice of offense with which he is charged. Pen.Code, §§ 484, 503, 952.

3. Embezzlement 🔑26

An indictment alleging that defendant was intrusted by a certain person with specific sums of money for express purpose of paying sums to a third party, that defendant did not pay such sums to third party, but willfully, in violation of trust, appropriated money to his own use was sufficient to charge offense of grand theft. Pen.Code, §§ 484, 503, 952.

4. Embezzlement 🔑44(1)

Evidence that individual gave money to defendant for purpose of paying off a mortgage to third party, that defendant was conversant with status of property and had possession of papers to clear title but retained money instead of paying mortgage, warranted conviction for grand theft. Pen.Code, § 484.

5. Embezzlement 🔑23

In prosecution for grand theft, it was not necessary to establish legal title to money which was paid by individual to defendant, it being sufficient if money was given to defendant by individual, and that it was not a gift or loan but a trust fund for a specific purpose, and defendant could not, in defense of his act, raise question of title as between others where defendant did not have title to money and his possession thereof was for a limited purpose only. Pen.Code, § 484.

6. Witnesses 🔑270(2)

In prosecution for grand theft of money paid over to defendant to satisfy a mortgage to third party, it was not error to limit defendant's cross-examination of a witness where examination was intended to show to whom money belonged and whether defendant was entitled to an offset for previous transactions, since such matters were immaterial. Pen.Code, § 484.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Casper N. Torp was convicted of grand theft, and he appeals.

Affirmed.

Carl L. Christensen, Jr., of Eureka, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was indicted and subsequently convicted of grand theft, and from the judgment of conviction and order denying a new trial this appeal is prosecuted.

In the first count of the indictment it is alleged:

"* * * Casper N. Torp was entrusted by Dorothy St. Louis Austin and W. G. Austin, her husband, with the sum of Four Thousand Five Hundred Dollars ($4500.00) * * * for the express purpose of paying the said sum of Four Thousand Five Hundred Dollars ($4500.00) * * * to Emilie H. Gaine; that the said Casper N. Torp did not pay said sum * * * or any part thereof, to the said Emilie H. Gaine, but * * * did wilfully, * * * and in violation of his trust, appropriate said sum * * * to his own use."

The second count is like the first count except it alleges a different amount and different dates.

The evidence discloses that Mary Costa was the owner of a tract of land which was subject to a mortgage for $7,400 held by Mr. and Mrs. Gaine. In January, 1937, Mr. and Mrs. Austin desired to purchase this land and called upon Torp, an attorney at law of Arcata, who had in his possession all the papers necessary to a satisfaction of the deal and was familiar with all the facts concerning this property. In April, 1937, it was agreed that the Austins would buy the property for $7,600, which would pay off the Gaine mortgage and leave a small balance for the owner. All the negotiations took place in the office of Torp, and when the arrangements had been finally agreed upon the Austins gave to Torp $50 in cash and four checks totaling $7,550, drawn upon their account. At the time of the delivery of these four checks Torp gave to Mrs. Austin a deed of the property from Mrs. Costa, the owner, and a satisfaction of the mortgage from Mr. and Mrs. Gaine. Mrs. Austin then returned the satisfaction to Torp, asking him to record it for her. For some reason not clear from the record, this satisfaction was not recorded but was deposited by Torp with a local title company. Torp cashed the several checks and retained the proceeds thereof. After cashing the checks Torp told Mr. and Mrs. Gaine that he could not pay the amounts due them in satisfaction of their mortgage until an action to quiet title, which had been filed, had been determined, telling them, however, that upon completion of the proceedings the entire sum would be paid them. After waiting several months Mr. Gaine obtained from the title company the satisfaction of the mortgage, which had been left with the company by Torp. In November, 1937, the suit to quiet title was concluded and Gaine demanded of Torp his money, and then for the first time learned that the entire sum had been converted.

Two points are urged by appellant upon this appeal,—first, that the indictment is insufficient in that it does not allege to whom the fiduciary relationship was owing, and secondly, that the court erred in certain rulings upon admissibility of evidence and in its instructions to the jury.

It is the contention of appellant, raised by demurrer, motion to set aside the indictment, and to strike, and in arrest of judgment and on motion for a new trial, that the indictment in merely charging that appellant was "entrusted" by Dorothy St. Louis and W. G. Austin with certain moneys to be paid over to Emilie H. Gaine failed to state a public offense and was wholly insufficient in that there was no allegation of fact as to the capacity in which appellant received the money, or to whom the money belonged, or to whom he owed any duty.

Appellant cites several cases as authority for the position that the existence of a fiduciary relationship must be pleaded and proved: People v. Steffner, 67 Cal.App. 23, 227 P. 699; People v. Riccardi, 50 Cal. App. 427, 195 P. 448; People v. Kirwin, 87 Cal.App. 783, 262 P. 803.

A careful examination of the cases does not support the claim of appellant, at least to the extent he claims.

[1] In People v. Steffner, supra [67 Cal.App. 23, 227 P. 701], the allegations of the information were that defendant was "entrusted" by the complaining witness with a specified sum and "then and there received the said * * * money in trust as aforesaid, and while so intrusted * * * did * * * appropriate to his own use the said money, not in the due and lawful execution of said trust * * *." The court there points out that the complaining witness "entrusted" the money to defendant, and that defendant "received the said property and money in trust as aforesaid, and while intrusted and in possession of said property, * * * fraudulently", etc. Under such allegations the court held it was clear that defendant received and held the money as trustee. While it was necessary, the court said, to

state the fiduciary relationship between the defendant and the owner of the property, it was not essential that defendant be called in the information the bailee, trustee or agent, or to designate defendant by any particular name, provided the facts constituting the crime were fully stated. Also, the title to the property involved need not be absolute, for any legally recognizable interest is sufficient to sustain an averment of ownership in an indictment for grand theft. People v. Treadwell, 69 Cal. 226, 10 P. 502. Embezzlement itself is defined in section 503 of the Penal Code, as "the fraudulent appropriation of property by a person to whom it has been entrusted".

In People v. Kirwin, supra, it is held that an information charging defendant was the agent and bailee is sufficient without showing the character and purpose of the bailment.

[2] The several cases cited by appellant were decided prior to the consolidation of the crimes of larceny, embezzlement and obtaining money under false pretenses, under the charge of grand theft as defined in section 484 of the Penal Code (1927). While of course these crimes still retain their specific elements as far as proof is concerned, they may, under sections 484 and 952 of the Penal Code, be now set forth "in the words of the enactment * * * or in any words sufficient to give the accused notice of the offense of which he is accused".

In People v. Hill, 2 Cal.App.2d 141, 37 P.2d 849, it was held that under that method of pleading, embezzlement is charged as grand theft.

[3] The indictment clearly charged that defendant was entrusted by Dorothy St. Louis Austin with specific sums of money for the express purpose of paying these sums to Emilie H. Gaine; that he did not do, but in violation of his trust appropriated the money to his own use. It would seem that a clearer statement, or more specific details would not be necessary to fully inform appellant of the nature of the charge against him.

[4] Appellant also claims there is no evidence that the money was entrusted to him for any specific purpose. The indictment alleges the money was entrusted to Torp for an express purpose, and the record discloses that it was paid over by the Austins to pay off a mortgage; that appellant, as an attorney, was conversant with the status of the property and had in his possession the papers to clear the title and make the transfer of ownership from Mrs. Costa to Austin and to pay off the Gaine mortgage, and he received the money for that purpose. He gave the Austins a deed to the property and a satisfaction of mortgage, but failed to pay off the mortgage and to clear the title. Not only is the testimony of the Austins and the Gaines clear as to all the facts, but a letter in evidence from Torp bears out all they claim as follows:

"April 19, 1937

Mr. C. F. Gaine,
5457 Broadway
Oakland, California.
Dear Mr. Gaine:

The transaction for the sale of a portion of the Costa property has been closed, but the title Company encountered more difficulty than was expected relative to the title, and they have instructed that proceedings be taken under the so-called 'Twenty-year Act' to quiet the title to the property. This procedure will take about ten weeks. The papers have all been executed and the buyers have placed $7500.00 with me in escrow to be paid to you as soon as the title is cleared.

Trusting the matter will go through according to schedule, and that you will let me know if you desire any further information relative to the matter, I am,

Yours very truly,
Casper N. Torp."

[5] As to criticism directed toward certain instructions, it is the theory of appellant, apparently, that it was necessary to establish the actual legal title to the money paid by the Austins to Torp. That was unnecessary. It is sufficient if the money was given to appellant by Austin, and the evidence shows it was not a gift or a loan but was a trust fund for a specific purpose. Whether the legal title to the money was in the Austins, the Gaines or Mrs. Costa, is immaterial in this criminal proceeding. As far as the defendant is concerned he had no legal title to the money and his possession was for a limited purpose only. He cannot, in defense of his act, raise the question of title as between others. Instructions, therefore, along those lines, were properly refused.

[6] Also appellant claims the court erred in limiting his cross-examination of Mr. Gaine. That examination was likewise to show to whom the money belonged, and whether or not appellant was entitled to an

offset for previous transactions. Those were matters not pertinent in this criminal action. The money, not the property of appellant, was paid over to him to satisfy a mortgage; it was not so applied.

We find no errors, and the judgment and order are affirmed.

I concur: THOMPSON, J.

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40 Cal.App.2d 204

PEOPLE v. MITCHELL.

Cr. 2103.

District Court of Appeal, First District, Division 1, California.
July 22, 1940.

1. Criminal law ⇨1159(3)

It is not the function of the reviewing court to weigh conflicting evidence.

2. Criminal law ⇨747

The weight to be given conflicting evidence in criminal prosecution is for the jury in reaching its verdict and the trial judge in passing on a motion for new trial.

3. Assault and battery ⇨92

Evidence that accused struck prosecuting witness over the head with a bottle inflicting injuries sustained conviction of assault by means of force likely to produce great bodily injury as against contention that accused struck prosecuting witness in self-defense. Pen.Code, § 245.

4. Indictment and Information ⇨110(3)

An information which charges an offense in the exact terms of the statute is sufficient and accused is not entitled to detailed allegation setting forth particular circumstances.

5. Indictment and Information ⇨110(17)

An information charging in words of statute that accused at a certain time and place did willfully and unlawfully assault the person of prosecuting witness by "means of force likely to produce great bodily injury" was sufficient as against contention that it was fatally defective in failing to allege kind or character of force used by accused in commission of alleged assault. Pen.Code, §§ 245, 952.

6. Criminal law ⇨1186(4)

Under constitutional provision providing that no judgment shall be set aside for error in pleading unless the error complained of has resulted in a "miscarriage of justice", the erroneous overruling of a demurrer to an information or the erroneous denial of a motion in arrest of judgment based on alleged insufficiency of the pleading is not reversible error unless prejudice is shown. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

7. Criminal law ⇨170

Where accused first struck prosecuting witness on the head with his fist and inflicted a cut and subsequently struck prosecuting witness on head with a bottle, information charging accused with assault by means of force likely to produce great bodily injury was not insufficient as depriving accused of the protection of the constitutional provision against "double jeopardy" where it clearly appeared that accused was prosecuted for assault with the bottle, and if he were prosecuted again for such offense he could plead conviction and establish identity of the cases by evidence. Pen.Code § 245; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Jeopardy".

8. Criminal law ⇨170

Where accused first struck prosecuting witness with his fist on forehead and inflicted a cut and subsequently struck prosecuting witness on head with a bottle and was charged by information with assault by means of force likely to produce great bodily injury, information was not insufficient as depriving accused of constitutional guaranty against "double jeopardy" on theory that two assaults were committed and information failed to identify which of two assaults it attempted to charge, since the two blows struck constituted but one assault. Pen.Code, § 245; Const. art. 1, § 13.

◆

Appeal from Superior Court, Monterey County; H. S. Shaffer, Judge.

J. E. Mitchell was convicted of an assault by means of force likely to produce great bodily injury, and he appeals from the judgment of conviction and from the order denying his motion for new trial and from the order denying his motion in arrest of judgment.

Judgment and orders affirmed.

A. E. Warth, of Salinas, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary and Dennis Hession, Deputies Atty. Gen., for respondent.

PETERS, Presiding Justice.

Mitchell was convicted by a jury of an assault by "means of force likely to produce great bodily injury", Sec. 245, Pen. Code, and sentenced to one year in the county jail. He appeals from the judgment of conviction, from the order denying his motion for a new trial, and from the order denying his motion in arrest of judgment. On this appeal he contends that the evidence is insufficient to support the verdict, that the court erred in overruling his demurrer to the information, and erred in denying his motion for arrest of judgment.

As to the first contention, a reading of the record demonstrates that there is substantial credible evidence to support the verdict.

Appellant Mitchell, at the time here in question, was a member of the city council of Salinas, and, before that, had been chief of police in McKittrick. He was forty-seven years of age, was six feet five inches tall, weighed about two hundred and forty pounds, and had been a former professional heavyweight prize fighter.

On July 9, 1939, at about 9 p. m., Mitchell, a Miss Whitaker, and Mr. and Mrs. Ed Storm, arrived at the Bridge Cafe, located a few miles from Salinas in Monterey county, for a dinner party. Ed Storm was thirty-one years of age, weighed two hundred and twenty pounds, and was a former college and professional football player. It is an admitted fact that both Storm and Mitchell were sober at all times here involved.

At about 9:30 p. m. the prosecuting witness, Lynn Dayhuff, arrived at the cafe with his wife, four other adults, and a child. This group was celebrating the birthday of one of the party. Dayhuff was forty-three years of age and weighed one hundred and sixty pounds. Although Dayhuff and the members of his party denied that they had had anything to drink prior to their arrival at the cafe, all of the disinterested witnesses testified that the adult members of the party showed evidences of having been drinking. Admittedly they had two highballs each after their arrival at the cafe.

At about 10 p. m. Storm and Mitchell visited the men's restroom. Upon leaving that room they met Mrs. Dayhuff and Mrs. Thompson, a member of the Dayhuff party, in the hallway. Storm and Mitchell apparently believed that the two women were about to enter the men's room in the mistaken belief it was the women's lounge. Some remark was made that Mrs. Dayhuff considered to be insulting. Storm and Mitchell returned to their table. A short time thereafter Dayhuff accosted Mitchell on the dance floor and asked him why he had insulted Mrs. Dayhuff. Appellant replied that he had not insulted anyone, but, if Mrs. Dayhuff so construed what had been said in the hallway, he apologized. This seemed to satisfy Dayhuff, and the parties returned to their respective tables.

A short time thereafter Mitchell and Storm observed the members of the Dayhuff party approaching the Mitchell table. They got up and went to meet them. Dayhuff again accused Storm and Mitchell of insulting his wife and Mrs. Thompson. Dayhuff and Storm began to push each other around, some names were called, and the other members of the Dayhuff party joined in the general melee. Although denied by Storm and Mitchell, Dayhuff testified that Storm hit him on the jaw, and that Mitchell hit him on the forehead. At about this time Mr. Pruitt, the cafe owner, his wife, and a Mr. Jeffery stepped in as peacemakers and tried to quiet Dayhuff, who apparently was the aggressor. Jeffery was a former wrestler, and finally he locked Dayhuff's arms behind him and walked him out on the porch. Various people surrounded Dayhuff pleading with him to control his temper. According to the testimony introduced by the prosecution, Jeffery was still holding Dayhuff, and Dayhuff had his back to the door of the cafe, when appellant stepped through the door onto the porch, stepped back inside the barroom, seized two beer bottles, returned to the porch, and, reaching over the heads of two or three people, hit Dayhuff on the side of the head with one of the bottles. Dayhuff's head was seriously lacerated by the blow, and he was immediately taken to the hospital for treatment.

Appellant, who took the stand on his own behalf, admitted hitting Dayhuff with the bottle, but, in defense of his actions, testified that when he struck Dayhuff the latter was not being held by Jeffery, but had an open pocket knife in his hand, and that he hit Dayhuff because he feared that Dayhuff was going to stab either Storm or himself. It is appellant's theory that the only credible evidence in the record demonstrates that he struck Dayhuff in defense of himself and Storm, and that the assault was justified. He produced several witnesses who corroborated his story that at the time he hit Dayhuff the latter was not being held by Jeffery, and that Dayhuff had an open pocket knife in his hand. As opposed to this testimony Dayhuff testified that he was still being held by Jeffery when appellant hit him with the bottle, that his back was to appellant, and that he did not at any time that evening have a knife in his hand. Several members of the Dayhuff party, as well as several other witnesses, testified that Dayhuff was still being held by Jeffery when Mitchell hit him with the bottle, and that at that time Dayhuff's back was towards Mitchell. Jeffery testified that he was holding Dayhuff when he was hit and that he did not see any knife in Dayhuff's hands. A half dozen other witnesses who were on the porch testified that they saw no knife in appellant's hands.

[1-3] It is obvious that, on the issue of whether Mitchell hit Dayhuff in reasonable self-defense, the evidence is directly in conflict. As an appellate court it is not our function to weigh this evidence. We are not required nor permitted to give our views as to the weight of the evidence. That is solely the function of the jury in reaching its verdict, and of the trial judge in passing on the motion for a new trial. Although the evidence shows that Dayhuff was the aggressor, and was probably a little drunk, and although the evidence also shows that up until he hit Dayhuff with the bottle Mitchell and Storm exercised considerable restraint, the evidence introduced by the prosecution and believed by the jury demonstrates an unlawful assault by Mitchell within the meaning of section 245 of the Penal Code.

The next main contention of the appellant is that the court erred in overruling his demurrer to the information and in denying his motion for arrest of judgment. It is urged that the information does not substantially conform to the code requirements in pleading the offense, and that the facts stated therein do not constitute a public offense. It is further urged that, if the information does comply with the statutory requirements, then he has been deprived of the rights conferred upon him by section 13, article I, of the Constitution of this state.

So far as pertinent here, section 245 of the Penal Code provides that "Every person who commits an assault upon the person of another * * * by any means of force likely to produce great bodily injury" is guilty of the offense defined in the section. The information charges Mitchell with "the crime of Assault by Means of Force Likely to Produce Great Bodily Injury, the same being a felony, committed as follows:

"The said J. E. Mitchell, on or about the ninth day of July, A. D. Nineteen Hundred and Thirty Nine, at the County and State aforesaid, did wilfully and unlawfully assault the person of one Lynn Dayhuff, by means of force likely to produce great bodily injury * * *."

It is the contention of appellant that this information is fatally defective in that it fails to allege or specify the kind or character of the force used by appellant in the commission of the alleged assault. In this connection appellant places his sole reliance on the case of People v. Perales, 141 Cal. 581, 75 P. 170, 171. That case involved an appeal by the People from a judgment entered after the sustaining of a demurrer to the information. The information charged Perales with having assaulted one Soto "by means likely to produce great bodily injury, to wit, with a heavy wooden stick". The court held that it was generally true that it was sufficient to charge an offense in the language of the statute, but held that, under the statutes then in effect, that rule was subject to the qualification that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, the facts must be set forth. The court stated (141 Cal. at page 583, 75 P. at page 171): "When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

[4, 5] The court then held that in pleading an assault within the meaning of section 245 of the Penal Code, it was not sufficient to plead the offense in the terms of the statute, but the information must specify the particular means used. There can be no doubt that if this case still is the law of California that the information here involved was defective. It is clear, however, that the Perales case no longer states the rule of law applicable. The rule of that case has been changed by statutory enactment. The Perales case was decided in 1904. At that time section 952 of the Penal Code required that the pleading must set forth the particular circumstances of the offense charged. The legislature in 1927, and again in 1929, amended various sections of the Penal Code relating to pleading in order to adopt a more simplified procedure. As amended in 1929, and as it now reads, section 952 of the Penal Code expressly provides that "In charging an offense * * * It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." This amendment, and other amendments adopted in 1927, has changed the rule of the Perales case. The Supreme Court, in People v. Pierce, 14 Cal.2d 639, 96 P.2d 784, and the Appellate Court, in People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970, have fully considered the legal effect of the 1927–1929 amendments to the Penal Code. As established by these cases the rule is that it is now sufficient to plead the offense in the exact terms of the statute, and the accused is not entitled to a detailed allegation setting forth the particular circumstances. The accused is amply protected because he is legally entitled to a transcript of the testimony upon which the indictment or information is based.

[6] Moreover, even before the 1927 amendments above referred to, it was held that if a demurrer to an information has been erroneously overruled, or a motion in arrest of judgment based on alleged insufficiency of the pleading erroneously denied, unless prejudice is shown the error is not reversible, and that section 4½ of article VI applies to such errors in pleading. People v. Hinshaw, 194 Cal. 1, 227 P. 156.

[7] Appellant contends further, however, that if the information here involved is sufficient under existing statutes, then he has been deprived of a right guaranteed him by section 13 of article I of the state Constitution. The portion of the section relied upon is the provision that "No person shall be twice put in jeopardy for the same offense." It is his contention that the evidence produced by the prosecution shows two assaults by him—the first occurring on the dance floor where Dayhuff testified appellant struck him on the forehead with his fist and inflicted a cut, and the other when he hit Dayhuff on the head with the bottle. It is his theory that, from the information, the evidence and the verdict, it is impossible to determine for which assault he has been found guilty so that in the event of a subsequent prosecution he would be deprived of his right to plead once in jeopardy. There is no merit in this contention. In the first place, a reading of the record demonstrates that appellant was prosecuted and convicted for his assault upon Dayhuff with the beer bottle. Were he to be prosecuted again for this offense he could plead his conviction and establish the identity of the cases by evidence. People v. Faust, 113 Cal. 172, 45 P. 261; People v. Burke, 18 Cal.App. 72, 122 P. 435.

[8] A second complete answer is that there was in fact but one assault. The evidence concerning the blow struck by appellant with his fist was merely testimony regarding a portion of a transaction which culminated in the assault with the bottle. In this regard the case closely parallels the factual situation presented in People v. Oppenheimer, 156 Cal. 733, 106 P. 74. In this case the defendant was charged with an assault with a deadly weapon. The information failed to specify the nature of the deadly weapon with which the assault was alleged to have been committed. The evidence showed that the defendant had first slugged his victim with a window weight and later stabbed him with a knife. It was held that there was in fact but a single assault even though two weapons were used. That is exactly the situation here presented. There was but one assault, although two blows, one with the fist and one with a bottle, were struck.

For the foregoing reasons the judgment and orders appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.

40 Cal.App.2d 211

HICKS v. SANDERS.

Civ. 2386.

District Court of Appeal, Fourth District, California.

July 22, 1940.

Rehearing Denied Aug. 14, 1940.

Hearing Denied Sept. 19, 1940.

1. Appeal and error 🔑957(1)
Judgment 🔑139

A motion to vacate a default is addressed to sound discretion of trial court which will only be disturbed where there has been a manifest abuse of discretion. Code Civ.Proc. § 473.

2. Judgment 🔑143(10)

Trial court did not abuse its discretion in setting aside a default and a default judgment on ground of mistake, inadvertence, surprise, and excusable neglect of plaintiff's counsel, where plaintiff was unable to promptly verify answer to amended cross-complaint because of her physical condition. Code Civ.Proc. § 473.

3. Judgment 🔑151

A motion to set aside a default judgment obtained on a cross-complaint was not fatally defective because it specified the mistake, inadvertence, surprise, and excusable neglect of counsel of plaintiff, rather than of plaintiff, since an attorney is agent of his client, and neglect of the agent is the neglect of his principal. Code Civ.Proc. § 473.

4. Action 🔑34

Where a right is created or remedy given by statute which does not prescribe procedure to be followed, the courts may adopt such reasonable rules of procedure as may be necessary to give the statute legal force and effect.

5. Judgment 🔑155

A motion to vacate a judgment under the statute can only be made on due notice to adverse party unless notice be waived. Code Civ.Proc. § 473.

6. Constitutional law 🔑309(1)

Where due notice of motion to vacate a default and default judgment against plaintiff on a cross-complaint was given to defendant, constitutional requirements of due process were satisfied. Code Civ.Proc. § 473; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

7. Judgment 🔑163

Trial court properly refused to strike portions of affidavits supporting motion to vacate default judgment against plaintiff on a cross-complaint, which detailed facts happening after entry of default and default judgment, since plaintiff was required to show that she had sought to be released from results of her excusable neglect within a reasonable time. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Amine Hicks against Hugh A. Sanders, wherein defendant filed counterclaim, cross-complaint, and amended cross-complaint. From an order setting aside a default and a judgment obtained after default, and permitting plaintiff to file an answer to defendant's amended cross-complaint, defendant appeals.

Affirmed.

Sanders & La Motte, of San Diego, for appellant.

Wright, Monroe, Harden & Thomas, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order setting aside a default and a judgment obtained after default and permitting plaintiff to file an answer to defendant's amended cross-complaint.

The bill of exceptions fails to contain any of the pleadings filed in this action. We glean some of the following facts from the brief of defendant.

Plaintiff's complaint was served and filed on June 15, 1939. Defendant filed his answer, counterclaim, and cross-complaint on June 23, 1939. A demurrer to the cross-complaint was sustained on July 17, 1939, with ten days within which to amend. An amended cross-complaint was served and filed on July 27, 1939. Plaintiff filed no pleading and her default was entered on August 9, 1939. Judgment on the amended cross-complaint was entered against her on August 12, 1939. On September 7, 1939, plaintiff filed a notice of motion to set aside the default and default judgment and specified that "Said motion will be made upon the following grounds: That said default and default judgment was entered through the mistake, inadvertence, surprise and excusable neglect of plaintiff and cross-defendant's counsel". Supporting affidavits were filed and the notice of motion was accompanied by plaintiff's proposed answer to the amended cross-complaint. Defendant filed counter affidavits and a motion to strike plaintiff's notice of motion and the supporting affidavits. On September 28, 1939, the trial court granted plaintiff's motion and denied defendant's motion. The order required plaintiff to pay to defendant, $18.50, costs incurred by him. This appeal from that order followed.

The affidavits disclose that plaintiff was sick in a hospital, and in her home, from July 4, 1939, to August 25, 1939. During much of that time she was attended by physicians and a nurse. She had an acute attack of bronchial pneumonia and in addition suffered an injury to her knee about August 18, 1939. It clearly appears that her condition was such that she could not attend to business until about August 26, 1939.

G. C. Thomas was the attorney in charge of plaintiff's case. He left on his vacation on July 15th and returned on August 6, 1939. On the morning of August 7, 1939, plaintiff's nurse, Mrs. E. P. Justice, saw him in his office and "at that time stated to affiant (Thomas) that plaintiff and cross-defendant was then seriously ill and although she was no longer at the hospital in La Jolla, as she had been between July 4th and July 15th, under the charge of Dr. E. F. F. Copp at the Scripps Metabolic Clinic, suffering from bronchial pneumonia, she was still in a very serious condition, and that any effort to carry on her business or any consultations with reference to the litigation might prove fatal to said plaintiff. That the said Mrs. E. P. Justice, suggested and requested that affiant do not seek to communicate with plaintiff until he was advised by her." The attorney prepared an answer to the amended cross-complaint on August 10, 1939, which was mailed to plaintiff, who, because of her physical condition did not verify it until August 26, 1939.

[1, 2] It is thoroughly established that a motion to vacate a default and a default judgment is addressed to the sound discretion of the trial court and that an appellate court will only disturb the order of the trial court where there has been a manifest abuse of its discretion. Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 173 P. 586; Nicoll v. Weldon, 130 Cal. 666, 63 P. 63. Under the facts before us here there was no such abuse of discretion.

[3] Defendant urges that the notice of motion was fatally defective as it specified the mistake, inadvertence, surprise and excusable neglect of counsel for plaintiff as grounds of the motion rather than the mistake, inadvertence, surprise and excusable neglect of plaintiff, as is required by section 473 of the Code of Civil Procedure. This contention is entirely without merit. The attorney is the agent of his client. The neglect of the agent is charged to his principal and in law is the neglect of his principal. O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am.St.Rep. 105. In a great majority of cases of this kind the neglect shown to support the order vacating the default and default judgment was actually that of the attorney.

Defendant urges novel grounds for a reversal of the order which may be consolidated and stated as follows: The third paragraph of section 473 of the Code of Civil Procedure dealing with the vacation of judgments because of mistake, inadvertence, surprise or excusable neglect does not require that notice be given of such a motion. A judgment is property. Due process of law requires that notice be given to a party before he is deprived of his property. As the section does not require that notice be given of the motion to vacate a judgment, it is unconstitutional and void as it violates the due process clauses of the state and federal Constitutions. Sec. 13, art. I, Const. of Cal.; sec. 1, Fourteenth Amendment to federal Constitution.

[4-6] The foregoing argument is without merit. Where a right is created or remedy given by a statute which does not prescribe the procedure to be followed, the courts may adopt such reasonable rules of procedure as may be necessary to give the statute legal force and effect. The courts of California have held, without exception, that a motion to vacate a judgment under the provisions of section 473 of the Code of Civil Procedure can only be made on due notice to the adverse party unless notice be waived. In Estate of Soboslay, 4 Cal.2d 177, 47 P.2d 714, 715, it was said: "There can be no doubt that in the ordinary case, a motion under this section must be made upon notice. and the setting aside of a judg-

ment, without such notice, is an unwarranted act. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91." Here due notice of the motion to vacate the default and the default judgment was given to defendant. This satisfies the due process clauses of the Constitutions.

[7] Defendant contends that at least those portions of his motion to strike parts of the affidavits which detailed facts which happened after the entry of the default and the default judgment should have been granted because those facts had no bearing on the neglect which resulted in the default and the judgment.

It was incumbent on plaintiff to show that she had sought to be relieved from the results of her excusable neglect "within a reasonable time". Sec. 473, Code Civ.Proc. Those portions of the affidavits bore on that question and were properly considered by the trial court.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

40 Cal.App.2d 160

WALTHER v. OCCIDENTAL LIFE INS. CO.

Civ. 11136.

District Court of Appeal, First District, Division 2, California.

July 18, 1940.

Rehearing Denied Aug. 17, 1940.

Hearing Denied Sept. 16, 1940.

1. Insurance 🔑84(1)

Where agent under written contracts to solicit life, health and accident insurance was entitled to commissions if his name was signed as agent on applications and contracts contained no stipulation that agent who made contact with and registered name of prospective group insurance purchaser should be entitled to commissions regardless of whether group policy was sold by agent, an alleged oral agreement for solicitation of group insurance giving agent right to commissions if he registered name of prospective purchaser of group policy at insurer's office prior to sale of policy notwithstanding that policy might be sold by another agent was not an "independent contract" but was an attempt to add a new term to written contracts and invalid for noncompliance with statute. Civ.Code, § 1698; Pol.Code, § 629b.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contract".

2. Insurance 🔑74

Under written contracts employing agent to solicit life, health and accident insurance, term "life insurance" construed in light of statute declaring group life insurance to be a form of life insurance, included within its scope group life insurance. Pol.Code, § 629b.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Insurance".

3. Insurance 🔑146(1)

The settled law of the land at the time an insurance contract is made becomes a part of it and must be read into the contract.

4. Insurance 🔑74

Whether a contract for the solicitation of insurance is upon its face a complete expression of the agreement of the parties is a question of law for the court.

5. Insurance 🔑84(1)

Where agent was employed under written contracts to solicit life, health and accident insurance on basis of commissions if his name was signed as agent on applications for insurance, an alleged oral agreement for solicitation of group life insurance giving agent right to commissions if he made contact with and registered name of prospective purchaser of group policy at insurer's office prior to sale of policy notwithstanding that policy might be sold by another agent could not alter written contracts unless oral contract was fully executed as required by statute. Pol.Code, § 629b; Civ. Code, § 1698.

6. Insurance 🔑84(1)

Where agent was employed under written contracts to solicit life, health and accident insurance and was entitled to commissions if his name was signed as agent on applications and agent alleged that under an oral agreement for solicitation of group insurance, insurer agreed to pay commissions if agent made contact with and registered name of prospective purchaser of group policy at insurer's office notwithstanding that policy might be sold by another agent, and it was not shown that superintendent of a company which subsequently purchased group insurance and with whom agent talked had authority to purchase insurance and agent had no part in final signing of policy by purchaser and his name did not appear on application, alleged oral contract was not "executed" as required by statute providing that a contract in writing may be altered by an "executed" oral agreement. Civ.Code, § 1698.

See Words and Phrases, Permanent Edition, for all other definitions of "Executed".

7. Contracts ⊜238(2)

Under statute providing that a contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise, an oral agreement is not "executed" unless it has been fully performed by both parties. Civ.Code, § 1698.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Fred H. Walther against the Occidental Life Insurance Company, to recover commissions alleged to be due from the sale of certain group policies. From a judgment for the plaintiff and from an order denying a motion for a new trial, defendant appeals.

Judgment reversed and appeal from order dismissed.

Louis Ferrari, Keyes & Erskine, and Andriano & Lowery, all of San Francisco (Leslie L. Roos, of San Francisco, of counsel), for appellant.

Vincent W. Hallinan, Carey Van Fleet, and Algerdas N. Cheleden, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant appeals from a judgment in favor of the plaintiff and from an order denying a motion for a new trial.

The plaintiff sought employment by the defendant company as a salesman, and was interviewed by F. B. Alldredge, manager of the branch office. At a subsequent meeting on January 20, 1934, the plaintiff signed a printed form contract entitled "Contract of Employment to Solicit Life Insurance" wherein he was employed as an agent for the purpose of soliciting insurance; at the same time he entered into a written contract of a similar type employing him as an agent to solicit accident and health insurance. These contracts of employment were signed by Alldredge, and subsequently by V. H. Jenkins, the vice-president of the company.

The plaintiff testified that a few days later Alldredge announced at a salesmen's meeting that the company desired to have its agents solicit group insurance; a "registration rule" was stated to be in effect whereby any salesman who contacted a prospective buyer and registered the contact at the defendant's office would have a prior right to the commissions. The plaintiff further testified that on January 27, 1934, he went to Alldredge's office for the purpose of discussing the sale of group insurance; it was orally agreed that the plaintiff was to solicit group insurance on the regular commission basis, registering his contacts, and after any single piece of business was closed the oral agreement would be reduced to writing. This oral contract forms the basis of the action.

In pursuance of the oral agreement, the plaintiff contacted Mr. Raymond, the warehouse superintendent of Purity Stores, Inc., and registered this contact with the defendant; the plaintiff further interviewed the members of the Employees' Council to explain the system of group insurance, and attempted to complete the sale. On March 15, 1934, Mr. Benjamin, manager of the defendant's group insurance department, talked with Mr. Niven, president of Purity Stores, after a prior contact had been made with Niven by Seawell, another of the defendant's insurance salesmen. After extensive negotiations which are of little import in this case, Mr. Benjamin again interviewed Mr. Niven on May 7, 1934, at which time the plaintiff was not present; the policy was finally written by the defendant through a brokerage firm, which had agreed to split the commission with Seawell.

The plaintiff brought suit against the defendant company for the commissions which he alleged were owed to him because of the sale of group insurance to the Purity Stores. His claim is based upon the alleged oral agreement employing him as an agent for the solicitation of group insurance and upon the fact that he first contacted the Purity Stores and registered his contact. The superior court found that such an oral agreement did exist, that the plaintiff had performed all the terms of the contract, and therefore was entitled to the commission upon the premiums paid to the defendant under these policies of group insurance.

The appellant contends that the written agreements of January 20, 1934, purport on their face to contain a complete expression of the whole agreement between the parties with respect to the plaintiff's employment, and consequently the alleged oral agreement employing the plaintiff for the purpose of soliciting group insurance is barred by section 1698 of the Civil Code and section 1856 of the Code of Civil Procedure. The respondent contends that the oral agreement can be shown because, first, it is an independent contract on an entirely different subject, and, second, it was fully executed by the plaintiff.

The primary question on this appeal is whether the written contracts of employment were the complete expressions of the parties and whether the terms of these contracts for the solicitation of insurance covered the subject of group insurance. If this is true, then the oral agreement is merely a modification of the terms of the written contracts, and is ineffective unless it is a fully-executed contract. Sec. 1698, Civ.Code. The plaintiff must rely on the subsequent oral agreement in order to recover, as under the written agreements he is only entitled to a commission if his name is signed as agent on the application for insurance, and it was not on the applications for the Purity Stores, Inc., insurance; under the written agreements if there is any dispute as to who is entitled to the commission, the defendant had the right to decide that dispute; and there is no stipulation in the written agreements to the effect that if the plaintiff registered on a contact he would be entitled to the commission whether or not the insurance was written by another agent in or out of the company.

At the outset it is important to determine the scope and contents of the written agreements under which the plaintiff was employed by the defendant company. The two contracts are similar in form so we will turn our attention to the agreement entitled "Contract of Employment to Solicit Life Insurance". Clause 1 states: "That the Agent is hereby appointed for the purpose of soliciting insurance and collecting and remitting the first year premiums on same, under the rules and regulations of the Company." Clause 3 provides that the contract "covers and includes all agreements verbal and written between the parties hereto". Clause 14 provides that commissions "shall accrue only as premiums are paid in cash to the Company, and shall be paid to the Agent whose name appears on the application". Clause 17 states "that the commissions shall be fixed by the Company on any policies which may be issued in the future or on any policies not specified in this contract". The written contracts are the complete expression of the parties regarding the employment of the plaintiff; under these agreements all of the terms of such employment are fully set forth. Although the writings do not mention group insurance specifically, they provide that the plaintiff shall solicit applications for life insurance and for accident and health insurance.

[1] Section 1698 of the Civil Code provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." We must determine then if the subsequent oral contract is a modification of the written instruments or an independent agreement. According to the testimony of the plaintiff he was told by Mr. Alldredge to "go ahead, work on this business, you will get the regular commissions when the business is closed, we will give you a one case contract". This expression cannot be interpreted as an independent contract, but can only be construed as adding a new term to the already complete expression of the plaintiff's employment; therefore it is clearly an attempted modification of the former written contracts.

[2, 3] The prior written agreements employed the plaintiff to solicit life insurance, and this latter term must be construed as covering group life insurance. As stated by the appellant, section 629b of the Political Code in effect at the time these agreements were made provided: "Group life insurance is hereby declared to be that form of life in-

surance * * *." The agreement must be construed in the light of the statutes in force at the time. In Weinreich Estate Co. v. A. J. Johnston Co., 28 Cal. App. 144, at page 146, 151 P. 667, at page 669, the court said: "The settled law of the land at the time a contract is made becomes a part of it and must be read into it." 6 Cal.Jur., pp. 310, 311, and cases cited therein. The written contracts must be said to include the employment for solicitation of group insurance, and therefore the oral contract is merely a modification which adds the "contact registration" rule whereby the agent has a right to the commissions if he notifies the defendant company of the contact prior to the sale of the policy.

[4] In Harrison v. McCormick, 89 Cal. 327, at page 330, 26 P. 830, at page 831, 23 Am.St.Rep. 469, the court states: "The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court." Weil v. California Bank, 219 Cal. 538, 540, 27 P.2d 904; Heffner v. Gross, 179 Cal. 738, 742, 178 P. 860. The written contracts of January 20, 1934, were complete expressions of the agreement of the parties concerning the plaintiff's employment, and the subsequent oral agreement was merely an attempted modification of the prior contracts.

[5] The oral agreement cannot alter the written contract unless the former has been fully executed. Sec. 1698, Civ. Code; California Securities Co. v. Grosse, 3 Cal.2d 732, 733, 46 P.2d 170; Anderson v. Adler, 42 Cal.App. 776, 779, 184 P. 42; Harloe v. Lambie, 132 Cal. 133, 136, 64 P. 88. The plaintiff has not fully performed his part of the agreement. A complete performance of the contract by the plaintiff would require nine years; the record shows that the plaintiff testified that as part of this contract he was required to exert his influence to keep the policy in force for nine years.

[6, 7] The oral agreement required the agent to register the contact at the defendant's office. The evidence in the lower court did not clearly define the word "contact". However, plaintiff testified that he was required to register the "business". It is not shown that Mr. Raymond had any authority to purchase insurance for the Purity Stores; on the contrary, Mr. Niven, president of Purity Stores, testified that neither Raymond nor the Employees' Council had a voice in the placing of the insurance. Therefore, it cannot be said that the plaintiff made a contact with the business when he talked with this superintendent, and hence the registration of such an interview was not a registration of the "business" as specified in the contract. The first contact with a person who had authority to purchase insurance was made by Seawell when he contacted Mr. Niven prior to the time that the plaintiff interviewed him. One of the plaintiff's own witnesses testified that the agent must close the business in order to be entitled to the commission under the group insurance employment contract. The plaintiff had no part in the final signing of the policy by the Purity Stores, and his name did not appear on the application. All this evidence shows that the oral contract was not executed as required by section 1698 of the Civil Code. Keeler v. Murphy, 117 Cal.App. 386, 390, 3 P.2d 950, 951, holds: "The cases are clear under this section that an oral agreement is not executed within the meaning of the Code unless it has been fully performed by both parties." Henehan v. Hart, 127 Cal. 656, 60 P. 426; Fuller v. Mann, 119 Cal.App. 568, 573, 6 P.2d 999; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 330, 290 P. 613.

The oral agreement is clearly a modification of the prior employment contracts, and as the modifying contract has not been executed it is ineffective as a basis for a cause of action. The plaintiff is not entitled to recover any commissions under this alleged oral agreement; he has not shown compliance with the terms of the written contracts and he is therefore not entitled to recovery thereunder.

The judgment is reversed, and the appeal from the order is dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

CLENDANIEL v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11346.

District Court of Appeal, First District, Division 1, California.

July 25, 1940.

Hearing Granted Aug. 22, 1940.

Workmen's compensation 🔑1785

A petition to reopen a compensation proceeding presented only question whether proceeding should be reopened and did not involve a complete retrial of the case. St. 1937, p. 302, § 5900; p. 303, § 5906; p. 301, §§ 5803–5805.

On petition for rehearing.

Rehearing denied.

Prior opinion, 103 P.2d 993.

Geo. B. Harris, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for Industrial Acc. Comm.

Keith & Creede, of San Francisco, for Fireman's Fund.

PER CURIAM.

The petition for rehearing filed herein by the respondent commission contains among others two misstatements of the state of the record which call for denial. The first is as follows: "It was only after the case *had been fully retried* on the petition to reopen that the Commission *again* denied the employee a recovery" (emphasis ours); the second is: "The testimony of the Chinese cook was presented *on the merits*" (emphasis not ours). The cause on the merits was determined against Clendaniel on November 18, 1937, and a rehearing was denied on December 9, 1937. The proceeding that was before the referee on July 20, 1938, at the time the Chinese cook testified as a witness, was not one initiated by a petition for rehearing authorized to be filed by section 5900 of said code, St.1937, p. 185, wherein the commission in denying the same may confirm its previous determination without a hearing (sec. 5906, Labor Code), but was one initiated by a petition to reopen filed under the provisions of sections 5803–5805 of the Labor Code; and on September 8, 1939, the petition to reopen was denied, the order reading as follows: "Applicant having filed petition to reopen for good cause, and all parties having appeared, and said petition having been heard before Joseph F. Ferrea and Margaret McGuire, Referees, and said matter having been submitted; and no good cause appearing why decision entered in the above entitled matter November 18, 1937, should be reopened for consideration, it is ordered that said petition to reopen for good cause be and it is hereby denied." It will be seen, therefore, that all that was before the referees at the time the Chinese cook was produced as a witness was the question of whether the case should be reopened. If reopened then as a matter of right on the issue there involved petitioner could present all his evidence as on a trial before one referee. If a proper case to reopen is presented, then the reopening thereof is equivalent to a new trial on that issue. Obviously, it is one thing to require the petitioner on a petition to reopen to attempt to overthrow existing findings and quite another to grant him an entire new trial on the issue involved.

Rehearing denied.

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40 Cal.App.2d 115

PEOPLE v. NEAL.

Cr. 1733.

District Court of Appeal, Third District, California.

July 12, 1940.

1. Criminal law 🔑371(1)

In prosecution for unlawful driving or taking of a vehicle, evidence as to removal of equipment from automobile taken and subsequent disposal thereof by defendant and another was admissible to prove intent with which defendant deprived owner of his automobile, notwithstanding act of removing equipment from automobile constituted a separate crime. Vehicle Code, § 503, St.1935, p. 174; Pen.Code, § 499b.

2. Criminal law 🔑24

Where a specific intent is made an element of the crime charged, the specific intent cannot be presumed from the doing of the unlawful act, but must be proved as a fact.

3. Automobiles 🔑319, 353

Under statute providing that any person who drives or takes a vehicle not his own without consent of owner thereof and in absence of owner, and with intent to either permanently or temporarily deprive owner thereof of his title to or possession of such vehicle, whether with or without intent to steal vehicle, is guilty of a felony, the intent is made an affirmative element of the crime and consequently must be proved by the prosecution as a fact. Vehicle Code, § 503, St.1935, p. 174.

4. **Criminal law** ⚷365(1), 371(1, 12), 372(1)
Evidence of the commission of another crime is admissible when it tends to establish intent, motive, plan, or system, or when the other crime is part of the res gestæ.

5. **Criminal law** ⚷369(2), 371(12)
Where an accused commits two offenses at same time and place, so that they constitute the same or approximately the same transaction, evidence of the crime not charged is admissible if it tends to show motive or any other fact relevantly bearing upon the crime charged.

◆

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Clifford Harvey Neal was convicted of unlawful driving or taking of a vehicle, and he appeals.

Affirmed.

Grover C. Julian and Donald P. Cady, both of Susanville, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Defendant appeals from a conviction of violation of section 503 of the California Vehicle Code (St.1935, p. 93 et seq.). By the provisions of this section the unlawful driving or taking of a vehicle is made a felony.

The theft of the automobile for which appellant has been convicted took place on the evening of December 15, 1939. The circumstances surrounding the theft were related by Oscar Johnson, who was charged in the information with appellant. Johnson pleaded guilty to the offense charged. On the trial of appellant, had before a jury, Johnson testified that he and appellant had been driving around the town of Westwood on the evening of the theft. He stated that they had been drinking and that there was some discussion as to procuring a radio from a car. They noticed a car parked along the street and saw that it was equipped with a radio aerial. They stopped their car and the appellant got into the parked automobile. It was discovered that the keys were in this car and the appellant, preceded by Johnson, who was driving his own automobile, drove the car out on a lonely road. They then proceeded to strip this automobile of its various equipment, including the radio and electric heater, the fog lights, the aerial and two horns. The car was abandoned at this spot and Johnson and appellant returned to town, where the equipment was divided between them.

At the trial the prosecution first introduced evidence to prove the taking of the automobile by Johnson and appellant without the consent of the owner. Evidence was then introduced as to the removal of the equipment from the car and the subsequent disposal thereof by Johnson and the appellant. Counsel made objections to the introduction of this evidence. Evidence of the removal of the equipment was offered for the purpose of proving the intent of the appellant to permanently or temporarily deprive the owner of the title to or possession of the car. The jury were instructed that this evidence was to be considered solely for such purpose.

Appellant contends that the trial court committed prejudicial error in admitting evidence tending to prove the removal of the parts from the car, which acts if committed constituted a separate and distinct offense in that such evidence did not tend to prove the crime charged in the information but caused a prejudice in the minds of the jury. It is also contended that the element of intent must be affirmatively put in issue by the defendant before the prosecution is entitled to introduce evidence of a separate crime for the purpose of showing intent.

[1] We are of the opinion that the admission of the evidence in question was proper and that the trial court did not commit error.

[2] Some crimes are perpetrated by the intentional doing of an act and there is no necessity of proving the actual intent to commit the crime. Statutes enacted under the police power are good examples of this rule of law. Other crimes not only require the necessary criminal intent but demand proof of a specific intent to do some particular thing. Burglary, for example, requires proof of the entry with intent to commit petit larceny or a felony. The specific intent which is essential in these cases cannot be presumed from the doing of

the unlawful act, but must be proved as a fact. In the case of People v. Maciel, 71 Cal.App. 213, 234 P. 877, the defendant was charged with the crime of assault with a deadly weapon with intent to commit murder. A judgment of conviction was reversed on appeal for an improper instruction in regard to "criminal intent". The court held that specific intent was an essential ingredient of the offense charged. At page 218 of the opinion in 71 Cal.App., 234 P. 877, 880, the necessity of proving "specific intent", when made an element of the crime charged, is indicated by the following language: "It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. 16 C.J. p. 81. When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. It is none the less a question of fact though it cannot be proved by direct and positive evidence. All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury, and no presumption of law can ever arise that will decide it."

Section 503 of the California Vehicle Code provides, in part, as follows: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and *with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle*, whether with or without intent to steal the same, * * * is guilty of a felony. * * *"

[3] Under section 503 the crime is committed when the taking or driving of the vehicle is accompanied by a lack of consent from the owner and an intent to either permanently or temporarily deprive such owner of his title to or possession of such vehicle. The intent is made an affirmative element of the crime and consequently must be proved as a fact. The proof of intent as a fact was incumbent upon the prosecution and the taking and abandoning of the car by appellant did not necessarily furnish sufficient evidence from which the presence of a specific intent may have been inferred by the jury. Section 503 is distinguished from section 499b of the Penal Code in that specific intent is not an element in the violation of this latter statute. Section 499b is the so-called "Joyride" statute. There is a violation within the meaning of the provisions of this section when an individual without the permission of the owner takes any aircraft, motor vehicle, bicycle, etc., for the purpose of temporarily using or operating the same. The violation of section 499b is made a misdemeanor. The necessity of furnishing sufficient evidence of the specific intent required to constitute a violation of section 503 is readily apparent.

[4] The proof of specific intent as a fact was, as stated, an affirmative element of the crime charged and the introduction by the prosecution into evidence of the removal of equipment from the car was proper as being upon the element of intent. The prosecution was not precluded from the introduction of such evidence simply because the acts of removing the equipment from the car constituted a separate and distinct crime. The taking of the vehicle, driving it out to a lonely spot on the road, the removal of the car's equipment, and the dividing of the various parts between appellant and Johnson all constituted one continuous transaction. The introduction of the evidence in question for the purpose of proving intent clearly came within the exception to the general rule of law which prohibits the admission of evidence tending to prove separate offenses. Evidence of the commission of another crime is admissible when it tends to establish intent, motive, plan or system, or when the other crime is part of the res gestae. People v. Morani, 196 Cal. 154, 236 P. 135.

[5] In the case of People v. Cahill, 11 Cal.App. 685, 106 P. 115, the defendant was convicted for the theft of an automobile. Upon the trial, evidence was admitted tending to prove that a pair of gloves found in the possession of defendant belonged to the owner of the automobile and that such gloves had been left in the car on the night of the theft. It was contended on appeal that the court erroneously permitted proof of another and distinct offense than that charged. The court held that proof of ownership of the gloves and the possession of them by the defendant was properly admitted into evidence. The contention of error in this regard was answered in the following language, 11 Cal.App. at page 690, 106 P. at page 117, of the opinion: "Where an accused commits two offenses

at the very same time and place, so that they constitute the same or approximately the same transaction, evidence of the crime not charged is admissible if it tends to show motive or any other fact relevantly bearing upon the crime charged. * * * The theft of the gloves in the case at bar was a part of the same transaction involving the larceny charged against the defendant, and, as stated, evidence that the gloves had been left with the machine by the owner when he last had possession of the car, and that they were found in possession of the defendant when arrested, was competent and admissible as a circumstance tending to show that he stole the machine."

The evidence in question was admissible to prove the intent with which appellant deprived the owner of his car. No error was committed by the trial court in admitting such evidence.

The judgment is affirmed.

I concur: PULLEN, P. J.

15 Cal.2d 721

STANFORD v. STATE BAR OF CALIFORNIA.

L. A. 17328.

Supreme Court of California.
July 26, 1940.

1. Attorney and client ⚿44(2)

Where attorney had himself appointed trustee of funds of 75 year old woman client and thereafter used trust funds to erect a home for himself, giving more than a year after such funds had been used a mortgage on his home, which mortgage provided that neither attorney nor his wife should be personally liable for indebtedness, acts of attorney "involved moral turpitude" and constituted a ground for his disbarment from the practice of law. Code Civ.Proc. § 287, subd. 5, now St.1939, p. 359, § 6106; Civ.Code, §§ 2229, 2231, 2234.

See Words and Phrases, Permanent Edition, for all other definitions of "Involving Moral Turpitude".

2. Attorney and client ⚿38

An act of an attorney which is contrary to honesty and good morals is conduct "involving moral turpitude" warranting attorney's suspension or disbarment from the practice of law. Code Civ.Proc. § 287, subd. 5, now St.1939, p. 359, § 6106.

In Bank.

Petition by Leland G. Stanford to review findings and recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred from the practice of law.

Petitioner disbarred.

Bertrand L. Comparet, of San Diego, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Petition to review the findings and recommendation of the board of governors of the State Bar that petitioner be disbarred from the practice of law in this state.

Petitioner was employed as the attorney in a proceeding to probate the will of Edwin R. Stevens, deceased, by Jennie C. Stevens, the wife of the deceased, who was named in said will as the executrix thereof. Proceedings were duly had whereby said will was admitted to probate, and the executrix therein named was appointed and thereafter duly qualified as the executrix of said will. Some two months thereafter she resigned as executrix and nominated petitioner as the administrator of said estate, and thereafter petitioner was appointed administrator with the will annexed of the estate of said deceased. Petitioner qualified as such administrator and completed the administration of said estate. Prior to the completion of the administration of said estate, Jennie C. Stevens conveyed to petitioner all property owned by her, including the property to which she was entitled as the sole devisee under her husband's will, and while by the decree of distribution in said estate the whole thereof was distributed to said Jennie C. Stevens, petitioner retained possession and control thereof under the deed previously executed by Mrs. Stevens in his favor. Said property was conveyed to petitioner in trust "for the benefit of Jennie C. Stevens, and to pay said Jennie C. Stevens during her lifetime such portion of the income or of the income or principal as shall be necessary or expedient for the health, comfort and convenience of the said Jennie C. Stevens. * * * This trust shall end at the death of said Jennie C. Stevens and the principal thereof by the said trustee shall be distributed according to the terms of the will and testament of said Jennie C. Stevens as executed by said Jennie C. Stevens on the 21st day of November, 1935."

Under this deed of trust petitioner took possession of all Jennie C. Stevens' property, including at least $10,800 thereof in cash, and used the same to pay the purchase price of a home for himself. This sum was taken by petitioner from the trust funds on the following dates: On July 18, 1936, the sum of $500; on July 25, 1936, the sum of $7,458.80; and on May 27, 1937, the sum of $2,601.20; and, on the same day, the further sum of $240. To secure the payment of said sums, petitioner and his wife executed what petitioner termed a mortgage on the property, or at least the greater part thereof, purchased by him with said trust funds. No promissory note or other evidence of said indebtedness, except said "mortgage", was executed either by petitioner or his wife, and it was expressly provided therein that neither petitioner nor his wife was personally liable for the payment of the money which the mortgage was given to secure. The purported mortgage provided for the payment of the monthly sum of $45 to Mrs. Stevens, which was interest on said sum of $10,800 at the annual rate of 5 per cent. The indebtedness was to run for the period of five years and at the option of the petitioner and his wife was to be extended for an additional five years. The instrument and the certificate of acknowledgment bore date of September 16, 1937, and they were not recorded until April 21, 1939. It was delivered to Mrs. Stevens on May 2, 1939, a day or so after the State Bar began the investigation of petitioner's transactions with Mrs. Stevens. Mrs. Stevens was about 75 years of age at the time she employed petitioner to probate her husband's will. She had never known petitioner before that date, but was introduced to him by her friend Mrs. Edith Christy, who had known petitioner since 1906 or 1907, and who recommended petitioner to Mrs. Stevens. Mrs. Stevens at that time had had but slight experience in business matters and was unable unassisted to handle her own business affairs. Mrs. Christy was much younger than Mrs. Stevens and was the latter's intimate friend, to whom Mrs. Stevens went for counsel and advice. Mrs. Christy's business experience was also quite limited. As stated before, her acquaintance with petitioner was of long standing and unquestionably she had implicit confidence in him and it is just as certain that she inspired in Mrs. Stevens the same confidence in petitioner which she herself possessed.

While there are other acts charged against petitioner in the order to show cause issued by the administrative committee, those set forth above, wherein it is shown that he used trust funds in his possession to purchase himself a home, are the most serious in our opinion, and we shall therefore confine our discussion to and rest our decision of this case upon that transaction alone, for if the recommendation of disbarment cannot be sustained upon that transaction, then the other charges, which are of minor moment, would not be sufficient to justify this court in approving the recommendation of the board. On the other hand, if the recommendation of the board of governors can be sustained upon the case made against petitioner by the facts as hereinbefore related, it will be unnecessary for us to consider the other charges set forth in the notice to show cause.

Petitioner makes no denial that he used the funds of the trust to purchase property for himself in the manner and to the extent set forth above. He claims, however, that it was done with the knowledge and express approval of Mrs. Stevens and was also known to her friend, Mrs. Christy, who also approved the transaction. He further claims that the whole scheme of deeding him the property in trust and the subsequent investment of the trust funds in property owned by him was for the purpose of protecting Mrs. Stevens' interest in her property and to secure for her a regular income therefrom sufficient to maintain her. He testified that Mrs. Stevens had relatives and friends who had designs upon her property and would unduly persuade her to convey it to them unless some means was devised to prevent such action on her part, and to that end and for the purpose of forestalling such event the trust was created, with the knowledge and approval of both Mrs. Stevens and her friend, Mrs. Christy; that after the trust was created Mrs. Stevens complained that the income from the trust property was only about $25 a month and was not sufficient for her needs; that she did not desire to encroach upon the principal and was anxious for an investment which would return to her a larger income, commensurate with her expenses, which ran about $45 a month. Petitioner therefore stated to her that he was about to purchase a new home and asked her if she would be willing to have him use the trust funds to purchase property for that purpose, she to accept a mortgage upon the property to secure the loan, with interest thereon at 5 per cent per annum. Both Mrs. Stevens and Mrs. Christy approved the suggestion and accordingly the property was purchased and the loan made according to the terms of his suggestion. Petitioner in his testimony before the committee strenuously contended, and his counsel now makes the same contention, that petitioner's sole object and purpose in entering into this transaction was in the interest of Mrs. Stevens and to preserve her property and provide for her a safe investment of the trust fund with an income therefrom adequate to her needs.

The findings of the administrative committee which heard the charges against petitioner, and as approved by the board of governors of the State Bar and certified to this court, were adverse to petitioner on practically all matters in issue in said proceeding.

As to the acts of petitioner in having himself appointed trustee of the property of Mrs. Stevens and in investing the funds of said trust in the purchase of a home for himself, the committee found: "that all the acts committed by him were deliberate and carefully thought out by respondent [petitioner] to enrich himself at the expense of an aged, trusting client who had abiding faith in the uprightness of the respondent". There is not only ample evidence taken before the administrative committee to support this and the other findings of the committee, but in our opinion the great preponderance of that evidence justifies the committee's findings.

[1] We think it hardly necessary to enter into an extended review of the evidence before us. Petitioner concedes all the essential elements of the charge against him. He admits that he was appointed trustee of this client's property upon his advice to her and without his client having any independent advice from any person capable of advising her. He admits that the funds came into his hands as trust funds under the trust indenture which his client signed under his advice. He admits that he used them in the purchase of property which was to and did become his individual property, or the property of himself and wife. He testified that Mrs. Stevens had agreed that he might use the trust funds for the purchase of said property upon his executing a mortgage covering the property purchased, yet he failed to take any steps toward giving her a mortgage or any security whatever until over a year after he had used the bulk of said funds, and for almost four months after he had used the entire amount thereof, and even then, if the so-called mortgage was executed on the day it bears date (September 16, 1937), it was not filed for record for over a year and a half after its date. He admits that the terms of this so-called mortgage are as stated above, that there was no assumption of liability by himself or wife of the indebtedness, but, on the other hand, there was an express provision therein that neither petitioner nor his wife should be personally liable for said indebtedness. He further admits that even after it was recorded he did not give the document to Mrs. Stevens until the State Bar had begun an investigation. Besides these admissions on his part, there are grave doubts whether this so-called mortgage was really executed on the day it bears date. The notary before whom it was acknowledged was his secretary and her official record failed to show any acknowledgment of said document by petitioner on that day, or on any other day, and the administrative committee found that "the transaction is such as to lead the committee to believe that said acknowledgment on said mortgage was dated back by the secretary of respondent at the request of respondent".

There is also some doubt as to petitioner's intentions in respect to the recordation of said mortgage, and whether he intended to record it at all. It appears from the testimony of Mrs. Christy that Mrs. Stevens had a cousin visiting her and the subject of the recordation of said mortgage came up for discussion. As a result of this conversation, Mrs. Stevens and Mrs. Christy went to the office of the county recorder and found that no mortgage had been recorded. They then called upon petitioner, who stated he would have the mortgage recorded, which was done, and it was not until after this call at the recorder's office and the subsequent conversation with petitioner and his promise to record the mortgage that the mortgage was recorded.

It might be well to here state that petitioner's troubles had their beginning in the recordation of the mortgage. The evidence shows that some unknown person rang up Mr. Hewicker, the local member of the board of governors of the State Bar, called his attention to the mortgage as recorded, and suggested that he investigate the matter. Mr. Hewicker acted upon the suggestion and, after learning of the unusual conditions embodied in the document, had an investigator of the State Bar come to San Diego to look into the transaction between petitioner and Mrs. Stevens. As a result of that investigation, the proceedings against petitioner were instituted before the local administrative committee. We mention these matters, as it is contended that petitioner is being persecuted by persons unfriendly to him and that the proceedings before the administrative committee were instituted and prosecuted through ulterior and even improper motives. From the foregoing statements it appears that they were instituted as a result of the investigation carried on by those public officials having jurisdiction of these matters and that they have been prosecuted through the regular channels of the law. We see no occasion to criticize either the institution or the prosecution of these proceedings.

While claiming that he acted for the benefit and in the interest of his client, the transaction as a whole shows that he profited materially by the use of the trust funds, and that the beneficiary's interest was not properly protected. He secured a home, for which he paid $10,000, which he put up as security for the sum of $10,800. Not only did the amount of the loan exceed the purchase price of the property, but there was omitted from the security a portion of the property purchased, and while the omitted portion was not large in comparison with that which was included in the security, it was at least substantial. No person with a knowledge of the first principles of business would have approved such a transaction, even if there had been no trust relation between the parties. No lawyer of any standing would have advised a client of his to accept as security for a loan of money, the purported mortgage which petitioner gave to Mrs. Stevens. No lawyer with even a limited acquaintance with the law of trusts would have sanctioned the use by a client of his of trust funds in the manner in which petitioner used those belonging to the trust in favor of Mrs. Stevens. When we consider that petitioner was an experienced lawyer and familiar with business transactions; that he had given special study to the subject of trusts, he at the time being an instructor in trusts in a local law school; and that the transaction in question resulted to the advantage and profit of petitioner and to the disadvantage of and possibly in a loss to his client and beneficiary under the trust, we are forced to agree with the local administrative committee in the finding "that all the acts committed by him were deliberate and carefully thought out by respondent [petitioner] to enrich himself at the expense of an aged trusting client who had an abiding faith in the uprightness of the respondent".

[2] These findings bring petitioner clearly within the provisions of subdivision 5 of section 287 of the Code of Civil Procedure (now section 6106 of the Business and Professional Code, St.1939, p. 357), which declares that the commission of any act involving moral turpitude constitutes a cause of disbarment or suspension. While there may be some disagreement as to the precise definition of moral turpitude, the authorities generally agree that an act of an attorney which is contrary to honesty and good morals is conduct involving moral turpitude. Matter of Humphrey, 174 Cal. 290, 163 P. 60; In re O'Connell, 184 Cal. 584, 194 P. 1010; Lantz v. State Bar, 212 Cal. 213, 218, 298 P. 497; and In re Hatch, 10 Cal.2d 147, 73 P.2d 885.

In the use of said trust funds in the manner and for the purpose set forth above, petitioner not only violated his obligations as a trustee, as these are defined and set forth in the statutes of this state (secs. 2229, 2231 and 2234, Civ.Code), but his conduct in that transaction cannot be squared with the rules of common honesty.

We do not consider it necessary to comment to any extent upon evidence offered in behalf of petitioner as to his reputation for honesty and integrity in the city of San Diego, the home of petitioner. Many of the most prominent men and women of the city, and the county of San Diego, testified to the good reputation of the petitioner in his home community. In the face of this evidence, the administrative committee, which was composed of attorneys residing in the very same community, found him guilty of the charges preferred against him. The record before us, to the salient portions of which we have given consideration in the foregoing pages of this opinion, convinces us that the findings of the committee are supported by overwhelming evidence, and we feel ourselves compelled to approve them, notwithstanding the testimony of the many reputable citizens of his home community, who have given evidence of his good reputation. Under these circumstances, conceding that those who testified as to petitioner's good reputation gave their evidence in his behalf in the utmost good faith and had the best interest of the public and of the State Bar at heart, we are unable to reconcile the conduct of petitioner, as recorded by the evidence in this case, with those principles of honest dealing which are so essential in one entrusted with the responsibilities of an attorney at law.

For the reasons hereinbefore set forth, the findings and recommendation of the board of governors are approved and it is hereby ordered that petitioner be and he is hereby disbarred from the practice of law in this state, this order to take effect thirty days after the date of the filing thereof.

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15 Cal.2d 706

PEOPLE v. SNYDER.

Cr. 4287.

Supreme Court of California.

July 24, 1940.

1. Criminal law 🔑**778(6), 823(5)**
Homicide 🔑**340(1)**

In prosecution for attempted murder, charging generally that a person is presumed to intend that which he voluntarily and willfully does in fact do, and is also presumed to intend all natural, probable and usual consequences of his acts, was prejudicial error as indicating that finding of specific intent may be based upon presumption, notwithstanding other instructions requiring proof of specific intent beyond reasonable doubt.

2. Homicide 🔑**145**

Where crime requires proof of specific intent to kill, such intent, like any other fact or essential of the crime, must be proved by evidence or inferences reasonably deducible therefrom and may not be based upon a presumption.

3. Criminal law 🔑**24**

A man is presumed to have intended that which he has done or that which is the immediate and natural consequence of his act, but where an act becomes criminal only when performed with a particular intent, that intent must be alleged and proved.

4. Homicide 🔑**348**

Instructions on presumption that one intends natural, probable and usual consequences of acts necessitated reversal of conviction of attempted murder, as indicating that finding of specific intent might be based on presumption, though other counts of indictment charged offenses not requiring proof of specific intent, where court also charged that instructions should be considered as applying to each count of indictment unless specifically limited. Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Martin M. Snyder was convicted of attempted murder, and he appeals.

Reversed and new trial ordered.

Prior opinion, 96 P.2d 986.

Jerry Giesler and S. Ward Sullivan, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., Buron Fitts, Dist. Atty., and Ugene U. Blalock, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM.

Defendant was convicted by a jury of attempted murder. He appeals from the judgment and from an order denying a new trial.

[1, 2] The evidence of the prosecution indicates that appellant was the aggressor. Appellant's testimony, on the other hand, discloses that he acted in apparent self-defense. In view of our conclusion it is unnecessary to detail the circumstances surrounding the shooting of the victim. We find there is merit in the appellant's contention that the trial court committed prejudicial error in charging the jury generally that a person is presumed to intend to do that which he voluntarily and wilfully does in fact do, and is also presumed to intend all the natural, probable and usual consequences of his acts. Appellant does not challenge the propriety of such an instruction in a homicide case where, under the authorities, the malice and intent are presumed from the unlawful killing and the burden is shifted to the defendant to establish mitigating circumstances and justification for the homicide, nor does he question the application of such an instruction in a case where the offense charged does not require proof of a specific intent. But where, as here, the crime of which the defendant stands convicted, viz., attempted murder, requires proof of a specific intent to kill the victim, appellant contends that such intent, like any other fact or essential of the crime, must be proved by evidence or the infer-

ences reasonably deducible therefrom and may not be based upon a presumption. The authorities support the appellant's contention. People v. Miller, 2 Cal.2d 527, 532-533, 42 P.2d 308, 98 A.L.R. 913; People v. Jones, 160 Cal. 358, 370-371, 117 P. 176; People v. Landman, 103 Cal. 577, 580, 37 P. 518; People v. Mize, 80 Cal. 41, 42, 44-45, 22 P. 80; People v. Brown, 27 Cal.App. 2d 612, 614-616, 81 P.2d 463; People v. Maciel, 71 Cal.App. 213, 217-220, 234 P. 877; People v. Ramirez, 64 Cal.App. 358, 360-361, 221 P. 960.

[3] In the Miller case, first above cited, where, as here, the offense charged was attempted murder, it is declared that "intent is an essential element to be alleged and proved as a fact, and may not rest upon a presumption". [2 Cal.2d 527, 42 P.2d 310, 98 A.L.R. 913.] The rule is stated in the Mize case, supra, as follows [80 Cal. 41, 22 P. 81]: "It is doubtless true that, as a general rule, a man is presumed to have intended that which he has done, or that which is the immediate and natural consequence of his act; but where an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant. This charge withdrew from the jury the consideration of the question whether the defendants intended to kill Coffey. The defendants claimed that they were acting in self-defense [as did defendant here], and upon real or apparent danger. * * * To tell the jury, therefore, that if they believed the defendants had shot at Coffey, and that the natural and ordinary consequences of the shooting would be the death of Coffey, the law would presume them guilty of an intent to kill him, was erroneous, because it entirely disregards the question whether the defendants acted in good faith, and to defend themselves against real or apparent danger. In homicide cases, where the killing is proved, it rests on the defendant to show justification, excuse, or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the prisoner; but this is because the statute expressly shifts the burden of proving circumstances of mitigation upon the defendant in homicide cases. The rule is confined to murder trials."

The other cited cases are substantially to the same effect. It is true that in some of the above cases the objectionable instructions went further than those here involved in that they expressly placed the burden on the defendant to "controvert the presumption by evidence on his own part". However, the instructions here complained of at least impliedly placed the same burden upon the defendant. Aside from this, the real vice of such instructions is in the charge to the jury that the specific intent essential to the commission of a crime less than homicide may be presumed from the doing of the unlawful act or that a finding of such specific intent may be based upon the presumption that one intends the natural, probable and usual consequences of his act.

The attorney-general while conceding the correctness of the rule announced in the above-cited authorities, directs our attention to the fact that other instructions were given on the subject of specific intent wherein the jury was in effect charged that to convict the defendant they must be satisfied beyond a reasonable doubt not only that he used a deadly weapon upon his victim but that he did so with malice aforethought and with the specific intention of taking the life of the victim. Obviously, the latter type of instruction did not preclude the jury from basing a finding of specific intent on the presumption referred to in the objectionable instructions. This matter is discussed in the Maciel case, supra [71 Cal.App. 213, 234 P. 880], wherein it is declared that "The vice of the instruction was not cured by what was said in other parts of the charge, to the effect that the defendant could not be convicted of the crime of assault with a deadly weapon with an intent to commit murder unless the jury believed beyond a reasonable doubt that the assault was committed with such intent to murder. The force of the objectionable instruction was left untouched, and its meaning was left unchanged and unimpaired. It and the other instructions, when considered together, amounted to no more than this: "To warrant the jurors in convicting the defendant of the crime of assault with a deadly weapon with intent to commit murder they must believe beyond a reasonable doubt that the defendant assaulted Rosas with a deadly weapon, with malice aforethought and with the intention of taking the life of Rosas; but if the evidence shows that defendant unlawfully discharged a loaded pistol at Rosas, that act in itself will be sufficient ground for the jury to infer the existence of such malice aforethought and intent to kill.'" To the same effect is People v. Brown, supra, 27 Cal. App.2d 615, 81 P.2d 463.

[4] It is true that the defendant was charged in other counts of the indictment with distinct offenses some of which did not require proof of a specific intent, and as to which the instructions under discussion were appropriate. However, the trial court charged the jury that "All of the instructions as given to you by the court are to be considered as applying to each of the counts set forth in the indictment, unless I shall limit your consideration of any particular instruction to any particular count, in which event it will be your duty to consider such instruction only as respects such particular count referred to." The trial court did not confine the instructions under consideration to those offenses charged which did not require proof of a specific intent. On the contrary, it refused an instruction requested by the defendant to the effect that the firing of a gun at the victim "in itself creates no presumption of law that defendant intended to murder the person fired at". In the absence of an appropriate limitation in the pertinent instructions, we cannot now say that the jury did not rely, improperly, upon the presumption in finding the defendant guilty of attempted murder. Nor are we confronted with a case wherein the error is rendered harmless by virtue of the defendant's conviction of an included offense, or of a distinct offense, not requiring proof of a specific intent. On the contrary, defendant was convicted solely of an offense requiring proof of a specific intent and, as indicated, it is impossible to now state that the jury was not influenced in its deliberations and verdict thereon by the inapplicable instructions. Under such circumstances, the authorities above cited expressly declare that the error is beyond the reach of the saving grace of section 4½ of article VI of the Constitution. People v. Brown, supra, 27 Cal.App.2d 616, 81 P.2d 463; People v. Maciel, supra, 71 Cal.App. 219, 234 P. 877.

The judgment and order appealed from are and each is reversed and a new trial is ordered on the charge contained in count 3 of the amended indictment.

PACIFIC VENTURE CORPORATION v. HUEY et al.

L. A. 17452.

Supreme Court of California.

July 24, 1940.

As Modified on Denial of Rehearing

Aug. 23, 1940.

1. Mines and minerals ⚷34

Where contract for sale of interest in mining claims provided that a fixed sum would be paid to vendors from royalties received by purchasers or out of final payment of purchase price of mining claims in event they were sold by the purchasers before the sum was paid out of the royalties, an agreement between purchasers and third party under which the interest was exchanged for other property, and third party agreed to pay the fixed sum to the vendors' assignee effected sale of the interest to third party and thereafter the purchasers and third party were obligated to pay the fixed sum due to the assignee.

2. Mines and minerals ⚷34

Contract for sale of interest in mining claims which provided that a fixed sum would be paid to vendors from royalties received by purchasers or out of final payment of amount received by the purchasers if they should sell the claims, contemplated that if the claims were sold by the purchasers they would be sold for a price sufficient to pay balance due to the vendors or their assignee, and the balance became due and payable by operation of law upon sale of the claims by the purchasers. Civ.Code, § 1657.

3. Contracts ⚷314

One cannot avoid liability for nonperformance of a contractual obligation by placing the performance beyond his control by his own voluntary act.

4. Mines and minerals ⚷34

Where contract for sale of interest in mining claims provided that a fixed sum was to be paid to vendors out of royalties received by purchasers or out of final payment of purchase price received by the purchasers if they should sell the claims, the purchasers who sold the claims and surrendered control thereof to third party could not avoid liability for payment of the fixed amount on ground that they had not received the amount, since purchasers voluntarily placed beyond their control the payment of the amount pursuant to the terms of the original agreement.

5. Mines and minerals ⚷34

Where contract for sale of interest in mining claims provided that fixed sum would be paid to vendors out of royalties received by purchasers or out of final payment of purchase price received by the purchasers if they should sell the claims, the obligation to pay the fixed amount which was assumed by third party to whom the purchasers sold the claims was an obligation for the benefit of vendors or their assignee and was enforceable against the third party. Civ.Code, § 1559.

6. Mines and minerals ⚷34

Where contract for sale of mining claims provided that fixed sum would be paid to vendors out of royalties received by purchasers or out of final payment of purchase price received by purchasers if they should sell claims, provision of agreement between purchasers and third party for sale of the claims, that third party would pay to vendors' assignee the fixed amount mentioned in the prior contract, constituted an "admission" by purchasers, who signed the agreement, that the assignee had succeeded to the interest of the vendors covered by the prior contract and was sufficient to vouchsafe a cause of action on behalf of assignee against all the parties to the agreement. Civ.Code, § 1559.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

7. Mines and minerals ⚷34

Where contract for sale of mining claims provided that a fixed sum would be paid to vendors out of royalties received by purchasers or out of final payment of purchase price received by the purchasers if they should sell the claims, an agreement between the purchasers and third party for sale of the claims was not construable as creating a lien on the claims to secure payment of the fixed sum due under the original contract.

In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by the Pacific Venture Corporation against John W. Huey and others to recover an amount allegedly due on contract for sale of an interest in certain mining claims. From an adverse judgment, the plaintiff appeals.

Reversed, with directions to enter judgment for the plaintiff.

Prior opinion, 97 P.2d 877.

Betts & Garrison, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent Albert Beck.

CARTER, Justice.

Plaintiff brought this action to recover the sum of $2,500 which it claimed to be due it from defendants pursuant to a contract entered into on the 15th day of July, 1936, between plaintiff's assignors, M. E. Rogers and John A. Hassell, and defendants Huey and Urie for the sale of their interest in certain mining claims situated in Santa Cruz county, Arizona. In said contract defendants Huey and Urie agreed to pay plaintiff's assignors as the purchase price for their interest in said mining claims, the sum of $1,891.90 upon the execution of said contract and the further sum of $2,500 either out of 10 per cent of the royalties received by said defendants Huey and Urie from said mining claims or out of the final payment on the purchase price of said mining claims in the event that the same were sold by defendants Huey and Urie before said defendants had paid said Rogers and Hassell said sum of $2,500 out of said ten per cent of said royalties. Defendants Huey and Urie paid Rogers and Hassell said sum of $1,891.90 upon the execution and delivery of said agreement, but said defendants received no royalties from said mining claims and made no further payment on account of the purchase price thereof to Rogers and Hassell or plaintiff.

The trial court found that on January 10, 1938, Huey and Urie entered into an agreement with defendant Albert Beck, which agreement was dated July 24, 1937, and provided for the exchange of said mining claims for certain property owned by Beck, and Beck thereby agreed to pay plaintiff or its assignors the sum of $2,500 to cover the balance of the purchase price of said mining claims. Said agreement provided:

"Huntington Park, California
"July 24, 1937
"Agreement

"In consideration of $1.00, and other good and sufficient considerations, I, Albert Beck, do hereby agree that the final and last payment on the deal whereby Albert Beck is exchanging certain equities in one apartment house at 1102 West 41st Place, Los Angeles, and 80 acres of land in Imperial Valley subject to their respective mortgages or trust deeds, etc., and as the final and last payment for certain mining claims, etc., in Santa Cruz County, Arizona, due John W. Huey and George G. Urie, Albert Beck hereby agrees to pay to the Pacific Venture Co. or their assigners or successors in interest, the $2,500.00 mentioned in that certain agreement between John W. Huey, George G. Urie and Pacific Venture Co. and or M. E. Rogers and John A. Hassell dated July 15, 1936.

"Albert Beck agrees to pay this $2,500.00 as per the terms and conditions provided in said contract to the legal owners or holders of the above-mentioned contract, which shall complete the final and last payment to Huey and Urie for above described mining claims. The quitclaim deed to be delivered to Albert Beck or his assigns for the interest owned by Huey and Urie in the above mentioned mining claims carries only Huey and Urie's interest after this agreement has been signed and delivered and the complete title to said aforesaid mining claims has been paid for by carrying out of payment as per conditions of the contract between Huey, Urie and Pacific Venture Co. and or M. E. Rogers and John A. Hassell.

"Albert Beck,
"John W. Huey,
"George G. Urie."

The sum of $2,500 was not paid plaintiff or its assignors and this action was commenced on February 14, 1938.

The trial court found the foregoing facts and adopted the following conclusions of law:

"That under the terms of said agreement of the 15th day of July 1936, between M. E. Rogers and John A. Hassell and John W. Huey and George G. Urie, two sources were designated out of which the payment of the sum of $2,500.00 should be made by defendants, John W. Huey and George G. Urie, to said M. E. Rogers and John A. Hassell, as follows:

"(1) Ten per cent (10%) of the royalties received by the defendants, John W. Huey and George G. Urie, from said mining claims; and

"(2) Final payment of the sales price of said mining claims.

"That subsequent to the date of said agreement, namely, the 15th day of July, 1936, and prior to the date of the filing of the above entitled action, or the filing of plaintiff's First Amended Complaint herein, the defendants, John W. Huey and George G. Urie, received no royalties from said mining claims, and said defendants have not received the final payment of $2,500.00 of the sales price of said mining claims;

"That by reason thereof, neither source of the payment of said sum of $2,500.00 by the defendants, John W. Huey and George G. Urie to M. E. Rogers and John A. Hassell, had materialized prior to the filing of plaintiff's complaint or the filing of plaintiff's First Amended Complaint herein.

"That the legal effect of the agreement dated the 24th day of July, 1937, and entered into on the 10th day of January 1938, between the defendants, John W. Huey and George G. Urie, and the defendant, Albert Beck, so far as the defendant, Albert Beck, was concerned was and is that the defendant, Albert Beck, guaranteed the payment by the defendants, John W. Huey and George G. Urie to M. E. Rogers and John A. Hassell of said sum of $2,500.00 when, as and if the same became due from the defendants, John W. Huey and George G. Urie to M. E. Rogers and John A. Hassell under said agreement of July 15th, 1936."

Judgment was entered that plaintiff recover nothing against the defendants or any of them and plaintiff prosecutes this appeal on the judgment roll alone.

Plaintiff contends that upon the execution of the agreement dated July 24, 1937, between defendants Huey and Urie and Beck, it was entitled to the immediate payment of the sum of $2,500 as the balance of the purchase price of the interest in said mining claims which its assignors had sold defendants Huey and Urie pursuant to the agreement of July 15, 1936. It takes the position that the effect of the transaction between Huey and Urie and Beck was to divest Huey and Urie of all right, title and interest in and to the mining claims in question, and thereby make impossible the operation of the mining claims by them and consequently put it out of their power to perform their contract of July 15, 1936, with plaintiff's assignors, and that since the balance of the purchase price was required to be paid upon the sale of the mining claims, said payment became due and payable upon the execution of the agreement dated July 24, 1937, which, in effect, constituted a sale or exchange of said mining claims by Huey and Urie to Beck.

Defendants contend that since the agreement between plaintiff's assignors and Huey and Urie provided that the balance of the purchase price of the mining claims be paid out of specific sources, such payment would not become due until such sources materialized, and that, in view of the fact that such sources had not materialized before the commencement of the action, the action was prematurely brought; in other words, that under the terms of the agreement between plaintiff's assignors and Huey and Urie, the balance of the purchase price of the mining claims was to be paid first out of 10 per cent of royalties received by said defendants from said mining claims, or out of the final payment of the purchase price of said mining claims in the event that said claims were sold by said defendants before said defendants had paid plaintiff's assignors the sum of $2,500 out of said royalties.

[1] There can be little doubt but that it was the intention of the parties to the agreement dated July 24, 1937, to effect a sale or exchange of the mining claims in question from Huey and Urie to Beck and that Huey and Urie thereby parted with all of their interest in said mining claims and Beck became the owner thereof, subject to the payment of the sum of $2,500 to plaintiff or its assignors. Such being the case, the question arises as to whether or not Huey and Urie, as well as Beck, became obligated to pay plaintiff the balance of the purchase price of said mining claims upon the execution of the agreement dated July 24, 1937. We are of the opinion that upon the execution of said agreement, which effected a sale of said mining claims from Huey and Urie to Beck, all three of said defendants thereby became obligated to pay the balance of the purchase price due plaintiff's assignors pursuant to the agreement of July 15, 1936.

While said last-mentioned agreement makes no provision for the operation of the mining claims by Huey and Urie and fixes no specific date for the payment of the balance of the purchase price in the event the claims are not operated, it does provide that in the event of the sale of said claims prior to the payment to plaintiff's assignors of said sum of $2,500 from royalties, plaintiff's assignors shall be paid said sum out of the final payment of said purchase price. In other words, Huey and Urie had the right to sell the claims, but upon the consummation thereof, plaintiff's assignors were entitled to receive $2,500 out of the final payment of the purchase price for which said claims were sold.

[2] By the sale of the claim to Beck, the right to pay plaintiff's assignors the balance of $2,500 on the purchase price out of royalties thereupon ceased, and plaintiff's assignors thereupon became entitled to receive said sum of $2,500 out of the purchase price paid by Beck for the claims; and, in the absence of an agreement that this payment be deferred, it became due and payable immediately. (Civ.Code, sec. 1657.) In other words, the agreement of July 15, 1936, contemplated that the claims would be sold for a price of $2,500, or more, in order that there be a sufficient amount available to pay plaintiff's assignors the balance due them. While no time was specified in the agreement of July 15, 1936, for the payment of this balance, it became due and payable by operation of law when the sale of the claims was consummated pursuant to the agreement of July 24, 1937.

There is no merit in the contention of the defendants Huey and Urie that plaintiff is not now entitled to receive the balance of $2,500 on the purchase price of said claims because said amount has not been received by them, as they, by their voluntary act, have surrendered control of said claims and rendered it impossible for them to obtain the balance of the purchase price therefor in any other manner than by receiving it from Beck.

By the execution of the agreement of July 24, 1937, Huey and Urie made it impossible for them to pay the balance of the purchase price to plaintiff's assignors out of royalties, and unless they made other provision for the payment of such balance, a cause of action thereupon accrued against them in favor of plaintiff.

[3] It appears to be well settled that a person cannot avoid liability for the nonperformance of an obligation by placing such performance beyond his control by his own voluntary act.

This rule is thus stated in 13 Corpus Juris at pages 647, 648: "'A party to a contract cannot take advantage of his own act or omission to escape liability thereon * * * where he prevents a fulfillment of a condition precedent, or its performance by the adverse party, he cannot rely on such condition to defeat his liability.'"

The same proposition of law is announced in 12 American Jurisprudence at page 885, as follows: "'One who makes impossible the performance or happening of the condition precedent upon which his liability by the terms of the contract is made to depend, cannot avail himself of its non-performance.'"

The rule announced above has been uniformly followed in this state. See Carl v. Eade, 81 Cal.App. 356, 253 P. 750, where the cases supporting this rule are cited and applied.

[4] Under the terms of the agreement of July 15, 1936, Huey and Urie assumed the obligation of securing to plaintiff's assignors the payment of $2,500 upon the sale of the mining claims in question. While they made provision for such payment in the agreement of July 24, 1937, said amount has not yet been paid, and plaintiff is entitled to judgment against them as the original obligors under the terms of the agreement of July 15, 1936, for the reason that they have voluntarily placed beyond their control the payment of said sum of $2,500 pursuant to the terms of said agreement.

[5] Plaintiff is also entitled to judgment against defendant Beck under the terms of his agreement of July 24, 1937, as the obligation assumed by Beck in said agreement was for the benefit of the plaintiff or its assignors and is clearly enforceable by plaintiff by virtue of the provisions of section 1559 of the Civil Code, which provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

The case of Washer v. Independent Mining & Development Company, 142 Cal. 702, 76 P. 654, appears to be strikingly in point in support of the legal proposition that plaintiff has the right to recover from Beck the balance of the purchase price which Huey and Urie agreed to pay plaintiff's assignors upon the sale of said claims. In the Washer case, supra, plaintiff had advanced money to the owner of a mine under an agreement that the amount would be repaid him out of the purchase price of the mine when it was sold. The defendant purchased the mine and adopted a resolution providing for the payment of the amount which plaintiff had advanced, but later refused to pay plaintiff said amount and defended the action upon the theory that there was no privity of contract between it and plaintiff for the payment of said amount. This court held that plaintiff was entitled to recover from defendant under the provisions of section 1559 of the Civil Code. In said case this court said, 142 Cal. at page 707, 76 P. at page 656: "The defendant contends that neither the allegations of the complaint nor the findings show that its grantors were personally liable to plaintiff for the advances made by him, and that there is nothing in either the complaint or findings to show any privity of contract between defendant and plaintiff, and hence there was no consideration for the assumption by defendant of the indebtedness due to plaintiff. Such position is not tenable. The defendant knew of plaintiff's claim, and the contract out of which it arose. It knew that, by the contract under which plaintiff made the advances, plaintiff was to be given a one-fourth interest in the mines. Knowing these facts, it passed resolutions in due form by which it expressly assumed the payment of the amount due plaintiff. It did this before it purchased the mines. Then in its deeds it was recited that the property was taken subject to the agreement made by Stephens and Banta with plaintiff. It has never paid plaintiff, and has refused to pay him. It has the title to the mines, procured by virtue of its resolutions, assuming the amount due plaintiff, and yet refuses to pay such amount. It will not be allowed to keep the property, and refuse to pay for it as it agreed." (See, also, Cal.Jur., vol. 6, sec. 279.)

The rule announced in the Washer case, supra, is clearly applicable to the case at bar and supports plaintiff's contention that it is entitled to judgment against defendant Beck for the unpaid balance of $2,500 on the purchase price of the mining claims in question.

[6] Defendants Huey and Urie contend that because the trial court did not find that plaintiff's assignors had assigned their interest in the contract of July 15,

1936, to it, plaintiff has no interest in the subject matter of this action. It is true that the trial court failed to find on this issue, but in view of the fact that the findings were prepared by counsel for defendants, we do not feel that they can, with very good grace, raise this point even if it were meritorious. However, the point is entirely without merit, as the contract between Huey and Urie and Beck, of July 24, 1937, provides that: "Albert Beck hereby agrees to pay to the Pacific Venture Company, (plaintiff herein) or their assignors or successors in interest, the $2,500.00 mentioned in that certain agreement between John W. Huey, George G. Urie and Pacific Venture Company, and/or M. E. Rogers and John A. Hassell, dated July 15, 1936." This provision is clearly sufficient to vouchsafe a cause of action on behalf of the plaintiff against all of the parties to said agreement.

This is obvious for the reason that the only parties to the agreement of July 15, 1936, were M. E. Rogers and John A. Hassell as first parties and John W. Huey and George G. Urie as second parties. The agreement of July 24, 1937, recognizes the Pacific Venture Company, plaintiff herein, as being entitled to the benefits to which Rogers and Hassell were entitled under the agreement of July 15, 1936, by the following provision, to-wit: "Albert Beck hereby agrees to pay to Pacific Venture Company or their assigners or successors in interest, the $2,500 mentioned in that certain agreement between John W. Huey, George G. Urie and Pacific Venture Company, and/or M. E. Rogers and John A. Hassell, dated July 15, 1936." As this agreement was signed by defendants Huey and Urie, it constituted an admission on their part that Pacific Venture Company had succeeded to the interest of Rogers and Hassell covered by the agreement of July 15, 1936, and since Huey and Urie were obligated to pay Rogers and Hassell $2,500 pursuant to the terms of said last-mentioned agreement, they are liable to plaintiff pursuant to their admission in the agreement of July 24, 1937, that plaintiff had succeeded to the interest of Rogers and Hassell covered by the agreement of July 15, 1936.

[7] Plaintiff contends that the agreement of July 24, 1937, between Huey and Urie and Beck creates a lien upon the mining claims in favor of plaintiff for the unpaid balance of $2,500 on the purchase price thereof. We cannot agree with this contention, as it does not appear from the terms of the agreement of July 15, 1936, between plaintiff's assignors and Huey and Urie that any claim of lien on said mining claims was reserved by plaintiff's assignors or that said property was impressed with any lien which plaintiff's assignors could enforce against said property. As we interpret said contract, plaintiff's assignors conveyed all of their right, title and interest in said mining claims to Huey and Urie so that the latter had the full power of disposition over them and plaintiff's assignors were entitled to the payment of the balance of the purchase price as a personal obligation of Huey and Urie. We do not construe the agreement of July 24, 1937, between Huey and Urie and Beck as creating a lien on said mining claims to secure the payment of the balance of the purchase price due plaintiff's assignors.

The judgment is reversed with directions to the trial court to enter judgment in favor of plaintiff and against defendants Huey, Urie and Beck for the sum of $2,500, with interest thereon at the legal rate from the 10th day of January, 1938.

We concur: GIBSON, C. J.; CURTIS, J.; EDMONDS, J.; SHENK, J.

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16 Cal.2d 19

LONG et al. v. WEST COAST LIFE INS. CO.

L. A. 16820.

Supreme Court of California.

Aug. 1, 1940.

1. Insurance ⚷146(3)

Insurance policies should be construed liberally in favor of the insured, but court cannot interpolate provisions which do not in fact exist.

2. Judgment ⚷715(2)

Judgment for insurer in former action by insured to recover disability benefits under life policy wherein insurer admitted that policy relieved insured from future premium obligations during pendency of disability, but denied liability upon ground of insured's

failure to give required notice of disability was "res judicata" in subsequent action wherein insured contended on the basis of such admission that disability automatically relieved him of all future premium obligations and of necessity of giving notice and proof of disability and sought declaratory relief that policy was in full force and effect with respect to possible future death benefits.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by John J. Long and another against the West Coast Life Insurance Company to have a life policy issued by defendant to the named plaintiff declared to be in full force and effect with respect to death benefits that might accrue in the future. From judgment for defendant, plaintiffs appeal.

Affirmed.

Arthur Rosenblum and Benjamin Elconin, both of Los Angeles, for appellants.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an action for declaratory relief brought by the plaintiffs against the defendant insurance company for the purpose of having a certain life insurance policy issued by the defendant insurance company to plaintiff, John J. Long, declared to be in full force and effect in so far as the death benefits that may hereafter accrue are concerned.

On March 29, 1920, plaintiff purchased from the defendant insurance company at a yearly premium of $174.75 a 30-year endowment policy in the capital sum of $5,000. This policy provided for three alternative methods of payment: (1) In the event of the death of the insured prior to the expiration of 30 years, $5,000 to be payable to his beneficiary, Maude S. Long, his wife; (2) in the event the insured survived until March, 1950, the sum of $5,000 to be payable to him; and (3) in the event insured became totally and permanently disabled while the policy was in full force and effect, the payment to him of $50 a month for 100 months.

The conditions relative to the third alternative method of payment are contained in the following provision of the policy: "Total and Permanent Disability. If the insured becomes totally and permanently disabled * * * prior to the attainment of sixty years, while this policy is in full force and effect, the Company agrees, without further payment of premiums, to pay monthly to the insured while living, as an advance, installments for one hundred months, each of such installments to be 1 per cent of the amount otherwise payable under this policy on the death of the insured, the first of such advance payments to be made immediately following the receipt by the company of satisfactory proofs of such total and permanent disability. The total amount of monthly advance payments that may be made hereunder shall be deducted from the total amount otherwise due under this policy on the death of the insured; all subject, however, to the conditions hereinafter set out; to-wit:

"1. That payment of this benefit shall be in lieu of all other benefits and values under this policy.

* * * * * *

"3. That immediately after the commencement of the Total and Permanent Disability full particulars thereof must be given in writing to the Company at its Home Office, together with the then address of the insured, and within 120 days after the commencement of the total and permanent disability, there must be given the Company at its Home Office satisfactory proof of total and permanent disability, and annually thereafter similar proofs must be given, if required by the Company, of the continuance of the total and permanent disability.

* * * * * *

"6. That no claim on account of total and permanent disability shall be valid or enforceable if there is a failure to comply with any of the foregoing provisions."

The above quoted provision of the policy is the only provision of the policy dealing with the question of total and permanent disability.

In February, 1932, plaintiff quit his employment because of an arthritic condition. He had theretofore borrowed $1,840 on the policy but had kept up payment of interest on the loan and premiums on the policy. On March 29, 1932, he failed to meet both the premium and interest then falling due. The latter part of April, defendant insurance company sent him a notice that his policy had lapsed. In September or October he called at the office for disability blanks. They informed him that his policy had lapsed for nonpayment of premiums, but furnished him with blanks which he filled out and mailed to the company on December 28, 1932. The company refused to pay his claim for instalments claimed to be due under the permanent and total disability clause, upon the ground that his policy had lapsed for nonpayment of premium, and because he had not filed his proof of claim within the time provided by the policy, that is to say, 120 days after the commencement of total and permanent disability. On July 8, 1935, plaintiff brought an action against defendant in the municipal court of Los Angeles for the recovery of disability payments covering a period from February 20, 1932 to June 20, 1935. Upon the trial, judgment was in favor of the defendant insurance company which was affirmed by the appellate department of the superior court. The court expressly found that plaintiff, in February, 1932, became ill with arthritis and was rendered so crippled with the disease that he became permanently and totally disabled as a result thereof; that it was not true that the defendant insurance company on or about February, 1932, was notified of the sickness and total disability of plaintiff; that plaintiff did not act diligently in regard to the matter of notifying defendant of his disability and did not give defendant notice of such disability within a reasonable time after he became aware of the fact that he was totally disabled and that such total disability was permanent; that the first notice received by defendant of any claim that plaintiff was totally disabled or was suffering from any permanent disability was the 28th of December, 1932. As a conclusion of law the court held that plaintiff "is entitled to take nothing by virtue of his complaint herein and that defendant is entitled to judgment against said plaintiff for his costs."

On August 18, 1937, plaintiff filed the present action by which he seeks to have it declared that by virtue of the terms of the insurance policy he was automatically relieved of any obligation to pay premiums, that the policy is still in full force and effect, and upon his death his beneficiary will be entitled to the payment of $5,000 as a death benefit from the defendant insurance company. The defendant insurance company answered pleading res judicata and the statute of limitations. Upon the trial of the cause only the judgment in the prior action was admitted in evidence, together with a stipulation that if the plaintiff were called to testify he would testify that his physical condition was still as bad or worse than it was at the time of the former trial in the municipal court and that by reason of his disability he has been unable to and has not worked since the former trial. The court found that the issues involved in the present action were the same as those in the prior action in the municipal court and hence res judicata, and also that the present action was barred by the statute of limitations. Upon these findings judgment was entered for the defendant. From said judgment, the plaintiffs have appealed.

We are satisfied that the conclusion of the trial court that the issues involved in the present action are the same as those in the prior action in the municipal court, and hence res judicata, is correct. Appellants base their entire claim for declaratory relief to the effect that the policy is still in full force and effect in so far as the death benefit is concerned, upon the premise that the total and permanent disability of the insured automatically relieved him from all future payments of premiums, and automatically converted the insurance into a paid-up policy which required the payment to the named beneficiary of the sum of $5,000 upon his death, and that this automatic conversion of the insurance into a paid-up policy took effect regardless of whether or not the insured gave any notice to the insurance company. The weakness in appellants' contention is the fact that there is no separate provision of the policy so providing, and the provision hereinbefore quoted is not susceptible of such construction.

[1] Even a cursory reading of said provision clearly indicates that the only subject of said paragraph of said policy is the advancement in the payment of said policy by $50 a month instalments in the event the insured becomes permanently and totally disabled and that this result is only to be accomplished by the fulfillment of the express provision of said paragraph with reference to the giving of proper notice and proof to the insurance company. Nothing is said therein to the effect that permanent and total disability will automatically relieve the insured from his premium obligations, and such a provision

cannot be extracted from the language employed without also carrying with it the express requirement that proper notice and proof within a designated time must be furnished to the insurance company. As before noted, the policy provided for three alternative methods of payment, (1) the payment of a death benefit, (2) the payment of the entire sum as an endowment, and (3) the payment in advance instalments of the face value of the policy in the event the insured became totally and permanently disabled and gave proper notice to the company. Appellant attempts to read into the policy the provision that the insured may select any of the three alternatives without further payment of premiums in the event he becomes permanently and totaly disabled, and that it is only in the event that he selects the third alternative that it was necessary for him to give proper notice and proof to the insurance company. But the policy does not so provide, and while it is the rule that insurance policies should be construed liberally in favor of the insured, the court cannot interpolate provisions in any insurance policy which provisions do not in fact exist.

[2] The insured after notification of the lapsing of his policy elected to select the third alternative, and upon a refusal of the company to pay to him the $50 instalments which he claimed to be due under the terms of the policy, the insured tested his right to said payments in the municipal court of Los Angeles. At that trial the insurance company set up the defense that the insured had not complied with the express terms of the policy requiring immediate notice of such permanent and total disability and satisfactory proof of such disability within 120 days. The judgment was for the insurance company, which judgment was affirmed by the appellate division of the superior court. This judgment, whether right or wrong, determined the rights of the insured and his beneficiary under said policy. There is no merit in appellants' argument that the judgment in that case was no broader than the issue actually involved, insured's right to advance payment in instalments of the benefits of the policy, and is, therefore, not res judicata as to the issue raised in the present proceeding, insured's right to a death benefit, which issue appellants' claim was outside the scope of the former judgment. The determination of the municipal court in finding that the insured was not entitled, by reason of his failure to give proper notice and proof to the company, to be paid by the third alternative method, likewise determined that he was not entitled to the benefits of the policy under either of the other alternative methods of payments.

As a matter of fact, appellants' argument is not based upon any provision of the policy either express or implied but upon an alleged admission on the part of the insurance company in its answer in the former suit in the municipal court of Los Angeles to the effect that, "defendant admits that said policy, among other provisions, relieved plaintiff from the obligation to pay premiums during the pendency of total and permanent disability as total and permanent disability is defined in said policy * * *". This alleged admission must be considered in its context in the former action, which action involved the issue of whether or not the insured was entitled to the benefits of said policy in advance instalments, and in which action the defendant company in addition to making the above admission, expressly denied liability upon the ground of the failure of the insured to give proper notice. It cannot be fairly said that said alleged admission was an admission on the part of the insurance company that in the event the insured became permanently and totally disabled, he was automatically relieved of all future premium obligations, and was relieved of the necessity of giving the notice and proof expressly required by said paragraph of the policy which conferred the benefit.

As before noted, although the insured had kept up the premiums for twelve years, he had prior to the time he became afflicted with arthritis borrowed the sum of $1,840 and he did not after March, 1932, keep up the payment of interest on this loan. However, in view of the conclusion we have reached that the plea of res judicata was properly interposed by the insurance company, and properly upheld by the trial court, it will not be necessary for us to discuss the effect of this failure to keep up interest payments. Nor, for the same reason, will it be necessary for us to discuss the question of whether or not the instant action was barred by the statute of limitations.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.

15 Cal.2d 685

ACADEMY OF MOTION PICTURE ARTS AND SCIENCES v. BENSON.

L. A. 16700.

Supreme Court of California.
July 22, 1940.

1. Trade-marks and trade-names and unfair competition 🔑3(1)

Generic terms and words descriptive of place are not subject to exclusive appropriation. Civ.Code, § 991.

2. Trade-marks and trade-names and unfair competition 🔑92

A proposed amended complaint alleging that plaintiff, the "Academy of Motion Picture Arts and Sciences," was organized to advance the arts and sciences of motion pictures by conferring awards of merit and had become generally known as "The Academy" and "the Motion Picture Academy", and that defendant had adopted the name "The Hollywood Motion Picture Academy" for her dramatic and coaching school with intent to deceive the public, and had induced certain persons into believing that her school was being conducted by or in connection with plaintiff, stated a cause of action which, if supported by proof, would entitle plaintiff to injunctive relief or would require defendant to alter her trade-name and call attention to the limited scope of her school in order to prevent confusion with plaintiff's institution. Code Civ.Proc. § 473.

> The word "academy" in one sense denotes simply a school, but in a well-accepted meaning it also signifies an institution similar to a college or university for the study of higher learning and also a society of learned men united for the advancement of the arts and sciences and literature, or of some particular art or science.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Academy".

3. Trade-marks and trade-names and unfair competition 🔑84

That an action for injunctive relief against the deceptive and injurious use of a trade-name and for protection of its alleged secondary meaning from encroachments and deceptive use by defendant was novel did not mean that plaintiff was not entitled to some relief.

4. Trade-marks and trade-names and unfair competition 🔑70(3)

To entitle a party to injunctive relief against the deceptive and injurious use of its trade-name which has allegedly acquired a secondary meaning, it is not necessary that the parties be in competitive businesses or that the injury has already occurred, but it is sufficient if the names, although not identical, are sufficiently similar to cause confusion and injury.

5. Trade-marks and trade-names and unfair competition 🔑70(3)

What similarity is sufficient for a party to benefit himself by the good name of another must be determined in each case by its own circumstances, and generally a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Academy of Motion Picture Arts and Sciences against Jennie Benson, doing business under the fictitious name and style of the Hollywood Motion Picture Academy, for injunctive relief. From a judgment of dismissal, plaintiff appeals.

Reversed.

Loeb, Walker & Loeb and Loeb & Loeb, all of Los Angeles (Norman Newmark and Herman F. Selvin, both of Los Angeles, of counsel), for appellant.

Wm. La Plante, of Los Angeles, for respondent.

SHENK, Justice.

In this action for injunctive relief the trial court sustained the defendant's demurrer to the complaint without leave to amend, and denied a motion for leave to file a proffered amended complaint. From the judgment of dismissal which followed the plaintiff has appealed.

The proposed amended complaint alleged:

That the plaintiff, Academy of Motion Picture Arts and Sciences, is a nonprofit California corporation organized in May, 1927, with its principal place of business in Hollywood; that its purposes are to represent and co-ordinate the various branches of the motion picture industry in their relations with each other, with other associations, both within and without the motion picture industry, and with the general public to advance the arts and sciences of motion pictures by conferring awards of merit to signalize outstanding creative achievements, by conducting research and furthering technological progress, and by promoting the interchange and development of knowledge through meetings, publications and in other ways; to advance the welfare of the industry by providing facilities for the arbitration and conciliation of disputes within the industry, and by establishing and administering agreements between and within the industry's branches, and in other ways promoting harmonious and just relations therein. It was further alleged that the plaintiff nationally and internationally enjoys a high reputation for the honesty and integrity of its methods and for the quality of service which it performs; that due to the wide publicity given to the plaintiff's organization through motion picture journals, newspapers and magazines, it has become generally known throughout the United States and in foreign countries as "The Academy" and "The Motion Picture Academy"; that it has a membership of about eight hundred persons drawn from all branches of the motion picture industry, including actors, writers, producers, directors and technicians, and is the only organization in existence composed of members from all branches of the motion picture industry and devoting itself to the purposes stated; that awards of merit are annually conferred by the plaintiff for the outstanding motion picture production, for the best performance by an actor, for the best performance by an actress, the best achievement in directing, cinematology, sound recording, and art direction; that the awards also include a scientific or technical award, and a writing award for the best adaptation and one for the best original motion picture story; that a motion picture receiving an annual award of merit is widely advertised and becomes popularly known as an "Academy Award", or by other appropriate reference conveys to the general public the information that either the picture of some of the actors or participants in its production have received academy awards of merit from the plaintiff.

It was alleged that in October, 1937, the defendant, Jennie Benson, who for several years had conducted in her own name a dramatic and coaching school in Hollywood devoted to instructing persons in the art of acting for motion pictures and the stage, adopted and has since used for her school the name, "The Hollywood Motion Picture Academy"; that the plaintiff, in a written notice to the defendant, promptly protested the use of that name; that it was the defendant's intention and purpose by the use of such name to deceive and mislead the public generally and that she has induced certain persons and prospective students in particular into believing that her school was being conducted by or in connection with the plaintiff, and that persons trained in the defendant's school had received or would receive "Academy Awards" for meritorious performances; that the defendant was thereby attempting to gain the benefit of the plaintiff's reputation and good will and to utilize the same to attract pupils to her school; that the defendant's use of the name, The Hollywood Motion Picture Academy, and particularly of the word "academy" therein, and any failure of persons trained in her said school to measure up to the plaintiff's standards and to receive academy awards, would lower the reputation, standing and prestige of the plaintiff, its usefulness to the motion picture industry and to the public would be lessened, and the plaintiff would be irreparably damaged and the public defrauded by reason of the defendant's continuing the use of said name. The plaintiff prayed that the defendant be enjoined from using the name objected to or any other colorable imitation of the plaintiff's name.

If the complaint preferred herein stated a cause of action, the plaintiff was entitled to file it. Frantz v. Mallen, 204 Cal. 159, 267 P. 314; sec. 473, Code Civ.Proc.; 21 Cal.Jur., pp. 181, 182.

[1] Generic terms and words descriptive of place are not subject to exclusive appropriation. American Automobile Ass'n. v. American Automobile Owners Ass'n., 216 Cal. 125, 13 P.2d 707, 83 A.L.R. 699; Dunston v. Los Angeles Van & Storage Co., 165 Cal. 89, 94, 131 P. 115; sec. 991, Civ.Code. The plaintiff points out, however, that it has not formulated its case on the claim of technical trade-mark or

exclusive right. Its cause of action is based on the distinctive or secondary meaning which its name has acquired and on the unfair and deceptive use of that meaning which it is alleged the defendant has made and threatens to continue to make, to the damage of the plaintiff in particular and the confusion and deceit in relation to the public generally.

The businesses of the parties are not directly competitive, although both are connected with the motion picture industry. By the use of the name Hollywood Motion Picture Academy the defendant does not take away from the plaintiff and draw to herself any business which the plaintiff otherwise would receive. Nevertheless, the plaintiff relies on certain elements as establishing that the words Motion Picture Academy, and especially the word "Academy", as against the defendant, have acquired a secondary meaning whereby the plaintiff will be irreparably injured by the defendant's use of such words; and that the plaintiff is entitled to have the defendant enjoined from any deceptive use of words which in the public mind will confuse the plaintiff's and the defendant's businesses. Those elements are that the business of the plaintiff and the business of the defendant, are concerned with motion pictures, and that both originate in Hollywood. The plaintiff contends that these facts, coupled with the use of the name chosen by the defendant, will result in utmost confusion and consequent injury to the plaintiff and deceit upon the public.

The decisions of the courts for the most part are concerned with the principles applicable to infringement and unfair competition in respect to businesses which are directly competitive. But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses. In situations involving the use of proper surnames in non-competitive businesses it has been held that where confusion was shown as likely to result the relief should be accorded to the complaining party. Tiffany & Co. v. Tiffany Productions, 237 App.Div. 801, 260 N.Y.S. 821, affirmed, 262 N.Y. 482, 188 N.E. 30; Yale Electric Corp. v. Robertson, 2 Cir., 26 F.2d 972. Likewise it has been said that "without regard as to whether there is actual market competition between the parties for the same trade, it is sufficient if the unfair practices of the one will injure the other". 63 Cor.Jur., p. 390, and cases cited in note. The same author, at page 394, in distinguishing between the primary and secondary meaning of generic terms, states: "In their primary descriptive sense, they are publici juris, and all the world may use them, but they must be used in such a way as not to falsely convey the secondary meaning, for this would constitute unfair competition as tending directly to pass off the goods or business of one man as and for that of another. This is what is known as the doctrine of secondary meaning and its perception by the courts was the genesis of the law of unfair competition as distinguished from technical trade-marks. In all this class of cases where the word, name, or other mark or device is primarily publici juris the right to relief depends upon the proof. If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning, so as to indicate his goods or business and his alone, he is entitled to relief against another's deceptive use of such terms, but if he fails in such proof, he is not entitled to relief. * * * Use by others may not be absolutely prevented, but only the misleading manner of using it will be enjoined, leaving defendant at liberty to use it in all honest ways not deceptive. Practically the whole law of unfair competition is an application of these principles. Unfair competition by means of generic, descriptive, personal, and geographical names are common instances." These general principles have been applied by the courts of this state. Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 P. 142, 30 L.R.A. 182, 50 Am.St.Rep. 57; Banzhaf v. Chase, 150 Cal. 180, 88 P. 704; Modesto Creamery v. Stanislaus Creamery Co., 168 Cal. 289, 142 P. 845; Lutz v. Western Iron & Metal Co., 190 Cal. 554, 213 P. 962; Jaynes v. Weickman, 55 Cal.App. 557, 203 P. 828; Mills v. Conservatory of Music, 47 Cal. App. 300, 191 P. 546; see, also, Federal Securities Co. v. Federal Securities Corp., 129 Or. 375, 276 P. 1100, 66 A.L.R. 934 and cases cited.

[2] The plaintiff, as stated, is not depending upon the deceptive use of a trademark, but is alleging the deceptive and injurious use of what may be designated as a trade name, and is seeking to have the secondary meaning which it has built up protected from encroachments and de-

ceptive use by the defendant to its injury. The complaint shows that the defendant had conducted her school heretofore under her own name; that she conducts her school in Hollywood, which is a center of the motion picture industry, for the purpose of training actors; and that the plaintiff also operates from Hollywood. True, the word "Academy" in one sense denotes simply a school; but in a well-accepted meaning it also signifies an institution similar to a college or university for the study of higher learning; also "a society of learned men united for the advancement of the arts and sciences and literature, or of some particular art or science; as, the French Academy". (Webster's New International Dictionary, Second Edition.) The defendant has adopted a name which prima facie is broad enough in its concept to be mistaken by the ordinary unsuspecting person for the institution created by the incorporators of the plaintiff. The plaintiff has stated a cause of action which, if supported by proof, would entitle it to the relief sought, or which would require the defendant to alter her trade name by some designation calling attention to the limited scope of her school in order to prevent confusion with the institution or society represented by the plaintiff—as stated by Justice Holmes in Herring-Hall-Marvin Safe Co. v. Hall's Safe Company, 208 U.S. 554, 559, 28 S.Ct. 350, 352, 52 L.Ed. 616, "so as to give the antidote with the bane".

[3-5] The case before us may be novel, but it does not follow that the plaintiff may not be entitled to some relief. In calling attention to the novelty of the facts in American Philatelic Society v. Claibourne, 3 Cal.2d 689, 46 P.2d 135, 140, this court said: "It is also to be borne in mind that the rules of unfair competition are based, not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit. * * * It may be granted that this case is a novel one * * * but the fact that a scheme is original in its conception is not a good argument against its circumvention. * * * When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem." See, also, Weinstock, Lubin & Co. v. Marks, supra. Also, in United Security Bank & Trust Co. v. Superior Court, 205 Cal. 167, 270 P. 184, 187, this court reaffirmed the jurisdiction of the court of equity to restrain an unfair use of a corporate name by others, "for the name of a corporation is a necessary element of its existence, and, generally speaking, even aside from statutory provision, the right to its use will be protected by the court sitting in equity, so far as may be necessary to safeguard property rights developed under it and to protect against fraud, actual or constructive". And it does not appear necessary that the parties be in competitive businesses or that the injury has already occurred. It is sufficient if the names, although not identical, are sufficiently similar to cause confusion and injury. Colorado National Company v. Colorado National Bank of Denver, 95 Colo. 386, 36 P.2d 454; Standard Oil Company of New Mexico, Inc. v. Standard Oil Co. of California, 10 Cir., 56 F.2d 973; see note with cases cited, 66 A.L.R. at pp. 967, 968, 971, 972. The general principle is thus stated in Celluloid Manufacturing Co. v. Cellonite Manufacturing Co., C.C., 32 F. 94, at page 97: "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law." See, also, 26 R.C.L., p. 888, and cases cited in note.

The judgment is reversed.

We concur: GIBSON, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.

15 Cal.2d 729

SOUTHERN PAC. MILLING CO. v. MILLIGAN et al.

L. A. 17436.

Supreme Court of California.

July 26, 1940.

1. Homestead ⚷186

Homestead property is not exempt from execution where the execution levy is a necessary step to secure or preserve to judgment creditor valuable rights, and such property, not being exempt from execution, is subject to attachment. Code Civ.Proc. § 541; Const. art. 17, § 1.

2. Homestead ⚷187

Homestead property which is sold at forced sale must be sold subject to any encumbrance thereon, and unless a bid is received exceeding the homestead exemption for the property subject to the encumbrance, no sale can be had. Civ.Code, §§ 1245–1259; Const. art. 17, § 1.

3. Homestead ⚷186

In action on contract wherein attachment was levied on homestead property of defendants, the trial court properly granted defendants' motion for discharge of levy of attachment, which was supported by affidavit that the homestead was of value of $5,000 and was subject to encumbrance of $3,500, where no contrary affidavit was filed and there was nothing to show that the property exceeded in value the maximum amount of the homestead exemption. Civ.Code, §§ 1240, 1255; Const. art. 17, § 1.

In Bank.

Appeal from Superior Court, San Luis Obspo County; Atwell Westwick, Judge.

Action by the Southern Pacific Milling Company against J. T. Milligan and others on a contract for direct payment of money, wherein a writ of attachment was issued which was levied upon realty of the defendants which was subject to valid homestead. Motion for an order releasing the lien of the attachment and discharging the levy was granted, and the plaintiff appeals.

Order discharging attachment affirmed.

Prior opinion, 96 P.2d 1010.

W. T. Shipsey, of San Luis Obispo, and Schauer, Ryon & McMahon, of Santa Barbara, for appellant.

Alex. Webster, of Paso Robles, and John J. Hutchins, of Los Angeles, for respondents.

CURTIS, Justice.

Plaintiff instituted this action upon a contract for the direct payment of money and procured a writ of attachment to be issued, and the sheriff levied the same upon the real property of the defendants, which was at the time of the levy subject to a valid homestead. The defendants, after said levy, gave notice to plaintiff of a motion for an order releasing the lien of the attachment and discharging said levy. This matter came on regularly to be heard, and was granted by the court. The plaintiff has appealed from said order.

Section 1 of article XVII of the Constitution provides that, "the Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families." Section 1240 of the Civil Code provides that, "The homestead is exempt from execution or forced sale, except as in this title provided."

Section 1241 of the same code enumerates the exceptions to the foregoing code section, none of which applies to the present proceeding.

Sections 1245 to 1259 of the Civil Code provide for the procedure for the levy of an execution upon a homestead exceeding in value the amount of the homestead exemption which is the sum of $5,000. No other section of the code of which we are aware is of any pertinence to the question now before us. It will be observed that nothing is said in any of the sections of the code, mentioned above, respecting an attachment of property selected as a homestead, and it is the contention of the appellant that as there is no express provision of the law forbidding an attachment of property selected as a homestead such a proceeding is within the law.

[1] The right to attach property selected as a homestead was before this court in the case of Marelli v. Keating, 208 Cal. 528, 531, 282 P. 793, 794, and it was there held that: "Property cannot be said to be exempt from, or not liable to, execution, where the execution levy is a necessary step to secure or preserve to the judgment creditor valuable rights, and, not being exempt from execution, it is, by the terms of section 541, Code of Civil Procedure, subject to attachment." We consider this decision decisive of the question now before us.

[2,3] However, a holding that property subject to a valid homestead may be attached in a proper attachment proceed-

ing is not decisive of this appeal. As we have seen, under certain sections of the Civil Code an execution will lie against the excess value of a homestead when its value exceeds $5,000. In this action, the defendants' motion was supported by an affidavit that this homestead property was of the value of $5,000, and was subject to an encumbrance of $3,500. No contrary affidavit was filed by the plaintiff and there is nothing before us to show that said property exceeded in value the maximum amount of the homestead exemption, even were it not subject to said encumbrance. The law is well settled that property selected as a homestead and subject to an encumbrance must be sold subject to the encumbrance, and unless a bid be received exceeding the homestead exemption for the property subject to the encumbrance, no sale can be had. Sec. 1255, Civ.Code; Martin v. Hildebrand, 190 Cal. 369, 373, 212 P. 618. With this situation before the trial court, we think it properly granted defendants' motion for the discharge of the levy of said attachment.

The order discharging the attachment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.; EDMONDS, J.

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16 Cal.2d 26

FRENCH et al. v. MORTGAGE GUARANTEE CO.

L. A. 17451.

Supreme Court of California.

Aug. 1, 1940.

1. Usury 🔑42

In testing a contract for usury, the entire period of the loan must be taken into consideration on the question of excessive interest.

2. Usury 🔑42

Where no interest in excess of the rate allowed by law would have been received by lender if loan had been carried out for the complete term contemplated by contract, alleged excessive interest collected by the lender on prepayment of loan by borrower did not render transaction usurious.

3. Usury 🔑11

A debtor cannot by his voluntary act render a transaction usurious which, but for such circumstance, would be entirely free from claim of usury.

4. Usury 🔑8

The constitutional amendment providing that a lender shall not receive from a borrower more than 10 per cent. per annum upon any loan or forbearance of any money effected no change in the usury law other than a reduction of the maximum rate of interest which a lender may receive for the loan or forbearance of money as against contention that lender cannot receive more than 10 per cent. interest in any one year. Const. art. 20, § 22, as amended in 1934; St.1919, p. lxxxiii.

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by J. Rollin French and Effie D. French against the Mortgage Guarantee Company to recover money and a penalty thereon alleged to have been paid in a usurious transaction. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

Prior opinion 97 P.2d 852.

Kraft & Gray and Harold D. Kraft, all of Los Angeles, for appellants.

Fleming & Robbins, C. S. Tinsman, and Clay Robbins, all of Los Angeles, for respondent.

PER CURIAM.

This action was brought to recover money and a penalty thereon alleged to have been paid in a usurious transaction. From a judgment rendered in favor of the defendant, after trial without a jury, the plaintiffs appealed. A hearing was granted in this court after decision by the District Court of Appeal, Second Appellate District, Division Two, in order to give further consideration to the contention that the ruling of the District Court of Appeal was contrary to that made in other appellate court decisions. After a review of the entire record it is the opinion of this court that the decision of the District Court of Appeal is correct. We have therefore adopted certain portions of that opinion which, together with such interpolations and additions as will hereinafter appear, constitute the decision of this court.

"The essential facts are: December 11, 1936, plaintiffs executed in favor of defendant company a note reading as follows:

" 'Installment Note (Principal in Installments—Interest Separately)

" '$27,500.00 Los Angeles, California, December 11, 1936.

" 'In installments and at the times hereinafter stated, for value received, I promise to pay to Mortgage Guarantee Company, a corporation, or order, at its office in the City of Los Angeles, California, or at such other place, either within or without the State, as the holder of this note may from time to time designate, the principal sum of Twenty-Seven Thousand Five Hundred Dollars, with interest from date on deferred payments until paid at the rate of five per cent per annum, payable March 1st, 1937 and quarterly thereafter. Said principal sum payable in installments of Eight Hundred Twenty-five Dollars ($825.00) each on the first day [of each and every sixth month, beginning on the first day] of September, 1937, to and including September 1st, 1946. The entire balance of the then unpaid principal and interest shall be due and payable March 1st, 1947.

" 'Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of the principal or interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States.

" 'Privilege is hereby reserved of paying this note on March 1st, 1938, or on any interest payment date thereafter prior to March 1st, 1942, maturity, by giving ninety days' written notice to the holder hereof and accompanying said notice with a sum of money equal to 90 days' unearned interest on the then unpaid principal as a bonus for such prepayment privilege.

* * * * * * * *

" 'Privilege is also reserved of paying this note on March 1st, 1942, or on any interest payment date thereafter prior to maturity by giving 90 days' written notice, plus a sum equal to 1% of the then unpaid principal as a bonus for such privilege.

" 'Effie D. French
" 'J. Rollin French'

"At the same time plaintiffs filed an application for a building loan from defendant and executed a trust deed to secure payment of the aforesaid note. Defendant immediately allocated [and credited to plaintiffs' account] $27,500 for the plaintiffs' loan, which at all times was available to plaintiffs on their compliance with the building loan contract executed by them."

By the terms of the building loan contract it was contemplated that the building should be completed within one hundred twenty days of the signing of the contract; that the proceeds of the loan should be advanced from time to time as the work progressed in such amounts as the defendant's appraiser should recommend; that one-fifth of the amount of the loan should be retained by the defendant until completion of the building and if at that time no mechanics' lien had been filed, the balance should be paid to plaintiffs; that notwithstanding the fact that the proceeds of the loan were to be advanced in instalments, interest other than that agreed to be paid in advance (in the sum of $825) which was to be prorated over the life of the loan, should be paid in the amounts and at the times stated in the promissory note.

"Defendant in fact paid out on plaintiffs' order on the dates set opposite each sum the following amounts:

"$4,125 February 24, 1937;
"$5,500 May 21, 1937;
"$5,500 July 31, 1937;
"$1,500 September 30, 1937;
"$4,000 November 30, 1937;
"$1,375 December 6, 1937.

"The balance of the amount of the loan, $5,500, was available to plaintiffs at all times upon their compliance with the terms of their building loan application.

"March 1, 1937, plaintiffs received a statement for $305.56, interest at 5 per cent per annum from December 11, 1936, to March 1, 1937, on the full amount of the loan. At this time plaintiffs claimed that they should be charged interest only on the amount of money actually advanced. However, upon it being pointed out to them that it was in accordance with the terms of their building and loan application, they paid on April 1, 1937, the (said) sum to defendant. * * *"

Thereafter until January 21, 1938, plaintiffs paid interest from time to time on the full amount of the loan notwithstanding the fact that the entire amount thereof had not been advanced to them at the time of the respective interest payments.

"In December of 1937 differences arose [in connection with one of the provisions of the building loan contract] between the plaintiffs and defendant. Thereupon plaintiffs requested defendant to permit them to pay and discharge their whole obligation to defendant in accordance with the prepayment option contained in the note * * * [and to apply the remaining $5,500 which had not yet been advanced to them, on the unpaid principal of the note]. Although under the prepayment option contained in the note the option could not be exercised until March 1, 1938, defendant permitted plaintiffs to discharge their obligation January 21, 1938."

It is conceded that at the time the prepayment option was exercised by plaintiffs, and the transaction brought to an end, the lender had received as interest at least the sum of $2,336.74; also that interest, at the rate of ten per cent, computed from the respective dates moneys were advanced to plaintiffs, to the date of repayment of the loan, did not exceed the sum of $1,500.

However, the interest rate on the note was five per cent per annum, and by the terms of the loan contract *all* interest, including that charged on funds which had not been advanced at the time of the respective interest payments, was to be prorated and distributed over the entire life of the loan, that is, from December 11, 1936, to March 1, 1947, or a period of time in excess of ten years. Both parties agree that had the loan been carried out for the complete term contemplated by the contract no interest in excess of the rate allowed by law would have been received by the lender.

[1] It has long been the rule in this state that in testing a contract for usury, the entire period of the loan must be taken into consideration. Sharp v. Mortgage Security Corp., 215 Cal. 287, 9 P.2d 819; Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725; Kraemer v. Coward, 2 Cal.App.2d 506, 38 P.2d 458; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501; Bush v. Sikking, 131 Cal.App. 703, 21 P.2d 1013; Finley v. Wyatt, 113 Cal.App. 233, 298 P. 80; Grall v. San Diego Bldg. & Loan Ass'n, 127 Cal.App. 250, 15 P.2d 797; vol. 11, Cal.Jur. 10-Yr. Supp., p. 120.

Thus, in the case of Bush v. Sikking, 131 Cal.App. 703, 21 P.2d 1013, where the subject is thoroughly considered, the court said:

"The whole question involved is whether or not the Usury Act limits the interest that may be received to [the then rate of] 12 per cent. for the actual time that the money was had by the plaintiffs, or whether the defendant had the right to accept an amount in excess of 12 per cent. per annum (computed upon the shortened period), in addition to the principal, by reason of the fact that the loan in question was paid before the maturity of the note. In other words, was the payment of an amount in excess of 12 per cent. per annum, plus the principal, a violation of the Usury Act, when the total amount of such interest paid did not exceed 10 per cent. per annum for the full period to the maturity of the note?

* * * * *

"In the case of Sharp v. Mortgage Security Corp., 215 Cal. 287, 290, 9 P.(2d) 819, 820, it is stated: 'The first question is: What is the period to be considered when testing a transaction for the presence of usury? In Haines v. Commercial Mortgage Co., 200 Cal. 609, 625, 254 P. 956, 255 P. 805, 807, 53 A.L.R. 725, this court said: "We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties *may freely contract* in respect thereto, if done in writing." While this pronouncement when made may have been open to the observation that it was dictum, yet we based it upon the weight of authority and what was deemed to be the only just rule [citing Conservative Loan Co. v. Whittington et al., 120 Okl. 137, 250 P. 485, 487; Easton v. Butterfield Live Stock Co., 48 Idaho, 153 (279 P. 716, 718)].'" (Italics added.)

[2] As already indicated, in the present case the allegedly excessive interest collected was brought about by the voluntary act of plaintiffs in exercising the prepayment option. The rule is that in such circumstances the transaction is not thereby made usurious. The following authorities are to that effect: Grall v. San Diego Bldg. & Loan Ass'n, 127 Cal.App. 250, 15 P.2d 797; 66 C.J., § 117; Southland Life Ins. Co. v. Egan, 126 Tex. 160, 86 S.W.2d 722, 724; Deming Inv. Co. v. Reed et ux., 72 Okl. 112, 179 P. 35; Clement Mortgage Co. v. Johnston, 83 Okl. 153, 201 P. 247; Eldred v.

Hart, 87 Ark. 534, 113 S.W. 213, 215; Anderson v. Hirsch, Tex.Civ.App., 112 S.W.2d 535; Barringer v. Jefferson Standard Life Ins. Co., D.C., 9 F.Supp. 493, 494, 495; Cissna Loan Co. v. Gawley, 87 Wash. 438, 151 P. 792, L.R.A.1916B, 807, Ann.Cas. 1917D, 722; 27 R.C.L., p. 235; see, also, note, vol. 21, Cal.Law Rev. p. 289.

Thus in the case of Grall v. San Diego Bldg. & Loan Ass'n, 127 Cal.App. 250, 15 P.2d 797, 799, the plaintiff borrowed from the defendant $100,000, repayable in ten years by monthly instalments. The first month's interest and a bonus were deducted in advance, and the plaintiff received only $97,300. The plaintiff's note, which was secured by a deed of trust upon certain real property, called for interest at a lawful rate, and provided that the plaintiff might repay the full amount within the year upon payment of two months' unearned interest. After making some interest payments, the plaintiff sold the property, and, with the consent of the defendant, transferred the obligation to the grantee and was released therefrom. An action was brought to recover treble the amount of the interest payments made by the plaintiff, on the ground that the transaction was in violation of the California Usury Law. It was held that the agreement was not usurious. In ruling that the full period of the loan must be considered in deciding whether excessive payments had been exacted, the court said:

"It is plain from an examination of the note here in question that if the $2,700 originally deducted be considered as interest and spread over the full period of the loan, and if the same was paid, the lender would not receive a profit on his investment in excess of the maximum amount permitted by the statute for the full period of the loan.

"It is respondents' contention, however, that the note was usurious from the beginning, and regardless of what later occurred, since it contained a provision to the effect that the appellant agreed 'to accept payment in full at the end of any month before one year from date hereof by the payment by the undersigned of all sums due and two months' unearned interest as a bonus.' It is argued that this provision renders the contract usurious, since the note could have been paid a month after its execution, in which event the amount of the original deductions would have exceeded the amount of interest permitted for that time. If this contention is correct, a note for $100 for one year at 5 per cent. interest, the interest paid in advance would be usurious if it contained a clause that the debtor might pay the note at any time after one day.

* * * * *

"In 27 Ruling Case Law, 235, the rule is thus stated: '* * * where the borrower has an option to pay the debt before maturity, the contract is not made usurious by reason of the fact that on exercising the option to pay before maturity the borrower is required to pay more than the legal rate of interest for the time he had the use of the money.'"

Appellants rely on the cases of Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252, and Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501, in which usury was held to be present in a transaction wherein plaintiffs had procured a construction loan, the proceeds of which were available to them only in instalments but where they were charged interest for the full amount of the loan. However, those cases are distinguishable on the ground that there the loan period was not shortened by a voluntary act of the debtor, and the full period of the loan was considered in deciding that usury was present. Moreover, the rule herein announced was recognized in Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501, 506, where the court said: "Where the excessive interest is caused by a contingency under the lender's control, or not under the borrower's control, the transaction is usurious; *otherwise when the contingency is under the borrower's control.*" (Italics added.)

A provision for acceleration of the maturity date upon default in payment of instalments of principal or interest, and actual payment of the principal before the date of maturity where there is no provision to that effect in the note (McCarty v. Mellinkoff, 118 Cal.App. 11, 4 P.2d 595) present situations analogous to that presented by the prepayment option. In each of the former situations the lender has been permitted to receive more than the legal rate of interest for the time the loan has actually run. Sharp v. Mortgage Security Corp., 215 Cal. 287, 9 P.2d 819; Anderson v. Hirsch, Tex.Civ.App., 112 S.W.2d 535; Barringer v. Jefferson Standard Life Ins. Co., D.C., 9 F.Supp. 493; 11 Cal.Jur. 10-Yr.Supp. p. 123; note: 45

Harv.Law Review, p. 196; Kraemer v. Coward, 2 Cal.App.2d 506, 38 P.2d 458; Low v. Sutherlin, Barry & Co., 9 Cir., 35 F.2d 443, 445. Thus in the case last cited the court said with regard to an allegedly usurious transaction, "* * * there is still no usury, unless we hold that a * * * contract nonusurious if complied with by the debtor, may be rendered by him usurious and illegal by his voluntary default in respect thereto. That a debtor cannot so bring his creditor under heavy penalties is too clear to admit of discussion, * * * Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725."

[3] Appellants concede that with regard to the acceleration of the maturity of the debt on the debtor's default the rule is as stated in the last cited cases, but they contend that the default of a debtor amounts to a breach of contract and therefore that it presents a different situation from that which is created by the exercise of a prepayment option. However, on principle, there would seem to be less reason for refusing to allow the debtor to bring his creditor to the penalties of the usury law in the case of a default, which is usually an involuntary act of the debtor, due to his inability to pay, than there would be where, as here, the latter acts voluntarily to bring about a termination of the loan period. However, the foregoing authorities clearly support the views herein expressed that a debtor cannot by his voluntary act render a transaction usurious which, but for such circumstance, would be entirely free from a claim of usury.

[4] Appellants make the further contention that under the 1934 amendment to article XX, section 22, California Constitution, a lender cannot receive more than ten per cent interest in any *one* year. The amendment provides that the lender shall not "receive from a borrower more than ten per cent per annum upon any loan or forbearance of any money * * *". Prior to the amendment the statute provided that a lender could not receive a greater sum than "at the rate of twelve dollars upon one hundred dollars for one year". Stats.1919, p. lxxxiii. A reading of that portion of the constitutional amendment just referred to shows that no change in the usury law was thereby effected other than a reduction of the maximum rate of interest which a lender may receive for the loan or forbearance of money. Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252.

The judgment is affirmed.

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39 Cal.App.2d 674

NORINS v. ASSOCIATED ACCEPTANCE CORPORATION et al.

Civ. 12558.

District Court of Appeal, Second District, Division 2, California.

June 26, 1940.

Appeal and error 🔑554(2), 607(1), 611

Where appellants took no steps toward procuring a clerk's transcript or bill of exceptions or other record for the District Court of Appeal, and the time in which a record on appeal might be prepared and filed pursuant to statutes, or otherwise, had expired, motion to dismiss the appeal would be granted. Code Civ.Proc. §§ 650, 953a.

Action by Edward Norins, administrator with the will annexed of the estate of Michael Norins, deceased, against the Associated Acceptance Corporation and others. From an adverse judgment, the defendants appeal, and the petitioner moves to dismiss the appeal.

Appeal dismissed.

Victor L. Mindlin, of Los Angeles, for petitioner.

Maurice Gordon, of Los Angeles, for defendants.

PER CURIAM.

The above-entitled matter having come on for hearing upon petitioner's motion to dismiss the appeal, and it appearing that appellants have failed to file with the clerk of the trial court a notice or request to prepare transcript under section 953a of the Code of Civil Procedure, or otherwise, and that the appellants have taken no steps toward the procuring of a clerk's transcript or bill of exceptions or other record for us on appeal, and that no proceedings have been instituted or are now pending for the purpose of preparing or procuring any transcript or bill of exceptions, or other record, and that the time in which a record on appeal herein might be prepared and filed pursuant to section 650 of the Code of Civil Procedure or pursuant to section 953a of the Code of Civil Procedure, or otherwise, has expired;

Now, therefore, it is ordered and adjudged that the appeal herein be, and it is hereby, dismissed.

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40 Cal.App.2d 68

WHITACRE et al. v. HALL et al.

Civ. 2380.

District Court of Appeal, Fourth District, California.

Aug. 5, 1940.

Hearing Denied Sept. 4, 1940.

1. Factors 🔑30

Where contract for consignment of cars of lettuce to vegetable broker, who advanced guaranteed minimum price per car, provided that all railroad or other claims should be property of consignors, consignors were entitled to sums recovered by broker from railroad for damage to shipments of lettuce, and broker was not entitled to a corresponding credit on minimum price guaranteed.

2. Factors 🔑44

Where vegetable broker accounted to consignors of lettuce on basis that lettuce damaged in shipment had been sold at same price as undamaged lettuce and charged commission on such selling price, broker was not entitled to commission on amounts realized by consignors upon damage claims against railroad, as against contention that such amounts were part of the selling price.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 104 P.2d 401.

Harry W. Horton, of El Centro, for appellants.

Whitelaw & Whitelaw, of El Centro, for respondents.

PER CURIAM.

[1] In this petition for rehearing the appellant William Shapiro, Inc., contends that it is entitled to a refund from the guaranteed advance of $275 per car of an amount equal to the value of the goods which were subsequently damaged, on the theory that the contract called for the delivery of merchantable produce and that to this extent this appellant never received such letuce. As pointed out in our opinion in this case, 104 P.2d 401, the 45 cars of lettuce were, in accordance with the contract, delivered to this appellant at El Centro with the necessary bills of lading and certificates of inspection, all of which were there accepted by this appellant. This entire matter is controlled by the interpretation of the contract, all of which is sufficiently covered in our previous opinion.

[2] It is further contended that under another provision of the contract this appellant was entitled to a commission of 8 per cent on the selling price of the lettuce, that the railroad claims which were awarded to the respondents were a part of this selling price, and that our opinion should be so modified as to allow this appellant to recover 8 per cent of the amounts realized upon the railroad claims. In our opinion we referred to the manner in which certain accounts were made to the defendants in connection with an issue as to fraud and deceit which was raised as to the other appellant. In the accounts thus made this appellant seems to have made returns that it had sold the damaged goods at the same prices as the good lettuce in the respective cars. In connection with the accounts so made this appellant charged its commission of 8 per cent on this supposed selling price. It is certainly not entitled to the 8 per cent commission on both amounts, relating to the same goods, and nothing is brought to our attention from which we can tell whether or not appellant has been prejudiced in this regard. In the absence of such a showing we cannot arbitrarily order the substitution of the one amount for the other.

The petition for a rehearing is denied.

40 Cal.App.2d—174

KLINE v. SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 11383.

District Court of Appeal, First District, Division 2, California.

July 18, 1940.

Rehearing Denied Aug. 17, 1940.

Hearing Denied Sept. 16, 1940.

See 105 P.2d 362.

1. Schools and school districts 🔑89

The statute imposing liability upon school district for any judgment against the district on account of injury arising out of negligence of the district or its officers or employees is in derogation of the common law and must be strictly construed. School Code, § 2.801, as amended by St.1937, p. 414.

2. Statutes 🔑267(2)

Changes in rules of procedure may be applied to pending rights if a reasonable time is given for the commencement of proceedings before the bar of the statute takes effect.

3. Pleading 🔑59

Where statute requires presentation of a demand before suit is filed, a complaint which fails to plead demand made in accordance with the requirements of the statute does not state a cause of action.

4. Pleading 🔑66

Where plaintiff is prevented from complying with a statute requiring presentation of a demand before suit is filed by what might be deemed a legal excuse, the facts upon which he relies as an excuse for noncompliance must be pleaded.

5. Schools and school districts 🔑115

Where statute requiring presentation of verified claim, within 90 days after accident, for injury arising out of negligence of school district or its officials was passed prior to accident in which student was injured and became effective two and one-half months following the injury and no verified demand was made by the student for injury until lapse of more than eight months after injury and no facts were pleaded to excuse noncompliance with statute, and there was nothing to show that time allowed for compliance was unreasonable, failure of student to file claim for injury within ninety days after injury was sustained barred an action for injuries. School Code, § 2.801, as amended by St.1937, p. 414.

6. Officers 🔑110

When a statute fixes a definite rule of action upon a public official for the benefit of the public at large, the official may not escape that rule by act of omission or commission.

7. Estoppel 🔑52, 62(1)

"Estoppel" is a species of waiver and where a public official may not waive a public right he cannot be estopped from asserting that right on the part of the general public.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

8. Estoppel 🔑62(5)

In student's action for injuries sustained on school grounds, school district was not estopped from raising the bar of the statute requiring the filing of verified claims within 90 days after injury by action taken by district officials on a letter written by student's mother advising district of injury where the letter was not verified and did not fix any claim for damages since knowledge of the school district officials of injury did not dispense with filing of claim. School Code, § 2.801, as amended by St.1937, p. 414.

9. Pleading 🔑364(2)

In student's action against school district for injuries sustained on school grounds, trial court did not err in striking from the complaint allegations relating to letter from student's mother to district advising it of the injury where allegations were irrelevant and stated no issue upon which student could have tendered any proof.

◆

Appeal from Superior Court, City and County of San Francisco; Andrew R. Schottky, Judge.

Action by Ruth Patricia Kline against the San Francisco Unified School District, a body corporate and politic, and another for injuries received while on the premises of the school of which she was a regular student. From a judgment sustaining a demurrer without leave to amend, plaintiff appeals.

Affirmed.

Philander B. Beadle and Jasper L. Searles, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of

San Francisco, (Irving G. Breyer, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries received while on the premises of the school of which she was a regular student. The defendants' demurrer was sustained without leave to amend. The appeal raises the single question whether, within the time prescribed, plaintiff filed a verified claim or demand with the officers of the school district.

The injury occurred on May 5, 1937; on January 27, 1938, a verified claim and demand for damages was filed with the school board; on February 15, 1938, the board rejected the claim; on August 18, 1939, the complaint for damages was filed. The demurrer was sustained upon the ground that the demand was not made within the time prescribed.

[1] Plaintiff's cause of action rests entirely upon section 2.801 of the School Code. No liability of this kind existed at common law. Hence the statute must be construed strictly. It reads in full: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees; provided, however, that a verified claim for damages shall have been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." The last portion relating to the presentation of a claim for such injuries was added by amendment which became effective August 27, 1937—about three and one-half months following the injury. It is appellant's contention that this amendment was not intended to be retroactive, and that the respondents were estopped to raise the bar of the statute.

[2] We do not understand that there is involved here any question of the retroactive effect of the statute, or any question of the intention of the legislature, express or implied. The question of the application of the statute to the particular case is determined by the universal rule that changes in rules of procedure may be applied to pending rights if a reasonable time is given for the commencement of proceedings before the bar of the statute takes effect. The precise question was decided in Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952, where the injury occurred some eight and one-half months prior to the effective date of the statute requiring claim to be filed within ninety days of the injury. The court there, following Thompson v. Los Angeles, 140 Cal. App. 73, 35 P.2d 185, 186, adheres to the rule that, if a reasonable time to file is given before the bar takes effect, the limitation will not be held unconstitutional. In the Thompson case, supra, the court quoted with approval this language from Terry v. Anderson, 96 U.S. 628, 24 L.Ed. 365: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * * It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain."

[3-5] Our courts have frequently held that, when the statute requires presentation of a demand before suit is filed, a complaint which fails to plead demand made in accordance with the requirements of the statute does not state a cause of action. Crim v. San Francisco, 152 Cal. 279, 281, 92 P. 640; Geimann v. Board of Police Com'rs, 158 Cal. 748, 752, 112 P. 553; Douglass v. City of Los Angeles, 5 Cal.2d 123, 130, 53 P.2d 353; Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 580, 59 P.2d 104; Farmers & Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 659, 91 P. 795; Continental Insurance Co. v. Los Angeles, 92 Cal.App. 585, 587, 268 P. 920; Western Salt Co. v. San Diego,

181 Cal. 696, 699, 186 P. 345. Where the plaintiff is prevented from complying with the statute by what might be deemed a legal excuse the facts upon which he relies as an excuse for non-compliance must be pleaded. Here the statute requiring a presentation of demand was passed prior to the accident; it was approved by the governor on May 3, 1937. It became effective on August 27, 1937. The injury occurred on May 5, 1937. No verified demand was made until January 27, 1938. It would thus appear on the face of the record that plaintiff had ample time to comply with the statute. But, in any event, she has pleaded no facts in excuse of her non-compliance, and there is nothing upon which this court could say that the time allowed for compliance was unreasonable.

[6-8] Appellant argues that, notwithstanding these principles, the respondents should be deemed to have estopped themselves from raising the bar of the statute because of their action upon a letter written them by her mother. It is not contended that this was anything more than a letter, or that it was verified, or fixed any claim for damages. The settled rule is that when a statute fixes a definite rule of action upon a public official for the benefit of the public at large the official may not escape that rule by act of omission or commission. Estoppel is a species of waiver and where a public official may not waive a public right he cannot be estopped from asserting that right on the part of the general public. The same question was raised in Johnson v. Glendale, 12 Cal.App.2d 389, 397, 398, 55 P.2d 580, 583, and the court disposed of it in this language: "It is contended that the said acts of the defendants Curl and MacIntyre amounted to a waiver by the city of Glendale of compliance with the law in the matter of filing the claim. This contention cannot be upheld. It is the generally accepted rule that a municipality and its officers are without power to waive compliance with the law in such matters. Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035; Spencer v. City of Calipatria, supra [9 Cal.App.2d 267, 49 P.2d 320]; Touhey v. City of Decatur, supra [175 Ind. 98, 93 N.E. 540, 32 L.R.A., N.S., 350]; Dechant v. City of Hays, 112 Kan. 729, 212 P. 682; Berry v. City of Helena, 56 Mont. 122, 182 P. 117. The statute does not authorize a waiver nor does it provide any substitute for a written verified claim. The authorities we have cited quite generally held that actual knowledge on the part of officers of a municipality of the facts required to be stated in the claim does not dispense with the claim itself."

[9] Appellant charges error to the trial court in its order striking from the complaint the allegations relating to her mother's letter. It is apparent from what we have said that these allegations were irrelevant and stated no issue upon which appellant could have tendered any proof.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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40 Cal.App.2d 153

CHAMBERS v. TERRY.

Civ. 2377.

District Court of Appeal, Fourth District,
California.

July 17, 1940.

1. Judges 🔑4

In election contest proceeding, it could be assumed that an amendment to Municipal Court Act concerning qualifications of judges of municipal court of city of San Diego conferred no benefit upon contestee who was elected to office of judge of municipal court of city of San Diego prior to effective date of amendment. Gen.Laws 1937, Act 5238, § 9(a); St.1939, p. 2122.

2. Judges 🔑4

The constitutional provision that no person shall be eligible to office of a justice or judge of certain courts unless he has been admitted to practice before Supreme Court for at least five years immediately preceding his election or appointment must be considered with other sections of article of Constitution concerning the judicial department, and, when so considered, the provision manifests an intent to provide for and fix the legal qualifications to be required of a judge of municipal court of city of San Diego and of justices and judges of certain other courts, and to provide that a person possessing named qualifications is, in so far as such subject matter is concerned, qualified to hold office of judge or justice of named courts. Const. art. 6, § 11, subds. 2, 3; § 23.

3. Judges ⚷4

The section of Constitution concerning the establishment of municipal courts is to be read in connection with section providing that no person shall be eligible to office of a justice or judge of certain courts, including a municipal court, unless he has been admitted to practice before Supreme Court for at least five years immediately preceding his election or appointment to office. Const. art. 6, §§ 11, 23.

4. Judges ⚷4

The portion of Municipal Court Act, as existing in April, 1939, which provides that judges of municipal court of city of San Diego must have had at least five years' active practice at law in the state prior to their election or appointment is unconstitutional as an attempted exercise of a power which had been expressly withheld from Legislature. Gen.Laws 1937, Act 5238, § 9(a); Const. art. 6, § 11, subds. 2, 3; § 23.

5. Courts ⚷160

The section of Constitution authorizing Legislature to fix jurisdiction of municipal courts and the powers, duties, qualifications, and responsibilities of judges thereof is not in conflict with section concerning the establishment of municipal courts, since the former section refers to a different kind of court than the one referred to in latter section. Const. art. 6, §§ 11, 13.

6. Courts ⚷160

The section of Constitution authorizing Legislature to fix jurisdiction of municipal courts and the powers, duties, qualifications, and responsibilities of judges thereof refers to such inferior courts as may be established by Legislature under power given to it in section of Constitution concerning establishment of municipal courts, even in cities where so-called new municipal courts have been established. Const. art. 6, §§ 11, 13.

7. Judges ⚷4

The section of Constitution authorizing Legislature to fix jurisdiction of municipal courts and powers, duties, qualifications, and responsibilities of judges thereof authorizes Legislature, notwithstanding any other provision contained in that article of the Constitution, to fix jurisdiction of such inferior or local courts as it may provide for in cities having municipal courts which are established in pursuance of the article, and where such additional inferior courts are established, Legislature may fix qualifications of judges thereof. Const. art. 6, § 13.

8. Statutes ⚷74(1)

In attempting to fix qualifications for judges of municipal court of city of San Diego in excess of those provided for by section of Constitution providing that no person shall be eligible to office of a justice or judge of certain courts unless he has been admitted to practice before Supreme Court for at least five years immediately preceding his election or appointment to office, Legislature was not dealing with a "municipal affair" and was bound by constitutional provisions requiring uniformity, through general laws, there being no natural or reasonable distinctions warranting a classification of municipal courts in various subdivisions of state based upon differences in required qualifications of their judges. Gen.Laws 1937, Act 5238, § 9(a); St.1939, p. 2122; Const. art. 6, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

9. Courts ⚷42(5)

The constitution of municipal courts from every viewpoint, except that of question of whether they shall exist in given localities, is a state, rather than a "municipal affair", especially in view of constitutional requirement that Legislature shall provide for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof, except in particulars otherwise specified. Const. art. 6, § 11.

10. Statutes ⚷98(2)

Although municipal courts of the sort contemplated by article of Constitution concerning the judicial department may exist only if provided for by freeholders' charters of cities having populations in excess of 40,000, such courts must yet be established pursuant to general law. Const. art. 6, § 11.

11. Statutes ⚷71

The requirement that laws of a general nature have a uniform application does not prohibit the making of reasonable classifications of persons or objects upon which the laws are to operate, but the classification must be based on some natural, intrinsic, or constitutional difference warranting it.

12. Statutes ⚿=74(1)

Litigants, in whatever part of the state they may be, are entitled to have in courts of the same grade, the same standards of required learning and experience in their judges.

13. Constitutional law ⚿=70(3)

Whether judgment of Legislature in making classification of salary of judges based upon cost of living in particular localities or pressure of business in one place as compared with another is correct is a matter of no concern of courts, but as to propriety of uniform standards of judicial competence in courts of same class, there is no reason for legislative judgment, it being a subject on which uniformity is of extrinsic importance and on which no reasonable ground for diversity can exist.

14. Judges ⚿=4

Where contestee, who was declared elected as judge of municipal court of city of San Diego at April, 1939, election, had been admitted to practice law in California in June, 1931, and, aside from approximately five years of judicial service, contestee had been engaged in general practice of law only for four years and seven months when elected, contestee was not, at time of his election, ineligible to hold office. Gen.Laws 1937, Act 5238, § 9(a); St.1939, p. 2122.

Appeal from Superior Court, San Diego County; Charles C. Haines, Arthur L. Mundo, Gordon Thompson, Edward J. Kelly, and L. N. Turrentine, Judges.

Election contest proceeding between Claude L. Chambers, contestant, and Clarence F. Terry, contestee. From a judgment sustaining a demurrer to the statement of contest, contestant appeals.

Affirmed.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for appellant.

Wright, Monroe, Harden & Thomas and Hervey & Holt, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an election contest. Following an election which was held in April, 1939, the contestee was declared to be elected to the office of judge of the municipal court of the city of San Diego. The contestant, who was a candidate for the same office at that election, filed a contest on the sole ground that under the "law of the State of California relating to Municipal Courts in the City of San Diego" the contestee was ineligible and not qualified to be elected to this office for the reason that he "had not had at least five years active practice at law in this State prior to his said election". A demurrer to the statement of contest was sustained by five judges of the superior court of San Diego county, sitting in bank, and the contestant has appealed from the judgment which followed.

[1] At the time this election was held, subdivision (a) of section 9 of the Municipal Court Act (Deering's Gen.Laws, Act 5238), which related to the municipal court of the city of San Diego, provided that the judges of said court "must have had at least five years active practice at law in this State prior to their election or appointment". Shortly after that election this section was so amended as to provide that such judges must have been admitted to practice before the Supreme Court of this state for a period of at least five years immediately preceding their election or appointment. Stats. 1939, p. 2122. It may be assumed, however, that this amendment confers no benefit upon this contestee who was elected prior to its effective date. Sheehan v. Scott, 145 Cal. 684, 79 P. 350; Bowring v. Dominguez, 3 Cal.2d 167, 44 P.2d 299.

It further appears that the contestee was admitted to practice law in this state on June 5, 1931; that he took office as city justice of the peace of the city of San Diego on January 5, 1935, and served as such city justice until May 7, 1935, when he took office as city police judge; that he served in that capacity until July 1, 1937, when he took office as a judge of the municipal court of the city of San Diego upon the establishment of that court; that since that date he has been serving and is still serving as such judge of the municipal court; and that, aside from some five years of judicial service, he has been engaged in the general practice of law only for four years and seven months. The question is squarely presented whether the contestee was at the time of his election ineligible and not qualified to hold said office because of this fact.

Section 11 of article VI of the state Constitution authorizes the establishment in certain cities of a new kind of municipal court, not theretofore known to our judicial system, which courts may be established "as in this article provided" notwithstanding any other provision in the Constitution. The second paragraph of this section declares that the legislature shall provide "by general law" for the establishment of such courts in certain cities, and for the government and jurisdiction thereof. The third paragraph of that section provides, among other things, that the "qualifications" of judges of such courts shall be prescribed by the legislature "except as * * * otherwise provided in this article". Section 23 of the same article provides: "No person shall be eligible to the office of a justice of the supreme court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the supreme court of the State for a period of at least five years immediately preceding his election or appointment to such office."

[2-4] Section 23, just quoted, must be read and considered along with the other sections of this article of the Constitution and given due effect. Edler v. Hollopeter, 214 Cal. 427, 6 P.2d 245. So construed, it seems to have been intended to provide for and fix what may be termed the legal qualification, that is to say the necessary proof of training and ability in the technical field of the law, which is to be required of the judge of such a municipal court, as well as of the judges and justices of the other named courts. While the proposition is negatively stated in section 23, the only reasonable interpretation thereof is that it was intended thereby to fix the qualification of such judges, in the respect in question, and to provide that a person possessing the named qualification was, in so far as such subject matter is concerned, qualified to hold the office of judge or justice of such courts. Section 11 is also to be read in connection with section 23 of the same article. The third paragraph of section 11, in giving certain powers to the legislature in connection with the establishment of the new municipal courts, expressly excepts therefrom such matters as "are otherwise provided in this article". What we have called the legal qualification of the judges of such courts was otherwise provided for in that article and is to be found in section 23. It may be conceded that under section 11 the legislature was given power to fix and provide for certain other qualifications of the judges of these courts, such, for instance, as residence and age requirements. But, in our opinion, the entire matter of what we have termed the legal qualification of such judges, having to do with their training, ability and experience in the legal profession, was one that was covered and fixed by section 23 and one which was clearly withdrawn from the powers given to the legislature by the exception set forth in the third paragraph of section 11. We, therefore, hold that that portion of subdivision (a) of section 9 of the Municipal Court Act, as then existing, which, at the time of the election here in question, provided that judges of the municipal court of the city of San Diego must have had at least five years' active practice at law prior to their election or appointment, is unconstitutional and void as an attempted exercise of a power which had been expressly withheld from the legislature.

The contestant and appellant contends that despite any limitation upon the power of the legislature which may be contained in the third paragraph of section 11, an absolute and uncontrolled power to fix the qualifications of judges of a municipal court is given to the legislature by section 13 of article VI of the Constitution. This section reads: "Notwithstanding any provision contained in this article, the Legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts which may be established in pursuance of this article, and may fix by law the powers, duties, qualifications and responsibilities of judges thereof." It is argued that the legislature was thus authorized to prescribe the qualifications of the judges of the municipal court of San Diego "notwithstanding any provision contained in this article" of the Constitution.

[5-7] If section 13 were in conflict with section 11 it might be necessary to harmonize the two and search for an explanation as to why certain matters were expressly excepted from the powers given to the legislature in section 11 and then expressly given to the legislature in section 13. It is quite apparent, however, that there is no conflict between these two sections since section 13 refers and relates to a different kind of court than the

one authorized and referred to in section 11. As we have said, section 11 authorized the establishment of a new kind of municipal court which was quite different from the various police courts and other purely local courts which had theretofore existed, and which had been and still are often referred to as municipal courts in the sense that they are city courts. The fourth paragraph of section 11 provides that in any city where a municipal court authorized by that section is established, there shall be no other court inferior to the superior court except as authorized by the legislature. Section 13 of article VI, prior to its amendment in 1928, provided that the legislature should fix the jurisdiction of any inferior courts which might be established in pursuance of section 1 of that article, and should fix the powers, duties and responsibilities of the judges of such inferior courts. This section was amended in 1928, and now reads as above quoted. Clearly, it refers to such inferior courts as may be established by the legislature, under the power given in the fourth paragraph of section 11, even in cities where what we have called the new municipal courts have been established. It plainly appears from the language used that section 13 now authorizes the legislature, notwithstanding any other provision contained in that article of the Constitution, to fix the jurisdiction of such inferior or local courts as it may provide for in cities having municipal courts which are established in pursuance of that article of the Constitution, and that where such additional inferior courts are established the legislature may fix the qualifications of the judges of such courts. Section 13, therefore, has no application to the present problem, which relates to a judge of this new kind of municipal court and has nothing to do with judges of any additional courts which might be, but have not been, established in the city of San Diego.

[8-14] A further consideration is that in attempting to fix qualifications for judges of the municipal court of San Diego in excess of those provided for by section 23 of article VI of the Constitution, the legislature was not dealing with a municipal affair, and was bound by the constitutional provisions requiring uniformity, through general laws, there being no natural or reasonable distinctions which would warrant a classification of the municipal courts in the various subdivisions of the state based upon differences in the required qualification of their judges. In this regard, we adopt portions of the opinion filed by the five judges of the trial court, which are as follows: "It is still our view that the Constitution of municipal courts from every viewpoint, except only that of the bare question whether they shall exist at all or not in given localities, is a state, rather than a municipal affair. This seems to us necessarily to follow from the requirement of section 11 of article VI of the State Constitution that 'the legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in particulars otherwise specified in this section, and for the establishment of municipal courts in cities or cities and counties governed under charters framed and adopted under the authority of this Constitution, and having the population hereinbefore in this section specified,' i. e., more than 40,000 inhabitants. The only 'particulars otherwise specified' in section 11, that is particulars in which the subjects mentioned are excepted from the requirement that they be governed by 'general law' have to do with the right of the voters of the municipality to decide whether they wish such courts or do not wish them. They can, if they choose, have courts of the sort prescribed by general law under authority of article VI of the Constitution. But they must choose whether they want those courts or do not want them. They must either take them as the general law constitutes them or not take them at all. The circumstance that such courts are not in their functions or jurisdiction treated as falling within the category of municipal affairs is patent. Their proceedings are, by authority of the express provisions above quoted of section 11 of article VI of the Constitution, regulated by the legislature, and are in fact governed by the Code of Civil Procedure. The Appellate Department of the Superior Court of Los Angeles county has in the recent case entitled People v. Barnhart, 94 P.2d 411, laid it down that their procedure as well as their jurisdiction is essentially a state rather than a municipal affair, and said that to interpret charter provisions as 'limiting the jurisdiction of, or regulating the procedure in, such courts would render such provisions void

as obnoxious to general law in a field not constituting a municipal affair and already occupied exclusively by the state.' As respects their jurisdiction it is now held that it extends to certain classes of cases not arising at all within the municipalities within which their judges are elected. In re Luna, 201 Cal. 405, 257 P. 76."

"Municipal courts of the sort contemplated by article VI of the Constitution, though they may exist only if provided for by freeholders' charters of cities having populations in excess of 40,000, must yet be established pursuant to general law. Const. art. VI, § 11. The requirement that laws of a general nature have a uniform application does not, of course, prohibit the making of reasonable classifications of the persons or objects upon which they are to operate, but the classification must be based on some natural, intrinsic or constitutional difference warranting it. Abeel v. Clark, 84 Cal. 226, 230, 24 P. 383; People v. Jordan, 172 Cal. 391, 397, 156 P. 451; Reclamation District v. Riley, 192 Cal. 147, 156, 218 P. 762; Heron v. Riley, 209 Cal. 507, 518, 289 P. 160. We cannot see that any possible reason can exist for the classification of judges of the municipal court of the city of San Diego in a category with respect to their required qualifications different from that applicable to the judges of other municipal courts constituted under the authority of article VI of the Constitution. In so far as they are charged with administering law generally the classes of cases which they are authorized to consider are throughout the state the same. It is suggested, indeed, that they may be called upon to deal with the ordinances of cities which differ from place to place. But since the requirement invoked is not that they have five years of active practice in any one locality within the state, the idea that it has any relation to the need for local experience with local enactments is untenable. Contrariwise we think this precisely a case where the general rule requiring uniformity should be enforced, for it ought to be the right of litigants in whatever part of the state they may be to have in courts of the same grade, the same standards of required learning and experience in their judges. Eccentricities in this connection are highly undesirable.

"It is, indeed, suggested that the particular distinction attempted by the statute under review is but one of a great many affecting even such municipal courts themselves, such for example as the variation between place to place in the salaries allowed their judges, in the number of their attaches and the salaries allowed the latter and so on. These distinctions, however, seem to us to fall into a different category. They may be wise or unwise but are of the sort recognized as legitimate in such cases for example as Cody v. Murphey, 89 Cal. 522, 26 P. 1081. There are numerous considerations having to do with the cost of living in particular localities or the pressure or want of pressure of business in one place as compared with another or other geographical considerations that furnish legitimate ground for the exercise of legislative judgment in making classifications of that sort. Whether in these circumstances the judgment of the legislature is correct or not is no concern of the courts. But as respects the propriety of uniform standards of judicial competence in courts of the same class we do not see that there is any reason for legislative judgment. It is a subject on which uniformity is of extrinsic importance and on which no reasonable ground for diversity can exist."

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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40 Cal.App.2d 76

OCEAN PARK PIER AMUSEMENT CORPORATION v. CITY OF SANTA MONICA.

Civ. 11297.

District Court of Appeal, First District, Division 1, California.

July 11, 1940.

As Modified on Denial of Rehearing Aug. 10, 1940.

See 104 P.2d 879.

1. Municipal corporations 🔑719(4)

A company granted a franchise by municipality for maintenance and operation of wharf for purposes of commerce and navigation as far as might be necessary and portions thereof not so used to be employed for amusement and recreation purposes, was not a "public service utility," where company did not agree to submit to any governmental body the right to fix prices and there was no agreement that all members of the public should be served. St.1905, pp. 777–780, as amended by St.1909, p. 125, and St.1915, p. 1300; St.1917, pp. 90, 91.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Service Utility".

2. Corporations ⚷382½

To constitute a true "public utility," the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Utility".

3. Municipal corporations ⚷719(4)

Municipality, in granting franchise to company for maintenance and operation of wharf for purposes of commerce and navigation as far as might be necessary and portions thereof not so used to be employed for amusement and recreation purposes, was performing a "governmental function," and was not granting a lease or private franchise to company where purpose of ordinance granting franchise was to dedicate wharf to public interest. St.1905, pp. 777–780, as amended by St.1909, p. 125, and St.1915, p. 1300; St.1917, pp. 90, 91.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function".

4. Franchises ⚷2

A franchise may be severable to give effect to the rights of the parties under the terms thereof.

5. Appeal and error ⚷719(1)

The District Court of Appeal is limited to questions raised on appeal.

6. Municipal corporations ⚷719(4)

The right of municipality to permit, on its own property, the erection of a wharf and the construction of buildings thereon by a private company, from which an income is to be derived, was a privilege of public concern, subject to public regulation and control by city council, and was therefore a "franchise." St.1905, pp. 777–780, as amended by St.1909, p. 125, and St.1915, p. 1300; St.1917, pp. 90, 91.

See Words and Phrases, Permanent Edition, for all other definitions of "Franchise".

7. Municipal corporations ⚷719(4)

That portion of franchise granted by municipality authorizing company to maintain and operate a wharf for purposes of commerce and navigation as far as might be necessary and portions thereof not so used to be employed for amusement and recreation purposes, which directed company to pay to municipality 2 per cent. of income from company's privately-owned property, as well as of income from tide land owned by municipality, was void. St.1905, pp. 777–780, as amended by St.1909, p. 125, and St.1915, p. 1300; St.1917, pp. 90, 91.

8. Municipal corporations ⚷719(4)

The acceptance by grantee of franchise authorizing grantee to maintain and operate a wharf for purposes of commerce and navigation as far as might be necessary and portions thereof not so used to be employed for amusement and recreation purposes, which directed grantee to pay to municipality 2 per cent. of income from grantee's privately-owned property, as well as of income from tide land owned by municipality, did not "estop" grantee's successor from showing that municipality had no authority to grant franchise in so far as it included grantee's privately-owned land. St.1905, pp. 777–780, as amended by St.1909, p. 125, and St.1915, p. 1300; St.1917, pp. 90, 91.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

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Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge

Action by the Ocean Park Pier Amusement Corporation, a corporation, against the City of Santa Monica, a municipal corporation, to have a portion of contract between plaintiff's predecessor and defendant declared void, wherein defendant filed a cross-complaint. From that part of judgment adverse to plaintiff, the plaintiff appeals.

That part of judgment appealed from reversed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Robert N. Baker, of Santa Monica, for respondent.

WARD, Justice.

An appeal by plaintiff and cross-defendant from certain portions of a judgment decreeing defendant and cross-complainant to be entitled to two per cent of the gross annual receipts derived from plaintiff's use, operation and possession of a franchise, and the rights and privileges thereof, as described in an ordinance of the City of Santa Monica.

It appears that the ordinance granting plaintiff's predecessor Venice Investment Company, a corporation, a franchise for the maintenance and operation of a wharf or pier, included therein a description of tide lands owned by the City of Santa Monica as well as privately owned lands of such predecessor, and that payment for such franchise was fixed at two per cent of the gross annual receipts of the business conducted. Subsequently, the Venice Investment Company sold, assigned and transferred its right, title and interest under the franchise to Ocean Park Realty Corporation, and later such interest was assigned by a referee in bankruptcy to the Ocean Park Pier Amusement Corporation, plaintiff herein, which company still exercises rights, interests and privileges under such franchise.

In July, 1917, the state of California upon certain trusts and conditions, granted to the City of Santa Monica certain tide lands and submerged lands bordering on the Pacific ocean and contiguous to said city. Thereafter, in July, 1921, the city by ordinance fixed and determined the line of mean high tide of the ocean within the municipality and defined the boundary lines between the tide lands and submerged lands granted the city by the state, and the privately owned uplands.

The complaint in this case alleged a mutual mistake between respondent and plaintiff's predecessor in the description of the lands. The point was not made at the trial, however, and is not urged upon appeal. A cross-complaint to quiet title raised issues relative to ownership of certain portions of the land.

The complaint also alleges that the city was "without right or authority" to include in the franchise the land held in private ownership. Taken as a whole, the complaint is sufficient to raise a question of the proper interpretation of the ordinance granting the franchise. From the record on appeal, and the arguments submitted by both sides, there appears to be no effort, either by appellant or respondent, to have the whole franchise or contract declared ultra vires and unenforceable; rather the purpose of appellant is to have a provision therein relative to the income from the uplands, privately owned, declared invalid.

The court found that on February 6, 1924, one L. W. Seymour presented a written application to the City of Santa Monica for a franchise to construct, operate and maintain a wharf and pier over certain lands; that after due proceedings the franchise was sold to the Venice Investment Company, and, on March 26, 1924, ordinance No. 270 (commissioners' series) was passed granting to the purchaser a franchise covering the subject-matter set forth in the application. In particular, appellant's predecessor was granted the right to maintain and operate on the lands described a wharf or pier, for the purposes of commerce and navigation as far as might be necessary, the portions thereof not so used to be employed for amusement and recreation purposes. The court further found that the franchise was granted in conformity with and in pursuance of the provisions of the Broughton Act, Stats. 1905, pp. 777–780, as amended by Stats. 1909, p. 125; Stats. 1915, p. 1300, and subject to the limitations of Statutes of 1917, pages 90, 91, "An act granting certain tide lands and submerged lands of the State of California to the city of Santa Monica upon certain trusts and conditions."

The court found also that the City of Santa Monica intended to include in ordinance 270 the lands therein described; that the predecessor of appellant knew at the time of the erection of the improvements upon the land, as did also appellant at the time of the acceptance of the assignment, what lands were described in the franchise. The court further found that it was not true that there had been a mutual mistake among the various parties interested as to the lands so included in the franchise; that appellant's predecessor intended to acquire by such franchise the exact lands described in ordinance 270, including the publicly and privately owned lands, and to pay therefor two per cent of its annual gross income from the use, operation and possession of the franchise; and that the Ocean Park Pier Amusement

Corporation, when it accepted the assignment, so understood. The court also found that the income derived from the land lying upward from the mean high tide line was not easily calculable, ascertainable, distinguishable and severable from that derived from the properties lying oceanward; that, notwithstanding the City of Santa Monica has never owned and does not now own the real property described in the ordinance which is landward of the line of mean high tide, nevertheless the franchise should be interpreted to include all property described in ordinance 270.

Separate findings were made on the cross-complaint of the City of Santa Monica, wherein the court found that the line of mean high tide was designated on a map introduced in evidence by a wavery line a distance of 55 feet, plus or minus, from the ocean front promenade; that such line, by gradual and imperceptible degrees and by natural means of avulsion and sudden and perceptible accretion, has been moving seaward; that the City of Santa Monica is the owner in fee as trustee for the state of California of the lands lying seaward of the high tide line established by ordinance; that appellant by mesne conveyance is the owner of the leasehold interest in various parcels of property above the tide line set forth by reference, but that such interest is subject to the rights of the City of Santa Monica under the franchise.

Judgment followed the findings and decreed that the City of Santa Monica is entitled to all sums heretofore, now, or hereafter due and payable as in the franchise provided. The notice of appeal does not indicate any objection to the findings or judgment in so far as the cross-complaint is concerned.

Respondent contends that plaintiff, having prayed for declaratory relief, based upon the theory of mutual mistake in the description of the lands set forth by metes and bounds in the franchise, in view of its later concession that there was no such misunderstanding, may not now present a different theory, namely, interpretation of the franchise grant and want of authority.

Respondent concedes that as a basic principle the City of Santa Monica did not have authority to grant a franchise over privately-owned lands. It contends, however, that the present franchise is in fact a lease of tide and submerged lands, and seeks to have the ordinance and the acceptance of the franchise construed as such, and upon that theory argues that the city was empowered to fix any price the grantee (lessee) agreed to pay. A number of cases are cited, an examination of which, however, indicates merely that a municipality, in granting the right to erect a private wharf, has the authority to enter into a lease.

[1] An examination of statutes and cases cited by appellant indicates that it deems this franchise to be one given to a public service utility, such as a street railway, or a gas or water utility, wherein a duty is imposed, under certain restrictions, to serve the public upon demand. Appellant corporation hardly comes within the purview of a public service utility. Certain essential characteristics are lacking; appellant and his predecessors did not agree to submit to any governmental body the right to fix prices; there was no agreement that all members of the public should be served. There is a price-fixing provision in the ordinance relative to the parking of automobiles, by which the city council reserved the right to determine whether there should be free parking or such fee as the city council shall from time to time prescribe, but this was merely incidental to the whole venture.

[2] In Richardson v. Railroad Commission, 191 Cal. 716, 720, 721, 218 P. 418, 419, the court said:

"In applying this principle to the proceeding before us, it is well to have in mind the definition of what constitutes a public utility, as adopted and clearly set forth by this court in the case of Allen v. Railroad Comm., 179 Cal. 68, 88, 175 P. 466, 474 (3 A.L.R. 249) wherein this court says:

"' "What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family, is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may instance the butcher. He deals with the public, he invites and is urgent that the public should deal with him. The character of his business is such that under the police power of the state it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (Eminent Domain, § 164 et seq.) but is the definition repeatedly announced by this court. * * * " '

"The court also and in the quite recent case of Van Hoosear v. Railroad Comm., supra [184 Cal. 553, 194 P. 1003], quoted with approval the further statement in the Allen Case that ' "To hold that property has been dedicated to a public use is no trivial thing," ' * * * and such dedication is never presumed 'without evidence of unequivocal intention.' "

[3] The purpose of the passage of the ordinance was to dedicate the wharf or pier to public interest. Its operation was of public consequence, concern and use. It granted a public franchise. Though the city, in its private or proprietary capacity, may have had the right and power to lease the land under the provisions of the Statutes of 1917, page 91, "that said city, or its successors, may grant franchises thereon, for a period not exceeding twenty-five years, for wharves and other public uses and purposes, and may lease said lands, or any part thereof for a period not exceeding twenty-five years, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor", it did not elect to do so. On the contrary, the ordinance refers to the grant as a franchise. It was intended by the parties thereto to be a franchise under the Broughton Act, the provisions of which were complied with in the steps taken for the passage of the ordinance. The franchise was primarily for the purpose of commerce and navigation; the amusement feature was incidental thereto. The work of erection was to be prosecuted diligently to meet the reasonable needs of the inhabitants of the territory for the service for which the franchise was granted; the wharf was to be kept open to the public for commerce and navigation; the public was to be given an area for free parking of automobiles.

The franchise herein clearly shows that the municipality was performing a "governmental function"; that it was granted in furtherance of a use and that the municipality did not assume to grant a lease or private franchise as in People v. Monstad, 209 Cal. 658, 289 P. 847, wherein a "lease and agreement" was entered into between defendant therein and the city of Redondo Beach, and the provisions of the Broughton Act were not followed. In the present case the contrary appears. At a meeting of the city council the only sealed bid submitted "to conform to your notice for the sale of a franchise * * *" was for the amount of $500, which amount, upon a request by the presiding officer for further bids was gradually raised until plaintiff's predecessor's bid of $2,000 was accepted.

[4] A franchise may be severable to give effect to the rights of the parties under the terms thereof. City of Oakland v. Great Western Power Co., 186 Cal. 570, 200 P. 395. In County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, in which part of the income derived from the sale of electricity arose from its transmission over lands in other counties and over private rights of way, the court determined that the county was entitled only to income that could be traced to the use of public highways in the county. In that case the court, at page 670 of 188 Cal., at page 985 of 206 P., said: "It is purely a matter of contract. While it is true that the payment is required by law as a condition of the franchise grant, it is a matter of option with the applicant whether he will accept the franchise on those terms. His obligation to pay is not imposed by law but by his acceptance of the fran-

chise." There is nothing in the Tulare County case to indicate that a charge could have been made in excess of the two per cent as provided in the act. The court merely said that the franchise could be accepted or rejected as the parties deemed proper.

Assuming that the Broughton Act has no application to the leasing of tide or submerged lands, and assuming, but not holding, that the contract was in fact a lease for the purpose of erecting a private wharf (People v. Monstad, supra), the agreement was made between appellant's predecessor and respondent. Whether it was a franchise or a lease is immaterial. The ordinance provided that the grantee pay the amount set forth as rental for the area described. Plaintiff's predecessor acquiesced in the contract through occupancy of the area. The description, however, embraced plaintiff's privately-owned property. Whether we consider the document as a franchise or a lease, we are confronted with the same problem; as to whether or not a governmental agency may include in a contract privately-owned property and collect revenue therefrom. The parties to a lease might have contracted to pay an amount in excess of two per cent, but only upon property in connection with which they had the rights of lessor and lessee.

[5] We repeat, the validity of the franchise contract in its entirety is not now in issue. The city not having appealed, it may not now attack the judgment upon the theory that it had no power to make the contract, or that the terms thereof were entirely beyond the scope of the city's jurisdiction. Likewise, the question of fair competitive bidding is not raised upon the present appeal. We are limited to the questions raised. The basis of this franchise is a contract, and the appeal simmers down to the construction to be placed upon the terms thereof.

[6, 7] The right of the municipality to permit, on its own property, the erection of a wharf and the construction of buildings thereon by appellant, from which an income is to be derived, was a privilege of public concern, subject to public regulation and control by the city council. It was, therefore, a franchise. That portion of the franchise contract directing appellant to pay to the municipality two per cent of the income derived from appellant's privately-owned property is void. In the case of In re Johnston, 137 Cal. 115, 120, 69 P. 973, 975, the court said: "When the sovereign authority of the state, either in its Constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality, where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise."

It may be well to mention the reason for the inclusion in the franchise of the privately-owned lands. A dispute existed relative to the line of mean high tide, which was not finally determined by judicial decree until the judgment upon the quiet title cross-complaint in the present proceeding. There is no appeal from that part of the judgment. It has become final. A transcript of the evidence at the time the franchise was offered for sale shows that a representative of the Venice Investment Company made the following statement: "I have already stated that these people (his clients) are the owners—lessees—of the water front, of the upland upon which the territory over which this franchise is proposed to be granted abuts. There is no question that the City of Santa Monica has a right to grant franchises extending out into the bays for piers and falls for the purpose of commerce and navigation. The grant of that franchise, however, grants no rights over private property. We desire to notify the bidders here that the franchise, if granted to anyone but the owners of the upland, will give no rights over our private property, no rights of passage or———", following which a representative of the city replied: "I simply want the city not to give an estoppel of any claim they have on any part of that land. * * * I say simply this: That any acceptance of that bid will not be made on any conditions laid down by Mr. Goudge. It will be accepted on the condition that it is a franchise to build it; and it doesn't matter whose property it is over—if he builds over his own property or somebody else's." A short time before, during the same meeting, the city had made the following statements: "We will have to rest on our construction by the courts of the written instrument. * * * If you can find a joker in it you can use it against the city. That is your privilege."

Respondent having conceded that the municipality had no authority to grant a franchise over privately-owned land, and the court having determined that the ordinance is in fact a franchise and not a lease, such concession terminates this appeal.

The municipal corporation had no power, express, implied or inherent, to include in the grant, land over which it had no proprietary interest. Whatever licensing or taxing power it may have over the land or the business conducted thereon, it may not, under the guise of issuing a franchise providing for the payment of two per cent. of the gross annual receipts arising from the use, operation or possession of the franchise, increase such percentage by including property over which it exercised no proprietary interest. City of Monrovia v. Southern Counties Gas Co., 111 Cal.App. 659, 296 P. 117; City of Oakland v. Great Western Power Co., supra; County of Tulare v. City of Dinuba, supra. In Suisun City v. Pacific Gas, etc., Co., 35 Cal.App. 380, at page 388, 170 P. 1078, at page 1081, in construing a similar provision of an act providing for the sale of street railroads and other franchises (Stats. 1901, p. 265), the court said: "* * * and upon the condition provided by the statute that the applicant pay to the municipality a certain percentage of the gross proceeds arising from the business of operating the franchise. The municipality has no control over this percentage. It is not the subject of contract, but is fixed at 2 per cent. by the law. * * * It is to be taken from the gross proceeds of the use and exercise of the franchise which is granted by said municipality. This means, of course, from the proceeds of the franchise which is legally granted by the authorities. No percentage can be charged against a franchise which already belongs to the applicant." In the Suisun City case, the court was dealing with the problem of an attempt to charge two per cent on two franchises, one of which had been already granted. In effect, the court said that the percentage payment could not be increased by a charge in connection with a franchise over property in which the defendant held a proprietary interest.

[8] From what has been said, it is clear that the acceptance of the franchise by grantee cannot estop appellant from showing that the city had no authority to grant the same in so far as it included appellants' own land. Suisun City v. Pacific Gas, etc., Co., supra. The doctrine of estoppel does not cover the portion of a franchise contract "entirely beyond the range of the municipal authority". City of Arcata v. Green, 156 Cal. 759, 106 P. 86, 88; Town of St. Helena v. Ewer, 26 Cal.App. 191, 146 P. 191.

The court found: "That it is not true that the income derived from the lands embraced within said Ordinance lying upward from the mean high tide line of the Pacific Ocean is easily calculable, ascertainable, distinguishable and severable from the income derived from the properties lying oceanward of the mean high tide line of the Pacific Ocean." This finding does not seem to be sustained by the evidence. If improvements are erected entirely on city-owned property, or entirely on that privately owned, the income should be readily ascertainable. If an improvement is on both properties, the space on each can be ascertained and the income proportioned, as has been done in connection with payments made under protest to the city by the appellant herein.

It appears that there are included in the franchise both so-called "state tideland" and privately-owned lands. No claim has been made that the franchise is void as containing two incongruous subjects (Washington Water Power Co. v. Rooney, Wash., 101 P.2d 580, 127 A.L.R. 1044), and we refrain from expressing an opinion in connection therewith. However, a new trial is granted which will give the parties an opportunity to apply to the superior court for permission to amend the pleadings should they deem such action advisable.

That part of the judgment appealed from is reversed.

We concur: PETERS, P. J.; KNIGHT, J.

40 Cal.App.2d 216

McKEE v. LYNCH et al.

Civ. 2376.

District Court of Appeal, Fourth District, California.

July 22, 1940.

Hearing Denied Sept. 19, 1940.

1. Appeal and error 🔑1008(3)

In action for value of attorney's services, trial court's construction of plaintiff's letters to defendant as not constituting contract to perform any and all services respecting defendant's income taxes for specified retaining fee *held* not unreasonable, untenable, or so clearly inconsistent with parties' expressed intent as to require appellate court to substitute interpretation precluding additional allowance for services in resisting government's subsequent demand for deficiency. Civ.Code, §§ 1580, 1647, 1648, 1661, 1698.

2. Appeal and error 🔑1008(3)

A reviewing court is not justified in disturbing trial court's construction of contract, where not unreasonable, untenable, or so clearly inconsistent with parties' intent, disclosed by their language, as to require substitution of interpretation for which appellants contend.

3. Evidence 🔑442(1)

When all terms of contract are not incorporated into written instrument, evidence is admissible to prove separate oral agreement concerning any matter on which document is silent, if not inconsistent with its terms.

4. Witnesses 🔑178(4)

Plaintiff's deposition, which defendant caused to be taken after being served with summons, was admissible as evidence on plaintiff's behalf, though defendant died before trial and action then stood as one against his estate. Code Civ.Proc. § 1880, subd. 3; § 2055.

5. Evidence 🔑442(4)

In action for value of attorney's services, plaintiff's testimony in answer to questions as to what arrangements, other than those stated in his letters to defendant, were made as to plaintiff's compensation, that bills were to be rendered for any unusual, complicated, or extraordinary services, was not inadmissible as attempt to modify written contract by parol evidence. Code Civ. Proc. § 2055.

6. Trial 🔑59(2)

The order of proof rests within trial court's sound discretion.

7. Trial 🔑60(1)

In action for value of attorney's services, question in plaintiff's deposition as to what services, for which he claimed compensation, were rendered by him for defendant, was properly read to jury as against objection that there was no previous showing that plaintiff was employed by defendant. Code Civ.Proc. § 2055.

8. Witnesses 🔑143(3)

One to whom attorney advanced money for services in assisting such attorney, pursuant to agreement with client for reimbursement by him, was not an "assignor" within statute prohibiting assignors of parties to actions on claims against decedent's estates from testifying therein, since attorney's cause of action against deceased client's estate for sum paid to such assistant was not derived from assignment of or subrogation to another's rights, but was an independent right, created by making of such payment at request and for benefit of decedent. Code Civ.Proc. § 1880, subd. 3.

9. Appeal and error 🔑105, 870(2)

An order denying motion for nonsuit is not appealable, but may be reviewed on appeal from judgment.

Appeal from Superior Court, San Diego County; E. J. Kelly, Judge.

Action by Dempster McKee against Frank Lynch, after whose death Georgia A. Lynch and F. C. Lynch, as executrix and executor of deceased's last will and testament, were substituted as defendants, to recover the value of services performed and amount of moneys expended by plaintiff as deceased's attorney. Judgment for plaintiff and substituted defendants appeal.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Wright, Monroe, Harden & Thomas, of San Diego, for appellants.

Hillyer & Boldman and Bertrand L. Comparet, all of San Diego, for respondent.

GRIFFIN, Justice.

The plaintiff and respondent, an attorney at law, brought action on common count against Frank Lynch, claiming in the first count $2,500 for the reasonable value of services performed as such attorney, and in the second count for the further sum of $47.25 for moneys expended on behalf of the defendant. Subsequent to the filing of the complaint Frank Lynch died and the defendants and appellants were appointed as executrix and executor of his last will. Claim was duly presented and payment refused and the appellants were substituted as defendants in lieu of the deceased. The allegations of these facts are contained in a supplemental complaint and are admitted.

By way of answer defendants denied the allegations of indebtedness and alleged that Frank Lynch during his lifetime fully and completely discharged all obligations which he owed to the plaintiff for services. The action was tried before the court. A motion by defendants for a nonsuit was denied. Judgment was subsequently rendered against the estate of Frank Lynch, deceased, for the amount prayed for. A motion for new trial was denied. Appeal is taken from the order denying the motion for nonsuit and from the judgment rendered.

Plaintiff and respondent had been employed by the decedent Frank Lynch and had acted as his attorney over a period of many years. On May 1st, 1936, respondent wrote to deceased a letter outlining the terms of his employment and the compensation which he was to receive. The letter read in part:

"Confirming our conversation of yesterday I submit the following as setting forth the terms of our arrangement commencing May 1, 1936:

"You are to pay me a retainer of $100.00 a month commencing May 1, 1936. This retainer is to cover miscellaneous office advice and the preparation of such instruments and documents as do not involve any unusual, extraordinary or complicated situations, for yourself and Mrs. Lynch concerning your business affairs in connection with both your strictly personal business and personal advice to you in connection with corporations in which you may be interested. For all services in court, or outside of the office, you are to pay at the rate of $100.00 a day. In addition you are to pay all expenses, including court costs, traveling expenses and miscellaneous expenses, such as telephone and telegraph bills. Hotel bills and living expenses out of the City shall be paid at the flat rate of $8.00 a day. With the above arrangement I will give such advice as may be necessary concerning the matters in which the Benson Lumber Company and the Benson Timber Company are involved and which are covered by the bill heretofore rendered to the Benson Lumber Company. Work done in connection with any other matters concerning either the Benson Lumber Company or the Benson Timber Company, or matters affecting affairs other than your own personal business, will be charged for at regular rates, or be subject to definite arrangements from time to time. * * * This arrangement is subject to being terminated at any time by either of us if it appears that the same is not satisfactory for any reason."

This letter was signed by respondent and approved by the deceased. Services were performed and payments made as therein specified. F. C. Lynch, the executor and appellant, is a nephew of Frank Lynch, deceased, and during the lifetime of the latter, acted as agent for his uncle and had a general power of attorney. During the fall of 1937, a representative of the United States Government, a Mr. Looby, in a conference with the appellant F. C. Lynch, advised that the government would make a claim for a deficiency in connection with the income tax returns of decedent for the years of 1935 and 1936. This fact was discussed with the respondent and arrangements made for the performance of such legal services as might be called for in connection with the claim for deficiency. The arrangement made was contained in a letter written by the respondent to Frank Lynch under date of December 30, 1937, as follows: "Frank tells me that there is some question in your mind as to whether or not there will be extra charges of fees covering services to be rendered by myself in connection with your income tax returns for 1935 and 1936. In order that this may be clarified to you, I am writing this letter. Frank and I have had several conferences with Mr. Looby of the Internal Revenue Department, with particular reference to your 1935 return, and as Frank no doubt informed you, Mr. Looby's report will probably reflect the question of additional taxes to be paid. This will no doubt necessitate a protest and possibly a hearing. I have, however, already considered the problems involved in the 1935 and 1936 returns, and there will be no other charges or fees, in addition to the retainer that you are paying me unless the work involves my absence from the city, attending hearings, or court proceedings, in which case my charge or fee will be at the rate of not to exceed $100.00 per day for services rendered and $8.00 per day for expenses, in addition to necessary traveling expenses."

The claim of the Government originally made was set forth in a report letter dated February 14, 1938. A tax deficiency of $4,298.32 was claimed for the calendar year of 1935. A protest of his claim was prepared by respondent. A hearing was had upon this protest in Los Angeles about April 4, 1938. On June 6, 1938, the Treasury Department issued its second report letter, this time claiming a deficiency of $184,592.31 in income tax for the year 1935. As a result of this letter and of conferences between the respondent and Frank C. Lynch, a Mr. Jack C. Thompson was employed to assist respondent in computations and accounting work in order to file protest to this claim. The services for which respondent seeks compensation are those alleged to have been rendered during the months of June and July, 1938, pertaining to this $184,592.31 deficiency.

There is evidence that respondent spent considerable time in this connection; that he investigated various legal questions; that he examined and considered a large number of documents relative to the transactions involved in the claims made by the Government, and that he directed and superintended the computation work done by Mr. Thompson. In the early part of August, 1938, the deceased and his nephew, F. C. Lynch, apparently determined to terminate the services of respondent without notice to him. Accordingly F. C. Lynch obtained from respondent the papers relative to the claimed deficiency and thereafter made a settlement with the United States Government for an amount in the neighborhood of $24,000. The record shows that during all of this period of time the retainer provided for in the letter of May 1, 1936, was paid and received by respondent. In connection with the protest and the hearing had in Los Angeles in April, 1938, payment therefor was made as provided for in the letter of December 30, 1937.

First, appellant argues and frankly concedes "that there was introduced at the trial sufficient evidence to support the court's finding that the work done by respondent during the months of June and July, 1938, was of a character that involved 'unusual, extraordinary or complicated situations', and also that evidence was introduced sufficient to support the implied finding of the trial court that the services were reasonably worth the amount for which judgment was given. Although these matters were disputed at the trial, evidence was offered by the respondent sufficient to support the court's findings. It is the claim of the appellants, and was at the trial, that these services were rendered by the respondent as an attorney at law, pursuant to the express terms of his written agreement, and that the agreement was never modified in any manner; that the compensation called for by the agreement was paid and received, and that therefore no additional compensation might be recovered."

At the close of the plaintiff's evidence the defendants moved for a nonsuit as to the first cause of action for payment for services, upon the ground that such services were performed pursuant to the terms of a written contract which expressly set forth the compensation to be paid; that the undisputed evidence showed that such compensation had been paid, and that the evidence failed to establish any alteration, change or modification of that written contract. This motion was denied and the appellants assigned such order as error.

Secondly, it is contended that certain questions of evidence arose at the trial, and appellants claim that the court's rulings with reference thereto were erroneous. During the lifetime of Frank Lynch the deposition of the plaintiff was taken under the provisions of section 2055 of the Code of Civil Procedure. This deposition was filed in the regular manner. Thereafter Frank Lynch died and the representatives were substituted. At the trial appellants objected to the testimony of respondent on the ground that he was disqualified as a witness under subdivision 3, section 1880, of the Code of Civil Procedure. Thereupon the plaintiff offered in evidence the deposition taken during the lifetime of Frank Lynch. This was objected to in its entirety on the ground that the plaintiff was disqualified as a witness under that section and the order of the court overruling such objection and admitting the deposition was assigned as error.

Thirdly, appellants assign as error certain rulings of the court with respect to admissions of certain testimony contained in the deposition and these specified objections will be discussed later.

Fourthly, objection is also made to certain testimony offered by Jack C. Thompson on the ground that he was likewise disqualified under subdivision 3 of section 1880 of the Code of Civil Procedure on the theory that he was under the classification of an assignor, and the order of the court overruling such objection and admitting the testimony is likewise assigned as error.

Fifthly, as to the second cause of action the appellant likewise concedes "that there is evidence sufficient to support the finding of the court that this amount is owed" but claims that this portion of the judgment cannot be supported if they are correct in their contention with respect to the admissibility of the deposition in evidence and as to the testimony of Jack C. Thompson, the claimed assignor, in regard to this cause of action.

[1-3] In support of the first point appellant claims that the written contract contains specific provisions for respondent's compensation and therefore he may not recover additional compensation for such services in the absence of abandonment or express modification of the contract of employment, and argues that under the first agreement of May 1, 1936, the provision that "you are to pay me a retainer of $100.00 a month commencing May 1, 1936. This retainer is to cover miscellaneous office advice and the preparation of such instruments and documents as do not involve any unusual, extraordinary or complicated situations * * *", would leave the question open as to whether the services performed were in the accepted category and therefore a finding by the trial court on the subject would not be disturbed on appeal, but claims that the second letter of December 30, 1937, forecloses any such interpretation as would permit an allowance for any service in relation to the 1935 and 1936 returns. They argue further that ordinarily a client, having arranged for a stated compensation, is entitled to rest upon that contract and is entitled to assume that the stated compensation is all that will be required and that if an additional compensation is to be sought, the client should have the right to determine whether he desires to continue the employment of the attorney under such new arrangement and that no additional compensation may be charged after the transaction has terminated, citing 6 Corpus Juris, pages 738 and 739; Reynolds v. Sorosis Fruit Company, 133 Cal. 625, 66 P. 21; Lindsay v. Carpenter, 90 Iowa 529, 58 N.W. 900; Payne v. Davis County, 150 Iowa 597, 129 N.W. 823; secs. 1661, 1698, Civil Code; Columbia Cas. Co. v. Lewis, 14 Cal.App. 2d 64, 57 P.2d 1010; Pearsall v. Henry, 153 Cal. 314, 95 P. 154, 159. We see no conflict with the rules of law set forth in the cited cases and the rules of law applicable to the facts in the instant case. In an opinion of the trial court printed in the respondent's brief that court thoroughly discussed the facts in evidence and presented a conclusion which we adopt in reference to this particular point raised by appellants. A portion of that discussion is as follows:

"Now to what extent is that contract (of May 1, 1936) affected or influenced by the letter dated December 30, 1937, signed by the plaintiff here addressed to Mr. Frank Lynch?

"I do not consider that letter * * * any modification, or I do not consider it any part of the contract whatever, but just what it purports to be, a statement to Mr. Frank Lynch that what he had been discussing with the attorney in fact for Mr. Frank Lynch and with Mr. Looby of the Internal Revenue Department did fall within the provisions of the ordinary retainer and not the excepted clause of waiver. Mr. McKee in that letter does not say 'I will handle any claim that the Government may make against you for deficiencies in your Internal Revenue tax now and hereafter until this contract is cancelled by either or both of us'; * * * He is writing with reference to a well known situation, known to Frank C. Lynch and known to him. Apparently Mr. Frank Lynch the client was wondering if his contract for the retainer with Mr. McKee covered the situation they were then discussing, or then considering; * * * Mr. McKee writes:

"'Frank and I have had several conferences with Mr. Looby of the Internal Revenue Department, with particular reference to your 1935 return, and as Frank no doubt informed you, Mr. Looby's report will probably reflect the question of additional taxes to be paid.' Now they knew at that time that there was going to be demand by the Government and they knew it would probably be in the nature of $4000, which the original demand was, and Mr. McKee had an idea what he would have to do, he says:

"'This will no doubt necessitate a protest and possibly a hearing,' but he says he already has considered the problems involved. Now that is what he is writing about, those problems which he has considered and which had been discussed with Mr. Looby and which were no doubt embraced in the first demand of the Government which they anticipated at the time Mr. McKee wrote this letter; * * * then he goes on to interpret the contract, not to modify it nor to create a novation. He says:

"'There will be no other charges or fees, in addition to the retainer that you are paying me, unless the work involves my absence from the city,' and so on. He didn't expect there would be very much to it so he decided that it didn't fall within the excepted clause of work set out in his letter of May 1st, which constituted the terms of the contract when approved by Mr. Frank Lynch. Mr. McKee evidently did not consider the matters that he had been discussing with Mr. Looby and Mr. F. C. Lynch fell within the class of those services which were or would be unusual, extraordinary or complicated. * * * The minds of the parties met on those things that had been discussed with Mr. Looby, the minds of the parties met on those things which Mr. McKee had examined in the 1935 and 1936 returns because those are the things that he was * * * writing about in his letter * * * he doesn't regard them as extraordinary. Then along comes the Government, * * * they certainly make a drive on Frank Lynch and want a whole lot of money—one hundred and eighty odd thousand dollars. Now is a demand for one hundred and eighty odd thousand dollars by the Federal Government and a resistance of that demand and the labor that it entailed as disclosed here ordinary, unusual, and not complicated? I don't think we could say so. An entirely different situation from that which the parties had in mind or could reasonably have had in mind at the time defendant's exhibit B (letter of December 30, 1937) was written. I do not think it is reasonable * * * to hold Mr. McKee bound to do all this work and labor for One Hundred dollars a month; I don't think he ever intended to, and I don't think Mr. Lynch ever intended him to do that.

"So the court will hold that defendant's Exhibit B is an interpretation of defendant's Exhibit A (letter of May 1st, 1936) with reference to the matters that had been discussed and considered by Mr. Frank Lynch through his Attorney in Fact, Mr. F. C. Lynch, and which had been discussed with Mr. Looby and which resulted in the first demand of the Government for approximately $4,000.00. * * *

"To * * * consider whether or not the services actually rendered by Mr. McKee are extraordinary, unusual and complicated—there can be no doubt they are; the court finds they are on the testimony here contained in the deposition of Mr. McKee and upon the testimony of Mr. J. C. Thompson, upon the testimony of Mr. Frank C. Lynch, on the testimony of Mr. Conlin. * * *

"Now what are the services of Mr. McKee worth and how should the services of a lawyer be measured? * * * We have the testimony of Mr. Curtis Hillyer that Mr. McKee's services were worth $8,000.00 in this matter * * * there was a pretty good settlement worked out; * * *

"Anybody that has the Federal Government threatening him with execution for $186,000.00 needs a lawyer mighty bad. There is nothing simple about that ordinarily.

"He took hold of the situation and labored on it, got a good result, or at least a good result was obtained and I cannot help but feel that he contributed to it materially, perhaps to a controlling extent; he certainly would have finished it were it not for the fact the papers were taken from him by Mr. Frank Lynch, and he was dismissed, by inference, and so I think that the demand in the prayer of the plaintiff's complaint is modest as to the first count * * *".

It is therefore quite apparent that the trial court did not consider the letters as a contract to cover any and all services to be performed, whether anticipated or not, in reference to the income taxes. The parties were contracting in respect to the matters which were then (December 30, 1937) known to them. This conclusion receives support in a report letter of the Treasury Department dated June 6, 1938, written to Mr. Frank Lynch, wherein it is stated:

"Your protest against the findings of a revenue agent's report in connection with your income tax liability for the year 1935 has been given careful consideration by this office.

"As a result of your protest, a further investigation was made and you will find enclosed a copy of revenue agent's supplemental report setting forth his recommendations on the issues raised, from which you will note that additional information has been obtained making necessary further income adjustments with an increase in the deficiency proposed. * * *"

It is therefore apparent that this report letter was based on new facts or new issues, and in effect was an entirely new and different problem from the one before suggested. The government asserted entirely new, different, unheard-of, uncontemplated and unknown claims in the second report letter, which claims were not known either to the taxpayer, Frank Lynch, or to the respondent or to Mr. F. C. Lynch, at the time of the writing of the December 30th letter. Being unknown, they could not have been referred to therein, nor were they apparently considered by the parties in connection therewith.

The contract specifically provides: "Work done in connection with any other matters concerning either the Benson Lumber Company or the Benson Timber Company, or matters affecting affairs other than your own personal business, *will be charged for at regular rates, or* be subject to definite arrangements from time to time." (Italics ours.) Section 1648 of the Civil Code provides: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." See, also, secs. 1580, 1647, Civil Code.

We are not prepared to declare that the construction given by the trial court to the entire transaction is an unreasonable construction or that it is untenable or so clearly inconsistent with the intent of the parties as disclosed by their language that we must substitute therefor the interpretation for which appellants contend. In such a situation it is settled that a reviewing court is not justified in disturbing the construction adopted by the trial court. Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 44 P.2d 670; Shelley v. Byers, 73 Cal.App. 44, 55, 238 P. 177. It has long been the rule that when parties have not incorporated into an instrument all of the terms of their contract evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms. Buckner v. A. Leon & Co., 204 Cal. 225, 267 P. 693; Lewis Publishing Co. v. Henderson, 103 Cal.App. 425, 284 P. 713; Kellogg v. Snell, 93 Cal.App. 717, 270 P. 232.

[4] As to the second contention in reference to the admissibility of respondent's deposition in evidence, appellants cite many cases from other states supporting their claim that the deposition was not admissible (Boyd v. Gore, 143 Wis. 531, 128 N.W. 68, 21 Ann.Cas. 1263; and cases cited; Smith v. Billings, 177 Ill. 446, 53 N.E. 81; Greenlee v. Mosnat, 136 Iowa, 639, 111 N.W. 996, 14 L.R.A.,N.S., 488), and claim that Rose v. Southern Trust Co., 178 Cal. 580, 174 P. 28; Mitchell v. Haggenmeyer, 51 Cal. 108; Pelton v. Andrews, 24 Cal.App.2d 124, 74 P.2d 528; Deacon v. Bryans, 88 Cal.App. 322, 263 P. 371; Davis v. Mitchell, 108 Cal.App. 43, 290 P. 887; McClenahan v. Keyes, 188 Cal. 574, 206 P. 454, and Hussey v. Loeb, 60 Cal.App. 469, 213 P. 271, are to the same effect.

The holding in Kay v. Laventhal, 78 Cal.App. 293, 248 P. 555, is directly in point under the facts in the instant case. We need but quote from the syllabus to show its applicability to the facts here presented: "In such action, where after defendants were served with summons they caused the deposition of plaintiff to be taken, such deposition was admissible as evidence on behalf of plaintiff, notwithstanding at the time of trial one of the defendants had died and the action stood as one against his estate." (Hearing denied by the Supreme Court.)

Appellants admit that "so far as we have been able to ascertain this decision is the last expression on the subject by the courts in this state. We believe we can demonstrate that it is not the law, and should be overruled". The same argument on the point here involved was quite thoroughly presented to the court in Kay v. Laventhal, supra. In the petition for hearing in the Supreme Court, pages 8, 9, 10, and part of 11, were devoted to a thorough exposition of this same contention and some of the same authorities were cited by the petitioner. We find no reason to reach a conclusion contrary to the one there expressed and particularly so when a hearing has been denied by the Supreme Court.

[5-7] Appellants' third claim of error arose upon the introduction of respondent's deposition in evidence. They moved to strike the answers to the following questions on the ground that they attempted to modify a written contract by parol:

"Q. Did you make any arrangements other than those set forth in the letter of

May of 1936 and the letter of December 30, 1937? A. Yes.

"Q. What were those arrangements? A. If there were any unusual or complicated or extraordinary services, why there would be bills rendered, depending upon what the services were and what they were worth."

For the reasons heretofore expressed the motion was properly denied. Objection was made to reading the following question in the deposition of respondent on the ground that no foundation had been laid, that is, there there had been no previous showing that respondent had been employed by the deceased: "Q. What services did you render for and on behalf of Frank Lynch for which you claim compensation in the action?" The order of proof rests within the sound discretion of the trial court. Lick v. Diaz, 37 Cal. 437. The objection was properly overruled.

[8] As to the fourth and fifth claimed errors, it should be noted that the second cause of action is based upon a claimed advance of $45 paid by respondent to J. C. Thompson for three days' services performed by him in assisting with the disputed claims. This employment and payment were in accordance with an agreement with F. C. Lynch that respondent would be reimbursed by Mr. Lynch. It is appellants' theory that "respondent, by the payment to Mr. Thompson or advancement of money to him, became subrogated to the claim of Thompson against the estate. Thompson therefore was in the position of one whose claim had been assigned", under subdivision 3 of section 1880 of the Code of Civil Procedure, which prohibits the parties to an action as well as their assignors from testifying in an action on a claim against the estate of a deceased. Respondent's cause of action for $45, which sum he paid to Thompson, is not derived from assignment or subrogation of another's rights, but to the contrary, is an independent right of his own, created by the fact of his having made the payment, at the request of and for the benefit of appellants' testator, to Thompson, under which respondent was entitled to have repaid to him the sum he so advanced. Badover v. Guaranty Trust & Savings Bank, 186 Cal. 775, 200 P. 638; 17 Cal.Jur. 587. He was not an assignor within the meaning of subdivision 3 of section 1880 of the Code of Civil Procedure.

[9] An order denying a motion for nonsuit is not an appealable order but may be reviewed on the appeal from the judgment. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 128 P. 399; Fraser v. Sheldon et al., 164 Cal. 165, 128 P. 33. The attempted appeal from this order is dismissed. What we have said in reviewing the appeal from the judgment sufficiently disposes of all the points made in regard to the denial of the motion for a nonsuit.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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40 Cal.App.2d 179

OSROWITZ v. MARKET INV. CO. et al.

Civ. 11055.

District Court of Appeal, First District, Division 2, California.

July 18, 1940.

1. Municipal corporations ⚷821(20)

A pedestrian who in course of crossing street stepped out of pedestrian lane was not guilty of contributory negligence as a matter of law, so as to be precluded from recovering for injuries sustained in fall into open freight elevator shaft in sidewalk in front of defendants' premises, where accident occurred on sidewalk, and no traffic accident was involved. Vehicle Code, § 562, St. 1935, p. 188.

2. Municipal corporations ⚷821(20)

In pedestrian's action for injuries sustained in fall into open freight elevator shaft in sidewalk in front of defendants' premises, whether pedestrian was contributorily negligent was a question of fact for the jury, not a question of law for the court.

3. Municipal corporations ⚷806(1)

On a sidewalk a pedestrian is not bound at all times and under all circumstances to be looking directly ahead in order to be free from contributory negligence which would bar recovery for injuries sustained in fall on sidewalk.

4. Municipal corporations ⚷818(10)

In pedestrian's action for injuries sustained in fall into open freight elevator shaft in sidewalk in front of defendants' premises, exclusion of city ordinance addressed solely to traffic regulations was proper, since ordinance was inapplicable.

5. Municipal corporations ⚷821(19)

In pedestrian's action for injuries sustained in fall into open freight elevator shaft in sidewalk in front of defendants' premises, where it was alleged that bars holding elevator doors open were so constructed that they did not efficiently lock sides of doors and that defendants had not placed across ends of open doors side screens as required by Industrial Accident Commission, whether the alleged negligence of the defendants was the proximate cause of the pedestrian's injuries was for the jury.

6. Municipal corporations ⚷823

In pedestrian's action for injuries sustained in fall into open freight elevator shaft in sidewalk in front of premises occupied by lessees and subtenant charged as joint tort-feasors, verdict in favor of the subtenant did not exonerate lessees from liability, where evidence did not disclose that relation of respondeat superior existed between lessees and subtenant.

7. Municipal corporations ⚷818(11)

In pedestrian's action for injuries sustained in fall into open freight elevator shaft in sidewalk in front of defendants' premises, where it was alleged that iron bars holding elevator doors open were not effectively attached to doors and it appeared when pedestrian sought to introduce bars in evidence that the original bars had been replaced after accident by other bars, showing that original bars could not be introduced in evidence because they had been replaced was not error.

8. Trial ⚷253(4)

Instruction that mere abstraction or lack of attention to the condition of the sidewalk by pedestrian passing over it cannot as a matter of law be assigned as contributory negligence and that a pedestrian is not contributorily negligent where his attention is diverted and opening is not noticed was proper, as against contention that instructions ignored mandatory provisions of traffic laws, where violation of traffic laws, if any, was not proximate cause of accident.

9. Damages ⚷130(1)

$8,500, of which $700 was sum proved as special damages to 70 year old retired furrier duly enrolled as a pensioner of the state, for injuries sustained in fall into open freight elevator shaft on sidewalk, *held* not excessive.

10. Appeal and error ⚷1004(1)

On appeal, the decision of the trial court and jury on the subject of damages cannot be set aside unless the verdict is so plainly excessive as to suggest at first blush passion or prejudice or corruption on part of the jury.

11. Appeal and error ⚷837(2)

In passing on the question of excessiveness of damages awarded in personal injury action, reviewing court may take into consideration amounts awarded in similar cases involving equally serious injuries.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by David Osrowitz against the Market Investment Company, a corporation, and others for injuries sustained in fall through an open freight elevator shaft on sidewalk in front of defendants' premises. From a judgment for the plaintiff, defendants appeal.

Affirmed.

M. Mitchell Bourquin, of San Francisco, for appellants.

Jesse H. Miller and Eugene H. O'Donnell, both of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff sued to recover damages for injuries sustained in falling through an open freight elevator shaft on the sidewalk in front of the premises owned and operated by the defendants. He recovered a judgment in the sum of $8,500. The defendants have appealed.

The accident happened at about 3:45 o'clock p. m. on January 20, 1938, a very sunny day, in front of the premises known as 739 Market street. That street runs east and west. A double set of street car tracks are located therein. Grant avenue extends from the north and terminates in Market street. Commencing with practically the east line of Grant avenue extended, a pedestrian lane extends across Market street. At a point approximately 15 feet west from that lane is the median line of the premises known as No. 739. In the sidewalk in front of those premises, is located a freight elevator. It is covered with two swinging doors and it is about 2 feet from the outer edge of the curb to the side of the elevator. The shaft measures from east to west 5½ feet and from north to south 6 feet. The doors open half and half from east to west. When open each door stands up 33 inches. At the time of the accident the doors were raised and the upper corners were hooked on the south side by an iron bar, with its ends turned down and inserted in eyes attached to the opposite doors. A similar attachment was provided on the north side.

The plaintiff, a man about seventy years of age, had come down the east side of Grant avenue and observing that the traffic signals were set to "Go" he proceeded to cross Market street. When he had reached the most southerly rail on Market street he turned his head toward the right and noticed the traffic was starting to move east and west. He increased his speed a trifle and continued forward. As he did so he observed an automobile approaching him from the right. He testified he continued to keep his eye on that automobile. When he was about 9 feet from the curb he swerved to his right, stepping outside of the traffic lane and walking diagonally toward the curb. As he stepped upon the curb, according to his testimony, the automobile was only 6 or 7 feet away from him. The automobile had come down Market street approximately one foot out from the curb. The course that the plaintiff had taken led him to about the middle of the bar connecting the sides of the elevator doors. As he stepped upon the sidewalk he was continuing the same accelerated speed and was also continuing to watch the approaching automobile. Almost instantly after he stepped upon the sidewalk he hit the iron bar on the north, it gave way, and the plaintiff plunged into the shaft. The plaintiff testified he did not step out of the traffic lane but about a foot and that he did so for the purpose of taking a shorter course to the Grant Market, the point of his destination, and that it was a quicker and shorter way to go.

[1-3] The defendants contend the plaintiff was guilty of contributory negligence as a matter of law. They quote much of the testimony which we have set forth and assert that in crossing Market street, as testified to by the plaintiff, he violated section 562 of the California Vehicle Code, St.1935, p. 188. Chase v. Thomas, 7 Cal. App.2d 440, 46 P.2d 200. The vice in that contention is that no traffic accident occurred. The accident complained of occurred on the sidewalk. Whether the plaintiff was guilty of contributory negligence was a question of fact to be determined by the jury and not a question of law to be determined by the court. From the time that the plaintiff stepped onto the sidewalk he violated no rule of law. Whether he exercised ordinary care under all of the circumstances was therefore solely a question of fact. That the story as above stated presents a peculiar set of facts we think must be conceded. Moreover, we think it is quite clear that on a sidewalk a pedestrian is not bound at all times and under all circumstances to be looking directly ahead.

[4] The defendants offered in evidence, and the trial court refused to receive, section 10 of article III of ordinance No. 7691. The ordinance is addressed solely to traffic regulations. If the accident in question had occurred in the street the offer would have had merit. However, the accident occurred on the sidewalk. Whether it occurred two feet from the edge of the sidewalk or a much greater distance is merely a matter of degree. But the defendants have not called to our attention any part of the ordinance which is pertinent to a regulation of the use of the sidewalk.

[5] The defendants next contend their open sidewalk elevator shaft was not a proximate cause of plaintiff's injuries and that the proximate cause of his injuries, was his own negligence. That contention is to usurp the function of the jury. It must be borne in mind at all times that it was the claim of the plaintiff that the defendants had been guilty of two acts of negligence. One act was that the ends of the bars were so constructed they did not efficiently lock the sides of the doors. The other act of negligence was that the defendants had not placed across the ends of the open doors side screens as required by order 332–L of the Industrial Accident Commission. Comparing the foregoing facts one with another it will be noted at once that the evidence contained material elements which it became necessary for

the jury to consider in determining each of the contentions stated immediately above as made by the defendants. Under these circumstances it is obvious that if the jury believed the story told by the plaintiff the jury was entitled to find in his favor and against the defendants. But the defendants assert that the plaintiff subjected the iron bar to a weight it was never designed to carry. Clyde v. Mitchell, 14 Cal.App.2d 365, 58 P.2d 205. That authority is not applicable to the facts in the case before us. It involved a negligent strain on a railing erected around the outer border of an elevated porch. Here the guard was placed and required to protect one from falling into a pit, which, in the absence of the guard, would have constituted a nuisance per se.

In support of the two points we have just discussed the defendants cite Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801. It is not helpful. It involved an accident on the premises of the defendant five feet inside of the property line and not on the sidewalk. It did not involve the law applicable to the use of sidewalks, but it involved the law regarding the care the owner of premises owes to an invitee to keep his premises in a reasonably safe condition and the care such invitee should exercise in visiting said premises.

[6] The defendant lessees had sublet a part of the premises to a subtenant who was also named as a defendant. The jury returned a verdict in favor of the subtenant. These defendants contend such verdict exonerated them. We find no merit in the contention. All were charged as joint tort-feasors. The evidence does not disclose that the relation of respondeat superior existed between these defendants and the subtenant. Doremus v. Root, 23 Wash. 710, 63 P. 572, 54 L.R.A. 649; Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171.

[7] In their next point the defendants contend the trial court erred in permitting the plaintiff to show that the bars were replaced after the accident by other bars. The first reply is that the trial court did not do so. As shown above, the plaintiff contended the shaft was not properly protected because the bars were not effectively attached to the doors. To prove that contention he sought to introduce the bars in evidence. It then transpired such evidence was not available because the old bars had been discarded and new bars had been substituted. Where, as here, certain facts are admissible in evidence, they should not be excluded because they are objectionable for other and different reasons. Cooney v. Glynn, 157 Cal. 583, 588, 108 P. 506.

[8] Acting on the request of the plaintiff the trial court, among others, gave the following instruction: "I instruct you that mere abstraction or lack of attention to the condition of the sidewalk by a pedestrian passing over it cannot, as a matter of law, be assigned as contributory negligence. A person walking along a sidewalk cannot be charged with contributory negligence, as a matter of law, where his attention is diverted and the opening is not noticed." The defendants contend the instruction ignored the mandatory provisions of the statutes. They again press the applicability of the provisions of the traffic laws. Such matters have been discussed above and that discussion need not be repeated. As to whether the plaintiff was guilty of contributory negligence as a matter of fact the trial court fully covered that subject in other instructions to which no objection is made.

The defendants quote three other instructions. They concede each is sound law. However, they claim that each ignores the contention of the defendants that this plaintiff was guilty of contributory negligence as a matter of law because he violated provisions of the traffic laws. That fact, if it is a fact, was not a proximate cause of the accident.

[9-11] Finally the defendants contend the damages awarded were excessive. The amount was $8,500 and of that sum $700 was the sum proved as special damages. The plaintiff was at the time of the trial seventy years of age. He was a retired furrier and duly enrolled as a pensioner of the state of California. The injuries he suffered, the treatment, and the extent of his recovery, are stated in the briefs. We have carefully read all briefs. Our powers in these matters have been specifically defined on many occasions. In Hale v. San Bernardino, etc., Co., 156 Cal. 713, at page 715, 106 P. 83, at page 84, the court said: "Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'" In the present case there was nothing in any of the proceedings on which it could be

said that the jury acted through passion, prejudice, or corruption. Again it was recently said that in passing on the question before us this court may take into consideration amounts awarded in similar cases involving equally serious injuries. McNeil v. East Bay Street Rys., Ltd., 220 Cal. 591, 600, 32 P.2d 598. The plaintiff calls to our attention Langensand v. Obert, 129 Cal.App. 214, 18 P.2d 725; O'Brien v. Edens, 125 Cal.App. 100, 13 P.2d 754, and Moffitt v. Ford Motor Co., 135 Cal.App. 7, 26 P.2d 661. The facts in each case were closely similar. The facts in the case last cited were almost parallel. In the case last cited the award was higher than in the present case. We are unable to say the verdict was, as a matter of law, excessive.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

ROTHSCHILD et al. v. WOLF et al.*

Civ. 6477.

District Court of Appeal, Third District, California.

Aug. 3, 1940.

Hearing Granted Sept. 30, 1940.

1. Executors and administrators 🔑315(6)

Decree of distribution which adopted agreement between heirs and beneficiaries relating to a stairway easement was final and excluded any implied covenants with respect to the easement. Civ.Code, § 1656.

2. Easements 🔑26(1)

That it might be economically advantageous for owner of building burdened with a stairway easement in favor of adjoining property to destroy the building and thus terminate the easement was immaterial with respect to owner's right to terminate the easement and would not justify the voluntary destruction of the easement.

3. Easements 🔑26(1)

A grant of the right to use a hall or stairway of a building gives no interest in the soil which will survive the destruction of the building.

4. Easements 🔑1, 26(1)

An "easement" is an interest in real estate and survives the destruction of a part of the servient tenement when there is anything remaining upon which the easement may operate.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

5. Easements 🔑25, 26(1)
Licenses 🔑44(3)

A grant of right to use stairway in building was not a "license" revocable at the will of the servient owner, but was an "easement" which servient owner could not voluntarily destroy and which would continue until destruction of the building without the fault of the servient owner.

See Words and Phrases, Permanent Edition, for all other definitions of "License".

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by J. B. Rothschild and another against Franklin Wolf, the Yosemite Theatre Company and others for a declaratory judgment that plaintiffs, as the servient owners, might terminate a stairway easement by voluntarily removing or destroying the servient tenement. From judgment for plaintiffs, the named defendants appeal.

Judgment modified and affirmed as modified.

Rutherford, Jacobs, Cavalero & Dietrich, of Stockton, for appellants.

Gaylord & Gaylord, of San Francisco, for respondents.

STEEL, Justice pro tem., delivered the opinion of the Court.

Defendants Franklin Wolf and Yosemite Theatre Company appeal from a declaratory judgment in favor of plaintiffs, decreeing that plaintiffs, as servient owners, may terminate a stairway easement by voluntarily removing or destroying the servient tenement.

The appellant Franklin Wolf, and the respondents, Rothschild, are owners of adjoining premises fronting on Main street in the city of Stockton, the appellant Wolf owning lot 7 and the respondents the easterly 32.29 feet of lot 5 in block 14, east of Center street in said city.

In 1905, Andrew Wolf, now deceased, father of appellant Franklin Wolf, owned the premises here involved, together with other adjoining lots in said block and during that year erected a two-story brick structure known as the Wolf building upon said premises. In that portion of the structure now owned by appellants a stairway was built extending from the Main street sidewalk to the hallway on the second floor thereof, the hallway running parallel with Main street for the entire length of the structure. Various rooms and offices were maintained for occupancy by tenants on this second floor and the only entrance thereto from Main street was by the aforesaid stairway.

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* Subsequent opinion 115 P.2d 801.

In 1911 Andrew Wolf died, leaving a will wherein he devised lot 5 to his daughter Delia Wolf Meiggs and lot 7 to certain of his grandchildren. The remainder of his estate was left to various legatees and devisees. In his will deceased expressed the wish that his devisees preserve the stairways and that they be kept and used for the benefit of said buildings on Main street. The other stairway referred to extends from the California street side of the property and connects with the hall way above referred to.

During the probate proceedings dissatisfaction with the provisions of the will arose among the heirs and beneficiaries which resulted in their entering into a written agreement which provided, among other matters not material here, that lot 5, being the property now owned by respondents, should be distributed to said Delia Wolf Meiggs, predecessor in title to respondents, and lot 7 to Franklin Wolf, the appellant herein.

By the terms of the agreement it was stipulated and agreed:

"That the stairway on Main Street now used for the purpose of ingress and egress to and from the properties mentioned in this Agreement, and fronting on Main Street of Stockton, California, shall be kept and maintained as a stairway for the use of all the property hereinbefore mentioned, fronting on Main Street of said City of Stockton, so long as the lot on which said stairway is now built, is occupied by the building now on said lot, of which said stairway forms a part."

In due course the estate was closed and distributed in accordance with the terms of this agreement, the decree adopting the language of the agreement in so far as its provisions relate to the stairway here in issue. The sole issue, therefore, is a determination of the rights of the parties hereto under this agreement as incorporated in the decree of distribution. Trial was had before the court sitting without a jury.

[1] Considerable evidence was introduced as to whether or not the structure built upon the two lots in question comprised one building or two separate buildings. This evidence was directed principally to the nature of the construction of the building, the partition wall, fire wall, and the general physical conditions and facts relating thereto, it being one of the contentions of appellants that the structure is but one building originally built and owned by one person and that an easement by implication arose when the property was devised into two or more ownerships upon the death of Andrew Wolf. The trial court found that the improvements did not constitute a single building, but that the portion thereof on lot 7 and the portion thereof on lot 5 constituted separate and distinct buildings. This finding appears to be supported by the record. We do not, however, consider this question of vital importance for the heirs and beneficiaries subsequently partitioned the property among themselves upon a basis entirely different from the provisions of the will, and expressly agreed as to the right and use of the stairway and the duration of such right. The decree of distribution makes no attempt to construe the will in this regard, but does adopt the terms and provisions of the agreement and therefore the easement implications, if any, arising by virtue of the will, cannot now be resorted to for the reason that the decree is final and excludes any implied covenants upon this subject. (Civ.Code, sec. 1656.) The trial court found in substance and effect that a stairway easement existed, and in this we concur. However, the court further found upon evidence introduced over the objection of appellants, and submitted upon the question of depreciation because of obsolescence, that such depreciation and obsolescence had not so far progressed as to be the equivalent of the destruction of the building, but had so far progressed as to make it *economically advantageous* to plaintiffs, as owners of the premises, to destroy the present improvements thereon and, in lieu thereof, to erect a new building.

[2] The fact that it may be *economically advantageous* for the owner of a building, burdened with a stairway easement in

favor of an adjoining property, to voluntarily destroy it and thus terminate such easement, is, in our opinion, immaterial and not in accord with the weight of authority applicable to such servitudes.

In this respect, however, we do not wish to be understood as intimating that depreciation or obsolescence of a building may not in the course of time so far progress as to impair property rights in the further maintenance thereof even though not to the extent of being the equivalent of destruction of such building. In the instant case no claim is made that the property is being operated at a loss, but to the contrary the evidence discloses a fair net return to respondents on their investment.

[3] While there are very few cases relating to destruction of servient tenements involving stairway easements, the doctrine appears to be generally established that a grant of the right to use a hall or stairway of a building gives no interest in the soil which will survive the destruction of the building. Cohen v. Adolph Kutner Co., 177 Cal. 592, 171 P. 424, L.R.A.1918D, 410; Muzio v. Erickson, 41 Cal.App. 413, 182 P. 974, 975.

[4] In the case last cited, the principal question before the court was whether stairway rights survived the destruction of the building by fire and therein it was held that the right to use the stairway terminated with the destruction of the building *without the fault of the owner thereof.* In this connection the court states:

"It is the established doctrine that where a mere right to use a part of a building is granted, no proprietary interest in the land is conveyed. Upon this principle it has been held that a grant of the right to use the stairway of a building gives no interest in the soil which will survive the destruction of the building, and the right ceases whenever the building is destroyed *without the fault of the owner of the servient tenement,* and the owner of the right to use the stairway will not acquire any right in any new building which may be erected in the place of the one destroyed. An easement, in the true sense of the word, is an interest in real estate, and survives the destruction of a part of the servient tenement when there is anything remaining upon which the easement may operate. But a right in the nature of 'an easement in a building,' as it is sometimes called, is extinguished by the destruction of the building, or the part thereof upon which the easement is imposed, so that there is nothing upon which it can operate. Cohen v. Kutner Co., 177 Cal. 592, 171 P. 424, L.R.A.1918D, p. 410; Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N.W. 1070, L.R.A.1918D, p. 691; Shirley v. Crabb, 138 Ind. 200, 37 N.E. 130, 46 Am.St. Rep. 376; 14 Cyc. 1194." (Italics added.)

Respondents contend that the rule laid down in the two California cases above cited is dictum in so far as it applies to the instant case, in that the destruction of the buildings was involuntary in both cases. Irrespective of the construction placed upon such language with reference to destruction of the buildings without fault of the owner, the court was, in both cases, engaged in a consideration of the law applicable to the destruction of stairway easements, and in our opinion fully stated the rule in that regard. The authorities in other jurisdictions appear to be in harmony with this principle; thus in Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N.W. 1070, 1071, L.R.A.1918D, at page 693, cited in Muzio v. Erickson, supra, it is stated:

"Where an easement has been granted for a particular purpose in connection with a particular building, it is extinguished by a destruction of that building. A grant of the right to use the hall or stairway in a certain building gives no interest in the soil which will survive a destruction of the building, *and the right ceases whenever the building is destroyed without the fault of the owner of the servient estate,* and the owner of the easement will not acquire any right in a new building which may be erected in the place of the one destroyed." (Italics added.)

Respondents cite the case of Union National Bank v. Nesmith, 238 Mass. 247, 130 N.E. 251, wherein the majority of the court held that such an easement is also lost when the building is destroyed by the intentional act of the owner of the servient estate. Such apparently is the rule in Massachusetts, although we find no other authority supporting such contrary doctrine in any of the other jurisdictions.

[5] It is further argued by respondents that the servitude in the instant case is in the nature of a license to use the stairway as distinguished from an easement which is an interest in land, and therefore revocable at the will of the servient owner. The covenant in the agreement creating the servitude is reasonably definite and certain.

The authorities uniformly hold that such a grant of the use of a stairway constitutes an easement and does not necessarily attach to the underlying soil. In both the Cohen case, supra, and the Muzio case, supra, the court held that such use does not survive destruction of the building, although the covenant creating the right provided in one case that the right shall be "forever" and in the other case "perpetual".

We therefore conclude that the decree herein should be modified to provide that respondents may not voluntarily destroy the easement for the use of the stairway, but that the same shall continue so long as the building exists on lot 5 and until it is destroyed without the fault of respondents, or their successors in interest.

As so modified the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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40 Cal.App.2d 321

PEOPLE v. SHAPIRO.

Cr. 3341.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1940.

1. Criminal law 🔑563

When it is proved that the crime charged was committed, the "corpus delicti" is established, but proof that crime was committed by defendant is not required in order to establish the "corpus delicti."

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Gaming 🔑98(5)

In prosecution for keeping or occupying a room with paraphernalia for the purpose of recording or registering bets upon horse races, evidence showing presence of defendant in a room equipped with paraphernalia usually and ordinarily utilized for purpose of receiving and registering bets on horse races established the "corpus delicti." Pen. Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

Evidence sustained conviction for occupying a room with paraphernalia for the purpose of recording or registering bets upon horse races. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Bernard Shapiro was convicted of occupying a room or building with books, papers, or paraphernalia for purpose of recording or registering bets upon horse races, and he appeals.

Affirmed.

Robert M. Kaufman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WHITE, Justice.

The defendant was charged by information with the crime of violation of subdivision 2 of section 337a of the Penal Code, in that he kept or occupied a room or building with books, papers or paraphernalia for the purpose of recording or registering bets upon horse races. A trial by jury having been waived and the cause submitted to the trial court upon the transcript of testimony taken at the preliminary hearing, defendant was found guilty and judgment entered accordingly. From such judgment, and from the order denying his motion for a new trial, this appeal is prosecuted.

The evidence presented at the preliminary hearing is contained entirely in the testimony of a police officer, who testified that he arrested the defendant on January 17, 1940, in an apartment in the city of Los Angeles. Before entering the apartment the witness and another officer observed the interior through a front window. "Looking through a front window we could see this defendant seated in a corner, the southeast corner of the living room, in a sort of armchair with a small coffee table pulled up in front of him, and on this coffee table were many betting markers laid out, spread out, and a telephone. He was at different times talking over the telephone and picking up various betting markers and making notes on them. We went to the door of the apartment, at which I listened for a considerable time. I could hear conversation, and at one time

I heard the voice say, '727, five to win and five to place'. And I heard other numbers also, but I did not distinguish them altogether. Later I checked this 727 and found it to be a horse running at Santa Anita that day in the seventh race. * * * We got a key and entered the apartment and the defendant was still seated at the same table that I had previously seen him at, and I placed him under arrest. * * * there was another man and two ladies. A lady was lying on the davenport. I think she was ill. * * * These are the betting markers that I saw on the coffee table, and this one in particular had the number '727' five to win and five to place, that I had heard out in the hall. I checked that with the scratch sheet and found it to be a horse called 'Carvola' running in the seventh race at Santa Anita that day. * * *

"Q. * * * Did you at any time see the defendant write anything on any of these papers? A. I saw him make several notations on some of them, but I could not pick out which he did.

"Q. Did you see whether or not he had a pencil in his hands? A. He did, yes, sir.

"Q. Officer, are those A B C betting markers papers that are commonly used by bookmakers in Los Angeles? A. They are, yes, sir.

"Q. What else, if anything, did you find at that address? A. We found a form sheet and the two National Scratch Sheets. * * *"

Testifying to a conversation with the defendant after placing him under arrest, the officer said, "I asked the defendant how long he had been making book there and he said, 'About two weeks.' I asked him if all of those bets on the table were on Santa Anita, and he said no, some of them were on eastern tracks. I asked him what made him think he could make book at that address without being caught and he said well, he was just going to take a chance."

[1-3] The sole ground relied upon by appellant for a reversal is that the evidence is insufficient to support the judgment. We are urged to hold that the evidence fails to establish the fact that defendant either "kept" or "occupied" the room in question within the meaning of the statute, and therefore that the extrajudicial statement made by the defendant to the police officer was inadmissible by reason of the failure of proof of the corpus delicti. When it is proved that the crime charged was committed the corpus delicti is established. Proof that the crime was committed by the defendant is not required in order to establish the corpus delicti. People v. Ward, 134 Cal. 301, 66 P. 372; People v. Bollinger, 196 Cal. 191, 237 P. 25; People v. Cowan, Cal.App., 101 P.2d 125. It is not disputed that the evidence shows the presence of the defendant in a room equipped with paraphernalia usually and ordinarily utilized for the purpose of receiving and registering bets on horse races. In the instant case the physical facts coupled with the conduct of the defendant in connection therewith were amply sufficient to support a finding that the room was kept for the purpose of accepting wagers on horse races. People v. Ryan, Cal.Sup., 102 P.2d 320. With the corpus delicti thus proved, the statement made by the defendant to the police officer was properly admissible in evidence. Taken in its entirety, the proof in the instant case amounted to a complete demonstration of defendant's guilt.

The judgment and order appealed from are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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40 Cal.App.2d 287

LA RUE v. BOARD OF TRUSTEES OF BALDWIN PARK SCHOOL DIST. IN LOS ANGELES COUNTY et al.

DE FOUNT v. SAME.

IBANEZ v. SAME.

Civ. 12566–12568.

District Court of Appeal, Second District,
Division 1, California.

Aug. 5, 1940.

1. Schools and school districts ⚷133

Under tenure law, if school district had an average daily attendance of more than 850 pupils, teachers employed for more than three consecutive years were entitled by operation of law to classification as permanent employees, and action of school board in making yearly contracts with purpose of employing teachers for one year only would not prevent the classification. School Code, §§ 5.500, 5.501.

2. Statutes ⚷219

The contemporaneous practical construction given a statute by the executive officers of a state charged with the administration of laws having a state-wide application is entitled to consideration by a court called upon to construe such statutory provisions.

3. Schools and school districts ⚷133

In construing tenure law provisions, whose application depends upon the average daily attendance of pupils in a school district, kindergartens are a part of the elementary school system, and kindergarten attendance must be included in computing the average daily attendance of the district. School Code, §§ 2.811, 2.877, 2.931, 2.1220, 3.110, 3.530, 3.570, 3.634, 3.667, 5.500, 5.501; Const. art. 9, § 6.

4. Mandamus ⚷154(5)

Petitions for writs of mandate to compel reinstatement of teachers as permanent employees under tenure law were not demurrable for failure to allege that school board or district had funds available with which to comply with any mandate for reinstatement and payment of salaries, since such matter was one of defense. School Code, §§ 5.500, 5.501.

5. Schools and school districts ⚷144(5)

The salaries due teachers, who have attained status of, permanent employees under tenure law, are obligations of school board which cannot be defeated by fact that board does not have money available for payment of salaries. School Code, §§ 5.500, 5.501.

6. Schools and school districts ⚷144(3)

Teachers who were entitled to classification as permanent employees under tenure law and who were prevented by school board from performing their contracts or rendering any services were not bound to seek other employment during period when question of reinstatement was being litigated. School Code, §§ 5.500, 5.501, 5.650 et seq.

7. Schools and school districts ⚷144(3)

Where teacher was employed as principal with reserved right in school board to change his assignment of duties and he acquired permanent classification under tenure law as a classroom teacher and acted as principal until time of ineffective dismissal, he was entitled upon reinstatement as a permanent employee in capacity of a classroom teacher to same salary for the school year in question as he received for the preceding school year. School Code, §§ 5.500, 5.501, 5.502, 5.650 et seq., 5.681.

8. Schools and school districts ⚷141(6), 144(3)

Where teachers were entitled to classification as permanent employees of school district and their dismissal at end of school year was not in accordance with provisions of tenure law, they were by operation of law automatically re-elected to their positions for the following school year, and were entitled to reinstatement for that year at the same salary as received for the preceding year. School Code, §§ 5.500, 5.501, 5.650 et seq., 5.681.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Three petitions for writs of mandate by W. Wesley La Rue, by Amy Temple De Fount, and by Mildred L. Alexander Ibanez, against the Board of Trustees of the Baldwin Park School District in the County of Los Angeles, State of California, and others, to compel reinstatement of petitioners as permanent employees of the school district for the school year 1939–1940. From adverse judgments, defendants appeal.

Judgments affirmed.

Clifford W. Twombly, of Los Angeles, and Ardene D. Boller, of Arcadia, for appellants.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for respondents.

Earl Warren, Atty. Gen., F. Walter French, Deputy Atty. Gen., and Alfred E. Lentz, of Los Angeles, amici curiae for Walter F. Dexter, Superintendent of Public Instruction.

WHITE, Justice.

The Board of Trustees of Baldwin Park School District in Los Angeles County; V. R. Long, John Bryant, and W. E. Ward, as members of such board, and the Baldwin Park School District appeal from adverse judgments ordering them to reinstate respondents as permanent employees of the aforesaid school district for the school year 1939–1940.

The legal questions involved in the three cases making up this appeal are identical, except that in the case of respondent La Rue the judgment is challenged by appellants upon the additional ground that it provided for the payment of the same salary to him for the school year 1939–1940 as had been fixed for him for the preceding school year of 1938–1939, he having been originally employed as a principal and having served in that capacity up to the time when the school board notified him of his dismissal at the end of the 1938–1939 school year. By reason of the foregoing, the three appeals have been consolidated and are presented upon one set of briefs.

The actions now before us were initiated through the filing by respondents of petitions for writs of mandate. By stipulation filed in the lower court it was agreed that the facts are as follows: That at all times pertinent to this litigation the respondents were the holders of general elementary school credentials and certifications, were duly qualified and certified to teach any subject or render any teaching services in any elementary school in the state of California, and were the holders of general elementary life diplomas; that the respondent W. Wesley La Rue was the holder of general secondary and secondary administrative credentials and certification and was qualified to hold any supervisory or administrative position in elementary schools, and is the holder of a general secondary life diploma and secondary school administration life diploma. That the Baldwin Park School District at all times mentioned maintained elementary schools, including kindergarten and the grades from first to eighth, inclusive, and that there was employed by the board of trustees of said district a principal for each of said schools and a district superintendent for all the schools of the district. That at all times mentioned said district had in its employ in excess of seventeen teachers. That respondent W. Wesley La Rue was employed by Baldwin Park School District for the school year 1933–1934 in a position requiring certification qualifications, to-wit, that of principal, the said district reserving the right to change La Rue's assignment of duties as it might deem wise at any time during the year, and that such teacher was by the board of trustees classified as a probationary employe of said district for said school year and duly performed all services required of him by said board in said position for the complete year of 1933–1934. That respondent La Rue was re-employed for the school year 1934–1935 at a salary of $1,700 for said school year, payable at the rate of $170 per month for each of the school months of said school year. That such respondent was re-employed by the school district for the school year 1935–1936 at a salary of $1,800 and performed all services required of him for such year. That said respondent was again re-employed in said position by said district for the school year 1936–1937 at a salary of $1,800 per school year, payable in installments of $180 per month for each of the school months, and that he duly performed all services required of him for that year. That again, for the school years 1937–1938 and 1938–1939, respondent La Rue was re-employed under the same terms and conditions, except as to salary.

As to respondent Amy Temple De Fount, it was agreed by stipulation that she was employed by Baldwin Park School District for the school year 1935–1936 in a position requiring certification qualifications, to-wit, as a full-time regular teacher in the elementary schools of said district, at a salary of $1,200 for such school year, payable in installments of $120 each at the end of each of the ten school months of the school year, and was by the board of trustees classified as a probationary employee of said district for said school year, and duly performed all services required of her by said board in said position for the complete school year; that said respondent was re-employed upon the same terms and conditions, except as to salary, for the school year 1936–1937 and the school year 1937–1938; and that again, said respondent was re-employed in said position for the school year 1938-1939, at a salary of $1,320 for such school year.

It was also stipulated that respondent Mildred L. Alexander Ibanez was employed by the district in a position requiring certification qualifications, to-wit, as a full-time regular teacher in the elementary schools of the district, and was classified by the board of trustees as a probationary employee, and duly performed the services required of her, for the school years 1934–1935, 1935–1936, 1936–1937, 1937–1938, and 1938–1939, and was duly classified as a probationary employee of said district during the first three years of her employment.

It was further stipulated that on May 12, 1939, appellants gave to each of the respondents a notice in writing that his or her services would not be required for the school year 1939–1940, and that his or her services in said district would terminate on June 9, 1939, as provided in a certain resolution adopted by the board on May 12, 1939, "which directed a notice to petitioner" (respondents in this court) "and five other certificated employees of said district that their services would not be required after the close of the school term June 9, 1939, under authority of Section 5.681 of the School Code of the State of California". That none of the respondents acquiesced in said dismissal or agreed to such termination of employment, and that on or about June 30, 1939, the respondents duly notified appellants that they stood upon their rights as permanent employees and demanded reinstatement; that respondents and each of them made written demand for reinstatement on August 11, 1939, and notified the board that they would be present at the opening of schools ready, willing and able to perform their duties as permanent employees; that when the schools were opened on September 11, 1939, respondents presented themselves and requested assignment to their duties, but that appellants refused to permit respondents to perform any duties as permanent employees of the district, or at all, and have at all times since refused and still refuse to admit respondents to their alleged status of permanent employees or permit them to perform any service whatever.

In the main, this appeal centers upon the question as to whether respondents had become permanent employees of the school district by reason of what is termed "teachers' tenure". The applicable sections of the School Code on that question are section 5.500, which provides as follows: "Every employee of a school district of any type or class, who after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district"; and section 5.501 of the same Code, reading: "Every employee of a school district of any type or class, having an average daily attendance of less than 850 pupils, who, after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications and is reelected for the next succeeding school year to a position requiring certification qualifications, may be classified by the governing board of the district as a permanent employee of the district. If said classification be not made the employee shall not attain permanent status and may be reelected from year to year thereafter without becoming a permanent employee until said classification is made."

The controversy here revolves around what the Legislature intended by the following language in the last-quoted section: "Every employee of a school district of any type or class, having an average daily attendance of less than 850 pupils." It is conceded that if the pupils enrolled in the kindergarten maintained by the school district are included in the computation with the pupils in grades one to eight, then there was an average daily attendance of more than 850 throughout all the school years from 1933–1934 to 1938–1939, while if the average daily attendance of pupils in the kindergarten is omitted from such compilation, then there was an average daily attendance of less than 850 pupils for the school years 1933–1934, to and including 1936–1937. It is at once apparent that if the kindergarten pupils should be included in the computation, then all the respondents had, under the provisions of section 5.500 of the School Code, supra, attained by operation of law the classification of permanent employees of the school district, and were not subject to dismissal in the manner resorted to herein by the school authorities. The dismissal of permanent employees is governed by chapter VII, article II, section 5.650 et seq. of the School Code, which provisions were not followed in the instant cases, but the dismissals were decreed by the board upon the theory that none of the respondents had attained the classification of permanent employees, but were probationary employees, subject to dismissal under the provisions of section 5.681 of the School Code.

[1] We are in accord with the determination of the trial court that the action of the school board in making yearly con-

tracts with respondents, with the idea of employing them for one year only, is not determinative of their status, but that when by the operation of law a teacher is entitled to classification as a permanent employee the failure of the school board to so classify such teacher does not prevent the classification, but the same inures by operation of the statutes. La Shells v. Hench, 98 Cal.App. 6, 276 P. 377; Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27; Gastineau v. Meyer, 131 Cal.App. 611, 22 P.2d 31; Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029; Mitchell v. Board of Trustees, 5 Cal.App.2d 64, 42 P.2d 397; Sherman v. Board of Trustees, 9 Cal.App. 2d 262, 49 P.2d 350.

Therefore, the question squarely presented to us is whether, as contended by appellants, the legislative expression "every employee of a school district of any type or class having an average daily attendance of less than 850 pupils" is to be so construed as to exclude from calculation the pupils of the kindergarten. That kindergartens should be considered as an integral part of the school system of this state seems to us to be thoroughly established. In article IX, section 6, of the Constitution, it is ordained that the public school system shall include day and evening elementary schools and such day and evening secondary schools, technical schools, kindergarten schools, and normal schools or teachers' colleges, as may be established by legislative, municipal or district authority. Section 3.110 of the School Code makes it mandatory upon boards of education in every school district, upon the petition of parents or guardians of 25 or more children, between the ages of 4½ and 6 years, to establish and maintain kindergartens. Part II of division 3 of the School Code, wherein appears the aforesaid section 3.110, is entitled "Elementary Schools". Chapter I thereof is entitled "Kindergartens"; while article I provides for the "establishment" of kindergartens. Therefore the conclusion that the Constitution of this state, as well as the School Code, classifies kindergartens as a part of the elementary school system of California seems inescapable.

Appellants rely upon sections 2.811, 2.877, 2.931, 2.1220, 3.530, 3.570, 3.634 and 3.667 of the School Code, but these sections are not controlling, for the reason that they have no connection with the right of a teacher to acquire permanent status after re-employment throughout a probationary period. For the same reason are the cases of Stockton School District v. Wright, 134 Cal. 64, 66 P. 34, and Los Angeles County v. Kirk, 148 Cal. 385, 83 P. 250, not helpful to a solution of the problem with which we are confronted. Both of these cases pass upon the appropriation of state moneys to the elementary schools and expressly limit the application of such moneys to schools named in sections 5 and 6 of article IX of the Constitution, as such sections stood at the time of the rendition of the decisions in question in 1901 and 1905. By the amendment of 1920 the constitutional provisions just cited were materially changed and elaborated by writing into section 6 thereof that among other schools kindergartens should also be included in the public school system of the state, and which amendment to section 6, supra, also directed the legislature to provide for the levying of school district taxes by the county boards of supervisors for the support of kindergartens. Moreover, as far back as 1895 it was held in Sinnott v. Colombet, 107 Cal. 187, 40 P. 329, 331, 28 L.R.A. 594, that kindergartens should be regarded "as part of the public primary schools". In an interesting and illuminative review of the historical background of the kindergarten, our Supreme Court in the last-cited case points out the educational value of the kindergarten for developing in the child the habits of discipline, self-control, harmonious action and purpose, as well as some definite lessons of fact, thus recognizing the kindergarten as an integral part of the educational system prevailing in the primary schools of the state. Furthermore, the words "average daily attendance" are expressly used with reference to kindergartens in section 3.140 of the School Code, which directs discontinuance of kindergartens at the close of a year during which "the average daily attendance" shall be ten or less for the school year. Appellants do not question the right of a kindergarten teacher to acquire permanent tenure after fulfilling the requirements therefor as a teacher in kindergarten. Surely an anomalous situation would be presented were we to hold, as we must, that kindergarten teachers may acquire permanent tenure, but that the pupils attending such kindergarten are not to be counted in the application of the tenure statute. Manifestly, the legislature never contemplated any such absurdity.

[2, 3] Another reason for holding that pupils attending kindergartens should be included in computations for the purpose of determining teachers' tenure is the well-established rule of statutory interpretation that the contemporaneous practical construction given a statute by the executive officers of a state charged with the administration of the laws having a state-wide application is entitled to consideration by a court called upon to construe such statutory provision. Godward v. Board of Trustees, 94 Cal.App. 160, 163, 270 P. 725. True, such contemporaneous construction is not conclusive of the question under consideration, but is entitled to great weight. In 1935 the attorney general of California advised the state department of education, the superintendent of public instruction, and the legal advisers to school boards and trustees throughout California that kindergarten pupils were to be included under section 5.501 of the School Code in determining tenure, and through the intervening years that ruling has remained unquestioned. Were such procedure contrary to the legislative intent, we can assume that the lawmaking body would by appropriate and specific legislation have so indicated. We therefore hold that in construing sections 5.500 and 5.501 of the School Code the average daily attendance of an elementary school district must be held to include therein the average daily attendance of any kindergarten or kindergartens maintained by such district.

[4, 5] It is next contended by appellants that the petitions for writs of mandate filed herein do not state facts sufficient to constitute causes of action, for the reasons that such pleadings are devoid of any allegation that the appellant board or district has funds available with which to comply with any mandate issued by the court. It is argued by appellants that a school district is but an agency of the state to promote the convenience of the public at large, and that before a mandate can issue requiring the expenditure of such public money it must first be shown that the money is available, citing Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 703, 704, 296 P. 1088. In this claim appellants cannot be upheld. In the first place, we are inclined to believe that appellants are foreclosed from raising this question for the first time on appeal, and further, that the failure of respondents to allege in their petitions the condition of the funds of the school district did not render the pleadings demurrable, as that was a matter of defense. Assuming, however, that appellants had set up such a defense in the lower court, it is unavailing under the facts of the cases before us. The salaries due these respondents as school teachers are obligations of the school board not responsive to the rule contended for by appellants. Lotts v. Board of Park Commissioners, 13 Cal.App.2d 625, 635, 57 P.2d 215.

[6] The next question raised is whether when, as here, a writ of mandate orders the reinstatement of a teacher, there is imposed upon such teacher the duty to seek remunerative employment during the period when the question of reinstatement is being litigated, or if employed during such period must the teacher remit any remuneration received, the same to be applied as a deduction from the salary ordered to be paid the teacher under the terms of the mandate to be issued. This contention is without merit. Where, as here, the admitted facts are that respondents were prevented by appellants from performing their contracts or rendering any services, the former were not bound to seek other employment. Giguiere v. Patterson, 138 Cal.App. 167, 31 P.2d 804.

[7] Finally, appellants challenge that portion of the writ of mandate granted respondent La Rue which, after directing his reinstatement as a permanent employee of the school district in the capacity of a classroom teacher, orders that his compensation be fixed in the sum of $2,100 for the school year 1939–1940. The agreed facts are that respondent La Rue was originally employed by the school district for the school year 1933–1934 in a position requiring certification qualifications, to-wit, that of principal, with the right reserved in the school board to change respondent La Rue's assignment of duties as such board "might deem wise at any time during the year". It is at once apparent that the school board is clothed with the right to assign Mr. La Rue to classroom teaching or to the duties of principal or other supervisory or administrative work, as in its judgment is deemed proper, but being a permanent employee, he retained his permanent classification as a classroom teacher. School Code, sec. 5.502. Further, under the tenure law, when the board contracted with respondent La Rue for a salary of $2,100 for the school year 1938–

1939, and, as the stipulation of facts shows, took no action during that particular school year to fix a different salary for the ensuing school year, respondent La Rue was entitled to the same salary for the 1939–1940 school year as he received for the preceding school year. Abraham v. Sims, 2 Cal.2d 698, 711, 42 P.2d 1029; Mitchell v. Board of Trustees, 5 Cal.App.2d 64, 69, 42 P.2d 397.

[8] Having attained the status of permanent employees of the school district, and having been automatically, by operation of law, re-elected to their positions for the fourth year, respondents are each entitled to reinstatement for the school year 1939–1940, at the same salary fixed for them for the school year 1938–1939.

For the reasons herein stated, the judgments from which these appeals are taken are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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40 Cal.App.2d 276

JORDAN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 2482.

District Court of Appeal, Fourth District, California.

Aug. 2, 1940.

1. Workmen's compensation 🔑1296

The provision in Workmen's Compensation Law authorizing compensation proceeding within two years from date of employee's injury if agreement for release or compromise, not approved by Industrial Accident Commission, has been made for amount less than full compensation or benefit to which employee is entitled, permits institution of proceeding within two-year period, whether agreement is oral or is in writing. St.1937, pp. 289, 295, §§ 5003, 5405(b).

2. Workmen's compensation 🔑1285, 1296

Under provision in Workmen's Compensation Law authorizing compensation proceeding within two years from date of employee's injury if agreement for release or compromise, not approved by Industrial Accident Commission, has been made for amount less than full compensation or benefit to which employee is entitled, minor employee for whom no guardian or trustee was appointed, and who orally agreed immediately after injury to her teeth not to file compensation claim in consideration of employer's promise to pay one-half of employee's dental bill, could institute compensation proceeding at any time within two years after reaching age 21. St.1937, pp. 289, 295, 296, §§ 5000–5003, 5405(a, b), 5408.

◆

Proceeding by Robert Jordan, employer, to review an order of the Industrial Accident Commission of the state of California, awarding compensation to Laveta Vilott Sears, employee.

Award affirmed.

John Solomon, Jr., of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is a petition to review an order of the Industrial Accident Commission. On April 15, 1937, the respondent Sears, while engaged in the performance of her duties as an employee of the petitioner, suffered an injury to her teeth. It is conceded that she was a minor at that time and that she reached the age of 21 years on June 6, 1939. Six months and five days later, on December 11, 1939, she filed her claim for compensation with the respondent commission. After a hearing, she was awarded $105 as the reasonable cost of the dental treatment made necessary by the injury.

The only point raised is that the respondent commission was without jurisdiction to make this award since the proceeding was barred by the limitation provided for in subdivision (a) of section 5405 of the Labor Code, St.1937, p. 295, the same not having been started until more than six months after the applicant became 21 years of age.

Two periods within which such a proceeding may be commenced are provided for in section 5405. In addition to the six months' period fixed by subdivision (a), subdivision (b) permits the bringing of such a proceeding within two years from the date of injury "in cases where agreement for a release or compromise, which has not been approved by the commission, is made for an amount less than the full compensation or benefit" to which an employee is entitled. In the instant case, it was established by testimony and by the stipulation of the parties that immediately after the accident the petitioner orally agreed with the applicant to pay one-half of the dental bill provided she did not file a claim. Subsequently, he refused to pay the bill or any part of it on the ground that it was excessive. The petitioner contended before the commission that subdivision (b) of section 5405 had no application here since it refers to an agreement for a compromise and since section 5003 of the Labor Code provides that every "compromise agreement" shall be in writing. We think this contention may not be sustained.

The provisions for compromise and release of such claims are contained in chapter 2 of part 3 of the Labor Code, St. 1937, p. 289 et seq. In general, they are as follows: Section 5000 gives the parties the right to compromise a liability claimed to exist "subject to the provisions herein contained". Section 5001 defines such compensation and provides that no compromise agreement shall be valid unless it provides for full compensation or unless it is approved by the commission. Section 5002 provides that a copy of the compromise agreement signed by both parties shall be filed with the commission. Section 5003 provides that every such agreement shall be in writing and includes further requirements as to its form.

It is at once apparent that these various sections set forth the requirements of a valid compromise agreement which is to have the effect of relieving an employer from further liability. Probably the main requirement is the approval of the commission, the others being more or less useful to that end. While all of these matters are essential to a valid compromise agreement, it would be unreasonable to believe that the legislature, in adopting subdivision (b) of section 5405, intended it to apply only to an agreement which fully conforms to the requirements of these other sections, in other words, to a valid compromise agreement. In the case of such a valid subsisting agreement the commission is authorized by section 5002 to enter an award based thereon and there would be little, if any, use or purpose in providing for an extended time during which a proceeding might be commenced.

[1] We think the meaning and intent of subdivision (b) of section 5405 is to provide a longer period in which to begin a proceeding, not merely in those cases where a valid compromise agreement exists, but in cases where the parties have entered into an agreement for a compromise which has not been approved by the commission, and this irrespective of whether such agreement was oral or in writing. This extension of time is apparently based upon the fact that the agreement has not been approved by the commission and we think it was never intended to base it upon any particular form which the agreement might take. While a valid agreement requires certain formalities, these cannot be deemed essential to the application of the benevolent provisions of subdivision (b), which must have been adopted for the purpose of protecting an employee from the effect of a delay which would naturally follow from the very fact that the employee thought that he had entered into an agreement with his employer, although this agreement never became a valid one which was approved by the commission.

Any other interpretation of subdivision (b) would enable an employer, after taking advantage both of the ignorance of the employee and of his desire to placate his employer by entering into such an agreement, to break the agreement with impunity when the six months' period had elapsed. In this connection certain remarks of the court in Davis & McMillan v. Industrial Acc. Comm., 198 Cal. 631, 246 P. 1046, 1049, 46 A.L.R. 1095, are appropriate: "It must be obvious, therefore, that no employee would make a settlement for less than he was entitled to except through ignorance of his rights. If ignorant of his rights as to the amount of compensation to which he would be entitled, he may also be ignorant of any right on his part to institute a proceeding to recover compensation. Having made a purported settlement, he would be less liable after such settlement to seek advice and ascertain his rights under the statute than he would have been had no settlement been entered into by him. It is a wise and humane provision of the law to permit such a person under such circumstances additional time in which to act in order to protect his rights. This is particularly so when the only persons who can possibly object to such a construction are those who have taken advantage of his ignorance and imposed upon him an unjust settlement."

[2] In the case just cited the court further said in discussing a provision of the Workmen's Compensation Act which is now found in subdivision (b) of section 5405 of the Labor Code that this provision "extended the time within which proceedings could be instituted in the case of an ineffectual settlement like that made by the insurance carrier herein with Pulliam to two years after the receipt of the injury". Section 5408 of the Labor Code provides that no limitation of time provided for by that division shall run against any person under 21 years of age unless a guardian or trustee has been appointed. No guardian or trustee was here appointed and the two years provided for in subdivision (b) of section 5405 during which a proceeding could be commenced did not begin to run until the applicant was 21 years of age. The proceeding here in question was brought well within that time and it follows that the same was not barred by the limitation relied upon.

The award is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

IRVINE v. GIBSON, County Treasurer, et al.*

Civ. 6484.

District Court of Appeal, Third District, California.

July 31, 1940.

Rehearing Denied Aug. 30, 1940.

Hearing Granted Sept. 25, 1940.

1. Limitation of actions 🔑177(2)

An action to recover interest allegedly accruing on bonds of reclamation district after maturity, was barred by 4-year limitations, where no facts were alleged to indicate the tolling of limitations. Code Civ.Proc. §§ 335, 337.

2. Waters and water courses 🔑230(6)

Bonds of reclamation district did not bear interest after maturity, and after all interest-bearing coupons were detached, in view of statute making interest payable only from a special fund created for that express purpose and making interest payable only upon presentation of proper coupons therefor. Pol.Code, § 3480.

3. Waters and water courses 🔑230(8)

The statute providing that an action on any bonds or coupons issued by the state of California must be commenced within 10 years, had no application to reclamation district bonds which were not issued by the state of California. Code Civ.Proc. § 337.5.

4. Limitation of actions 🔑180(2)

Where a complaint shows on its face that the cause of action would ordinarily be barred by limitations, a special demurrer on that ground should be sustained unless circumstances are also alleged which toll the statute.

◆

Mandamus proceeding by James Irvine against California Gibson, Treasurer of the County of Colusa, as trustee of Reclamation District No. 108, and as trustee of the Bond Fund of Reclamation District No. 108, the Board of Trustees of Reclamation District No. 108, and Reclamation District No. 108, to compel the payment of interest on reclamation bonds.

Writ denied.

W. Coburn Cook, of Turlock, for petitioner.

Horace B. Wulff, of Sacramento, Thomas Rutledge, of Colusa, Huston, Huston & Huston, of Sacramento, and Hudson Ford, of Colusa, for respondents.

Milton T. Farmer, of San Francisco, amicus curiae for respondents.

THOMPSON, Acting Presiding Justice, delivered the opinion of the Court.

By means of a writ of mandamus the petitioner seeks to compel the Treasurer of Reclamation District No. 108 to pay interest on sixteen reclamation bonds of the face value of $1,000 each for the period of time following their maturity until they are actually paid. The bonds matured January 1, 1936. All interest-bearing coupons have been detached and fully paid. April 26, 1939, there was paid on account of the principal amount due on said bonds, the sum of $10,400, leaving a balance of $5,600 thereof unpaid. No interest on any of the bonds was paid after their maturity on January 1, 1936. The treasurer refused to pay interest on the bonds after their maturity, and also refuses to pay the balance of the principal sum due thereon until the bonds are surrendered.

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* Subsequent opinion 118 P.2d 812.

It is contended that reclamation bonds bear interest at the rate specified therein "until paid" even after maturity of the bonds and all interest-bearing coupons have been detached and paid.

A general and special demurrer to the petition for a writ of mandamus was filed on the grounds that the petition fails to state facts sufficient to constitute a cause of action, and that the proceeding is barred by the statute of limitations. More than four years elapsed after the maturity of the bonds before the claim for interest after that date was made. The petition contains no allegation of facts which would toll the statute of limitations. An answer to the petition was also filed denying the material allegations thereof.

The petition alleges the due organization of Reclamation District No. 108; the qualification of California Gibson, Treasurer of Colusa County, as treasurer of the district; the issuing and sale of bonds of the denomination of $1,000 each with their attached interest-bearing coupons payable in January and July of each year at the annual rate of 6 per cent interest payable semi-annually, as provided by section 3480 of the Political Code; that the petitioner owns sixteen of such bonds which matured January 1, 1936; that all of said bonds became due and payable on the last-mentioned date and all interest-bearing coupons have been detached therefrom and paid; that on April 26, 1939, $10,400 was paid on account of the principal on said bonds, leaving a balance thereof unpaid in the sum of $5,600 which the Treasurer is ready and willing to pay upon surrender of the bonds; that she has paid no interest on any of said bonds after their maturity and refuses to do so on the claim that the bonds do not bear interest after the date when they became due. The petition prays for a peremptory writ of mandamus compelling the Treasurer to pay the balance of the principal sum due on the bonds, together with semi-annual interest at the rate of 6 per cent on $10,400 from January 1, 1936, until that sum was paid April 26, 1939, and interest on $5,600 from January 1, 1936, until said sum is paid in full.

[1, 2] We are of the opinion this cause of action is barred by the provisions of section 337 of the Code of Civil Procedure, and that the petition fails to state a cause of action for the reason that the bonds do not bear interest after maturity.

Clearly, this claim for interest on reclamation bonds after the date of their maturity if under any circumstances it is valid, is based on a "contract, obligation or liability founded upon an instrument in writing". Under sections 335 and 337 of the Code of Civil Procedure such actions must be commenced within four years from the time the claims accrue, unless the statute is tolled for lack of funds to pay the claim or otherwise. Curtis v. Rialto Irrigation District, 44 Cal.App. 738, 742, 187 P. 117; Hewel v. Hogin, 3 Cal.App. 248, 84 P. 1002; Moody v. Provident Irrigation District, 12 Cal.2d 389, 395, 85 P.2d 128; Meyer v. City & County of San Francisco, 150 Cal. 131, 88 P. 722, 10 L.R.A.,N.S., 110.

[3] Section 337.5 of the Code of Civil Procedure, which provides that "An action upon any bonds or coupons issued by the State of California" must be commenced within ten years, has no application to this case for the reason that the bonds in question were not issued by the state of California.

[4] It is true that the running of the statute of limitations would be suspended during the period of time following the maturity of bonds when the district is without funds with which to pay them. Moody v. Provident Irrigation District, supra. When a complaint shows on its face that the cause of action would ordinarily be barred by the statute of limitations, a special demurrer on that ground should be sustained unless circumstances are also alleged which toll the statute. Sullivan v. Shannon, 25 Cal.App.2d 422, 428, 77 P.2d 498; Pleasant v. Samuels, 114 Cal. 34, 38, 45 P. 998. In the Sullivan case, supra, suit was brought to recover the balance due on a bond. The complaint showed on its face that more than four years had expired since the maturity of the bond. No facts were alleged to indicate the tolling of the statute of limitations. It was contended on appeal that the running of the statute had been suspended by the absence of the defendant from the state. A special demurrer on the ground that the action was

barred by the provisions of section 337 of the Code of Civil Procedure was sustained. The court held that when the complaint affirmatively alleges facts showing that the statute of limitations under ordinary circumstances will have expired, in the absence of a recitation of further facts indicating that the statute, for some valid reason, ceased to run, the action must be deemed to be barred.

In the present proceeding the petition alleges facts definitely showing that the suit was not commenced for more than four years after the maturity of the bonds in question. No facts are recited which indicate the suspending of the statute. The demurrer on that ground should therefore be sustained. The petitioner would be granted leave to amend his petition in that regard except for the fact that we are of the opinion he may not recover on the merits of his cause for the reason that the bonds do not bear interest after their maturity.

Reclamation bonds issued under the provisions of section 3480 of the Political Code do not bear interest after their date of maturity. Such bonds and the interest due thereon are payable only from a special fund created by statute for that express purpose. The attached coupons indicate the measure of responsibility for interest which is payable only "upon the presentation of the proper coupons therefor". The section of the code, construed as a whole, clearly indicates that liability for the payment of interest ceases at the date of the maturity of the bonds. Meyer v. City & County of San Francisco, 150 Cal. 131, 88 P. 722, 10 L.R.A.,N.S., 110; Davis v. Porter, 66 Cal. 658, 6 P. 746; Bates v. Gerber, 82 Cal. 550, 22 P. 1115; Engebretson v. City of San Diego, 185 Cal. 475, 197 P. 651; Sawyer v. Colgan, 102 Cal. 283, 36 P. 580, 583, 834, 27 A.L.R. 94, note. The case last cited holds that: "The state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers."

In the present case section 3480 of the Political Code provides for the payment of interest on the bonds semi-annually only "upon the presentation of the proper coupons therefor". It specifically provides that "Coupons for each installment of interest shall be attached to said bonds". In this case all of the interest-bearing coupons have been detached, presented and paid. No coupons for interest after the maturity of the bonds have been provided for by law, and no coupons can be presented for that purpose. The form of the interest-bearing coupons to be attached to the bonds as provided by the act specifies the exact amount of interest to be paid. It reads:

"The county treasurer of —— County, California, will pay to the holder hereof on the —— day of ——, 19—, at his office in said county of ——, the sum of $—— in gold coin of the United States out of the funds of reclamation district No. —— for interest on bonds of said district numbered ——."

The case of Kendall v. Porter, 120 Cal. 106, 45 P. 333, 52 P. 143, upon which the petitioner relies in support of his claim of interest on the bonds after their maturity, is clearly distinguishable from the proceeding in this case. Justices McFarland and Van Fleet rendered an able dissenting opinion thereto. That particular case was in fact distinguished by the Supreme Court in the case of Meyer v. City & County of San Francisco, supra, holding that the statute is the measure of the bondholder's rights to interest on the bonds and that in the absence of a provision for the payment of interest after maturity of the bonds no such payments could be allowed. In distinguishing the Kendall case the court said [150 Cal. 131, 88 P. 724, 10 L.R.A., N.S., 110]: "We think, however, that the act there construed is easily distinguishable from that here involved. The bonds there under consideration were the general bonds of the City of Sacramento, and both the principal and the interest [were] to be paid out of a certain fund consisting of a certain proportion of the general annual revenues of the city. This revenue would, of course, continue indefinitely after the maturity of the bonds as well as before. There was not in that case separate taxes for the interest and the principal, to be applied exclusively for the purposes for which it was levied, nor a specified number of levies to be made for a specified number of years. There was no certainty that the fund provided in that case from the annual revenues of the city would be sufficient to pay the bonds at or before their maturity, as is the case here."

It is true that municipal bonds which are payable from the general funds of a city, the acquiring of which funds are not limited by statute, may create a liability for the payment of interest after their maturity. That was the principle on which the Kendall case was decided, but it has no application to the present situation where the liability is limited to a special fund created by the levying of assessments only for the payment of particular bonds with their attached interest-bearing coupons in a specified aggregate sum. The liability for the payment of interest on ordinary municipal bonds from general municipal funds which are unlimited by statute, upon which rule the petitioner relies, is concisely stated in 6 McQuillin's Municipal Corporations, 2d Ed (Rev. vol. 6), page 134, section 2431, as follows: "*Municipal bonds ordinarily bear interest.* And moreover it should be said that interest does not stop running at the maturity of the bonds, and this is so although the coupons attached do not extend beyond the maturity of the bonds. The interest, as to coupon bonds, is represented by the coupons, and such coupons in turn bear interest from the time they become due, at the rate fixed by the law of the place where payable."

The statement of law announced in the preceding quotation is not in conflict with the Meyer case heretofore cited. On the authority of that case the peremptory writ of mandamus is denied.

We concur: PAULSEN, Justice pro tem.; TUTTLE, J.

PER CURIAM.

The petition for a rehearing is denied; the amended petition for a writ of mandamus is denied without prejudice.

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40 Cal.App.2d 298

OHRAN v. YOLO COUNTY.

OHRAN et al. v. SAME (two cases).

Civ. 6245–6247.

District Court of Appeal, Third District, California.

Aug. 5, 1940.

Rehearing Denied Sept. 4, 1940.

Hearing Denied Oct. 4, 1940.

1. Automobiles 🔑306(4)

In actions against county for injuries and deaths resulting when automobile skidded from highway at slippery point, evidence concerning method of construction and other accidents at such point supported implied finding of dangerous or defective condition. St.1923, p. 675.

2. Automobiles 🔑306(5)

In actions against county for injuries and deaths in automobile accident resulting from slipperiness of highway, evidence *held* to authorize inference that board of supervisors had notice of defect. St.1923, p. 675.

3. Highways 🔑193

To make county liable for injuries and deaths resulting from defect in highway, it is only necessary that supervisor in charge of highway have knowledge of the condition, and constructive notice is sufficient. St.1923, p. 675.

4. Negligence 🔑48

Where dangerous condition is created by the party claimed to be liable, no further notice to such party is necessary.

5. Negligence 🔑48

Long-continued neglect to remedy dangerous condition is such constructive notice of the condition as to fix liability.

6. Appeal and error 🔑1064(1)
Automobiles 🔑308(11)

In actions against county for injuries and deaths resulting when automobile skidded on highway at slippery point, wherein evidence was in conflict on extent of slippery stretch, contributory negligence of driver was not established as a matter of law, and hence instructing that driver and occupant were presumed to have taken ordinary care was not prejudicial error. Code Civ.Proc. §§ 607a, 1961.

7. Automobiles 🔑308(11)

A speed of 35 miles an hour, even in a rainstorm, is not necessarily "negligence per se."

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

8. Negligence 🔑122(1)

The presumption that one took ordinary care for one's own safety is disputable, but is satisfactory if uncontradicted. Code Civ. Proc. § 1961.

9. Appeal and error 🔑1010(1)
Evidence 🔑89

When disputable presumption is controverted, an issue of fact is raised which court must determine as in other cases, and court's conclusion is conclusive upon appellate court unless manifestly without support in the evidence. Code Civ.Proc. § 1961.

10. Evidence ⚷89

A disputable presumption, made evidence by statute, may not be dispelled by mere conflict in evidence, and is not dispelled unless the fact opposed thereto is proved as a matter of law. Code Civ.Proc. § 1961.

11. Appeal and error ⚷928(1)

It must be presumed on appeal that instruction complained of was served on adverse party before the taking of testimony, as required by statute. Code Civ.Proc. § 607a.

12. Trial ⚷256(1)

Where a week elapsed between calling of first witness and instruction of jury, one wishing a more elaborate instruction than that given, which was presumably served on him before taking of testimony, was under duty to prepare and present the same to court, and, having failed to do so, could not subsequently complain. Code Civ.Proc. § 607a.

13. Negligence ⚷141(7)

An instruction on duties of a person suddenly confronted with danger "through the negligence of another" was not erroneous as failing to include the element that situation was created through no negligence on the part of those seeking its benefits, since quoted phrase was equivalent in effect to "caused by the negligence of the defendant."

See Words and Phrases, Permanent Edition, for all other definitions of "Through the Negligence of Another".

14. New trial ⚷75(4, 5)

In three actions against county for injuries and deaths in automobile accident resulting from defect in highway, awarding new trials in two of the actions on ground of inadequacy of damages was not an abuse of discretion, as against contention that inadequacy showed that verdicts were result of compromise.

15. Appeal and error ⚷977(3)

The action of trial court in granting new trial will not be disturbed on appeal in absence of showing of abuse of discretion.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Separate actions, consolidated for purpose of trial, by Carl R. Ohran, by Carl R. Ohran and another, as guardian of the person and estate of Norylene Ohran, and by John L. Ohran and another, against the County of Yolo, State of California, for deaths and injuries in automobile accident. From judgments for plaintiffs, and from orders granting new trial on limited issue of damages in two of the actions, defendant appeals.

Affirmed.

Gerald M. Desmond, of Sacramento, and C. C. McDonald, of Woodland, for appellant.

Huston, Huston & Huston, of Sacramento, and Gregory, Hunt & Melvin and Faulkner & O'Connor, all of San Francisco, for respondents.

HAWKINS, Justice pro tem., delivered the opinion of the court.

Herein are considered appeals from certain judgments and orders granting motions for new trials in three separate actions, brought by members of two Ohran families against the County of Yolo for damages based upon the liability of said county under the Public Liability Act of 1923 (Stats.1923, chap. 328, p. 675), which said actions were consolidated for the purposes of trial. The trial was by jury and resulted in the following verdicts and judgments:

In action No. 8665 a verdict and judgment for $2,000 in favor of Carl R. Ohran for damages for the death of his eight-year-old son, Duane.

In action No. 8666 a verdict for $2,000 in favor of Carl R. Ohran for damages for the death of his wife, Golda Ohran, and a verdict in the sum of $6,000 in favor of Norylene Ohran for the death of her mother, Golda Ohran. The amount of the separate verdicts, $8,000, was entered in a single judgment segregated as above.

In action No. 8667 a verdict and judgment for $2,000 in favor of John L. Ohran and Marguerite Ohran for damages for injuries to the wife and consequential damages to the husband.

In all three cases the defendant moved for a new trial on all the statutory grounds. In action No. 8665 plaintiff Carl R. Ohran moved for a new trial on the ground that the damages for the death of his son were inadequate.

In action No. 8666 plaintiff Carl R. Ohran moved for a new trial on the ground that the damages awarded were inadequate.

All of the motions for a new trial made by the defendant were denied by the trial court. Each of the motions for a new trial made by the plaintiff Carl R. Ohran in cases No. 8665 and No. 8666 was granted and the order limited the new trial so granted solely to the issue of damages.

Defendant appeals from each of the orders granting a new trial on the limited issue as aforesaid and from all of the judgments, including the ones following which the limited new trials were granted.

The essential facts are:

On March 21, 1937, about 1 o'clock in the afternoon, John L. Ohran, thirty-eight years old, with twenty years' experience in operating an automobile, was driving an automobile over a county highway constructed on the top of a levee, in the county of Yolo. The car was equipped with practically new tires. None of the Ohrans had been over the road before.

With the driver were riding the other members of the two Ohran families heretofore named. It had been raining steadily for more than an hour and was still raining at the time of the accident, which occurred at a slight curve on a certain section of highway about 4.14 miles long, at a point opposite a ranch owned by one Nevis. Immediately before the accident John L. Ohran had been driving for about a mile at a speed of around 35 miles an hour without any trouble whatever, keeping always on the right-hand side of the highway. When he reached the Nevis property the rear wheels skidded and the car plunged off of the levee into the Sacramento river. Golda and Duane Ohran were drowned and Marguerite Ohran suffered injuries as the proximate result of the accident.

The paved portion of the highway was 20 feet wide, was constructed with a standard black macadam base, surfaced with a thin coating of hot liquid asphalt into which fine heated rock screenings were rolled while the asphalt was still hot. The highway had been in active use for nine years and no resurfacing or other repair work had been done on it during that time.

Plaintiff introduced evidence and the implied finding of the jury was to the effect that this 4.14 mile section of highway was still in fair condition and not particularly slippery in wet weather, except for a stretch about 500 feet long adjoining the Nevis property where the accident occurred, that this section did not have any rock surfacing, due to the fact that the rock screenings were applied when the liquid asphalt was cold and therefore did not bind and that this 500-foot stretch could not be readily distinguished from the rest of the highway in rainy weather by anyone unfamiliar with the road.

Appellant makes four assignments of error:

(1) The evidence was insufficient to justify the verdicts, and the judgments are without legal evidentiary support.

(2) The court erroneously instructed the jury that the law presumed that the driver of the car, John L. Ohran, and the owner of the car, Carl R. Ohran, took ordinary care for their own safety.

(3) The court erred in failing to refer to the question of proximate cause in one of its instructions to the jury and gave erroneous instructions upon the question of imminent peril and sudden emergency.

(4) The court erred in its orders granting a limited new trial as to the issue of damages in two of the actions.

In support of its first assignment of error appellant contends that there was no substantial legal evidence to support the implied finding of the jury that the highway at the point of the accident was in a dangerous or defective condition.

[1] This contention is not tenable. B. A. Taylor, a witness produced by plaintiffs, testified that he had driven a school bus over the highway for sixteen years, including a number of years before it was paved; that he witnessed a good deal of the construction work when it was done in 1929; that he had seen the liquid asphalt spread on the 500-foot stretch in question, but had not seen any rock put on; that he knew there was considerable delay after the asphalt was spread because he traveled the road to the bridge (about one mile), and there was no rock coming down; that "the screenings failed to bound or contact the oil and was all knocked off by the vehicles passing over the road"; that he first noticed the slippery condition with the first rains in the fall of 1929; that when it was wet he always slowed down to 5 miles or less per hour when passing that spot, but drove

35 miles per hour on the rest of the highway; that he had actually seen at least three cars going less than 20 miles per hour skid badly in front of his bus on that stretch; that he had seen about twenty-five cars that had skidded completely off of the levee; that there was no slick places anywhere else on the highway; that on March 31, 1937, its surface was pure asphaltum oil with no rock, gravel or anything to afford traction. He further testified, "Well, it was slippier than anything I know of. I don't know that ice would be any slippier than the surface of that highway was when wet." (Referring to the 500-foot stretch.)

He further testified that no repairs were ever made on that stretch; that there were no warning signs or railings anywhere on the road; that two or three years prior to the accident he talked to Mr. Merkeley, a supervisor, and asked him when he was going to fix that piece of road; that Merkeley said he didn't know, and that the witness replied, "I suppose you will wait until somebody is killed before you think about it"; that in January, 1937, about three loads of screenings were dumped alongside the road near the place of the accident, but they were never used.

Other witnesses testified to the slippery condition of the 500-foot stretch and to other similar accidents, one witness testifying that about forty cars had slipped off the road at that particular spot.

No objection was made to the introduction of evidence as to similar accidents, and appellant does not attack its admissibility. He does claim, however, that it has no substantial evidentiary value. With this we cannot agree.

There is ample evidence in the record to support the implied finding of the jury that there was a dangerous or defective condition in the highway at the place where the accident occurred.

It was stipulated that the board of supervisors of the county of Yolo was at all times the governing and managing board of said county and had full power and authority to remedy any dangerous or defective condition which might exist.

[2] Appellant further asserts that the board of supervisors did not have legal notice of the alleged dangerous or defective condition. There is no merit in this contention. Supervisor Merkeley, who had charge of the road work in that district, testified that at least half a dozen persons had talked to him about the condition of the road during a period of two or three years before the accident and that he did not remember whether or not he had discussed the matter with the board of supervisors. The jury had a right to infer that the whole board had notice from the facts and circumstances of the case, including the fact that the screenings were dumped at the spot in question just a few months before the accident, and the further fact that the road was resurfaced after the accident.

[3-5] It is only necessary that the supervisor in charge of the highway have knowledge of the condition. Rubell v. Santa Clara County, 27 Cal.App.2d 377, at page 380, 80 P.2d 1023. Furthermore, actual notice is not necessary, constructive notice being sufficient. Where the condition is created by the party claimed to be liable, no further notice is necessary. Sandstoe v. Atchison, T. & S. Fe Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216. Long-continued neglect is such constructive notice as to fix liability. Boyce v. San Diego High School District, 215 Cal. 293, at page 295, 10 P.2d 62.

[6] As a second assignment of error appellant claims that the following instruction given by the court is prejudicially erroneous: "You are instructed that the law presumes that both Carl R. Ohran and John L. Ohran took ordinary care for their own safety."

In support of its position it points to the fact that all evidence as to the conduct of the driver of the car, John L. Ohran, and of his brother, Carl R. Ohran, immediately preceding and up to the moment of the accident, came without contradiction from the lips of respondents, John L. Ohran, Carl R. and Marquerite Ohran, who, with the exception of Norylene Ohran, who did not testify, were the only eyewitnesses to such conduct.

The testimony of these witnesses, without substantial conflict, was to the effect that John L. Ohran, at the place of the accident and for a distance of at least a mile before reaching it, drove the car at a speed of approximately 35 miles per hour, stayed on the right-hand side of the road, and that there was nothing unusual about his manner of driving.

Appellant has no doubt sought to fit the facts relating to contributory negligence in this case to the rule laid down in the case of Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269, 273, which states, "a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

But appellant has overlooked the fact that the question to be determined here is not what was the conduct of John L. Ohran and Carl R. Ohran, but were John L. Ohran and Carl R. Ohran guilty of contributory negligence.

[7] To determine this latter question other factors than the conduct of the driver must be considered, to-wit, the state of the weather, the mechanical condition of the car, and the condition of the highway. A speed of 35 miles an hour even in a rainstorm is not necessarily negligence per se.

There was a sharp conflict in the evidence concerning the condition of the highway. Respondents' witnesses testified that it was slippery only on the 500-foot stretch where the accident occurred, while witnesses for appellant testified that it was equally slippery throughout the whole section of 4.14 miles. With such a conflict it cannot be said that contributory negligence was established as a matter of law.

[8, 9] The presumption in question is disputable but is satisfactory if uncontradicted. Code Civ.Proc., sec. 1961. A disputable presumption may be controverted by other evidence, direct or indirect, but unless so controverted the jury are bound to decide according to the presumption. Code Civ.Proc., sec. 1961. When so controverted, an issue of fact is raised which it is the duty of the court to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it be manifestly without support in the evidence. Simonton v. Los Angeles Trust & Savings Bank, 205 Cal. 252, at page 258, 270 P. 672; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529.

[10] Since a presumption is made evidence by statute, it is illogical to say that it may be dispelled by a mere conflict in the evidence as to the fact to which it is opposed. A sounder rule would be that though evidence, irrespective of its source, conflicts with a presumption, the latter is not dispelled unless the fact opposed to the presumption is proved as a matter of law.

This court is aware that the rule enunciated in Mar Shee v. Maryland Assurance Corp., supra, has not always been followed with strictness by the appellate courts of this state; that in some instances it has been indicated that an instruction like the one here attacked should not be given except where the one in whose favor it is sought to be invoked is deceased and there are no eyewitnesses to the accident.

The cases in which this question is involved are numerous. They are not altogether in harmony and many of them are factually different from the instant case. In most instances where the giving of the instruction was held to be erroneous it was not considered prejudicial.

In Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510, 511, the court at the plaintiff's request gave the following instruction: "The presumption is that a person takes ordinary care of his own concerns. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."

[11] The court in that case did not hold directly that the instruction was erroneous but stated that it could "not properly be objected to by the defendant" because of the qualifying language in the last sentence of the instruction. There is no such qualifying language in the instruction in the instant case. But, in a civil case, it is required that instructions be presented to the court and served on the adverse party before the first witness is sworn. Code Civ. Proc., sec. 607a. It must be presumed that the instruction complained of was served on the adverse party before the taking of testimony. Ramos v. Service Brothers, 118 Cal.App. 432, at page 437, 5 P.2d 623.

[12] In the instant case a full week elapsed between the calling of the first witness and the instruction of the jury. If appellant wished a more elaborate instruction it was his duty to prepare and present the same to the court. Smith v. Pacific Greyhound Corp., 139 Cal.App. 696, at page 705, 35 P.2d 169. Having failed to do this he cannot now complain of the meagerness

of the instruction. Townsend v. Butterfield, 168 Cal. 564, at page 569, 143 P. 760.

With these authorities in mind, the instant case stands upon the same footing as Ellison v. Lang Transportation Co., supra, and the giving of the instruction, if error, could not be held to be prejudicial under the holding in that case.

Campbell v. City of Los Angeles, 28 Cal. App.2d 490, 82 P.2d 720, appears to be the strongest case cited by appellant in the support of its contention concerning the presumption; but this case has been disapproved in part at least by the Supreme Court. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590.

It was proper to give the instruction under the circumstances existing in the instant case, and in any event the substantial rights of appellant were not prejudiced thereby.

In its third assignment of error, appellant complains of two instructions. The first was a formula instruction which omitted the element of proximate cause. Elsewhere the trial court fully and accurately instructed the jury upon the question of proximate cause. Appellant concedes that this instruction, standing alone, constitutes harmless error, but asserts that it magnifies the alleged error of the instruction concerning the presumption heretofore discussed and makes it impossible to cure said error by reading the instructions as a whole. Since we have not held that it is necessary to read the instructions as a whole to cure said alleged error, this contention becomes of no moment.

[13] The second instruction was as follows:

"You are instructed that a person suddenly confronted with danger through the negligence of another is not required to use that calm dispassionate judgment and action that is required in calmer moments, and when not under the stress of circumstances.

"Therefore, if you find that the driver of this car was suddenly confronted with danger caused by the negligence of the defendant, then the driver in attempting to escape the impending danger was only required to use the care and skill that an ordinarily prudent and skillful person would use under the same or similar circumstances, and not that degree of care and skill that is required when not thus confronted with danger, and if you find that the driver did use such care and skill under the circumstances proven, he was not guilty of contributory negligence."

Appellant complains that this instruction fails to include the element that the situation of imminent peril was created through no negligence on the part of those seeking its benefit. The language used "through the negligence of another" and "caused by the negligence of the defendant" has an equivalent effect. Similar language used in defining the law on this subject has been approved by our appellate courts. Coffman v. Singh, 49 Cal.App. 342, at page 350, 193 P. 259; Reinders v. Olsen, 60 Cal.App. 764, at page 772, 214 P. 268. It was not error to give this instruction.

Appellant does not attack the orders granting new trials referred to in its fourth assignment of error, but claims that the orders should have been general and not limited to the question of damages.

[14] It is conceded by all the interested parties that the verdicts were inadequate, but appellant's position is that the inadequacy of the damages awarded furnishes convincing proof that the verdicts were reached as the result of a compromise, citing Bencich v. Market Street Railway Co., 20 Cal.App.2d 518, 67 P.2d 398. This contention is somewhat negatived by the fact that much more adequate verdicts were returned in favor of the other plaintiffs. The trial judge also had the right to assume that the verdicts might have been influenced unconsciously by the fact that members of the jury were taxpayers in the county and would have to participate in the payment of the judgments.

The instant case also differs from the Bencich case in that here the jury's verdicts were for damages for the loss of a wife and minor son, the monetary value of which it is impossible to estimate with any degree of certainty, while in the Bencich case the verdict was for damages for injuries to plaintiff therein which were capable of almost exact calculation. The cases present sufficient distinguishing features to justify the trial court in not following the Bencich case as a precedent.

[15] The action of a trial court in granting a motion for a new trial will not be disturbed on appeal, in the absence of a showing of an abuse of discretion. We find no such abuse here.

It is conceded that if John L. Ohran, the driver of the car, were negligent, such negligence would be imputed to Carl R. Ohran and Marguerite Ohran, but not to Norylene Ohran. Therefore, all discussion herein regarding the question of contributory negligence has no application to the judgment in favor of Norylene Ohran.

The orders granting new trials on the limited issue of damages and the judgment in favor of John L. Ohran and Marguerite Ohran are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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40 Cal.App.2d 249

SCULLY v. ROSANOFF, Director of Department of Institutions, et al.

Civ. 12741.

District Court of Appeal, Second District, Division 2, California.

July 23, 1940.

Appeal and error 🔑607(1), 611

Where it appeared that more than five months elapsed after filing of notice of appeal, and that no notice to prepare the clerk's transcript had been filed and that no transcript had been filed, motion to dismiss the appeal, supported by a certificate of the clerk of the superior court setting forth the facts required by court rule, was granted. Rules of the District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Frank Scully, individually and as Secretary of the Department of Institutions, against Aaron J. Rosanoff, Director of the Department of Institutions, and others. From an adverse judgment, the plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

A. Brigham Rose, Paul Angelillo, and Lucien A. Sauvage, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondents.

PER CURIAM.

The respondent having served and filed his motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that more than five months have elapsed since the filing of the notice of appeal, and it appearing that the notice of appeal was filed on the 29th day of December, 1939, and that no notice to prepare the clerk's transcript has been filed, and that no transcript has been filed.

It is hereby ordered that this appeal be, and it hereby is, dismissed.

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40 Cal.App.2d 340

PEOPLE v. LOVLEE.

Cr. 3342.

District Court of Appeal, Second District, Division 2, California.

Aug. 7, 1940.

Criminal law 🔑1182

Where transcripts on appeal were filed in District Court of Appeal on April 8, 1940, and thereafter, time for filing briefs having elapsed, an order to show cause why appeal should not be dismissed was issued, returnable June 26, 1940, and on latter date there was no appearance on behalf of defendant, either by brief or otherwise, judgment and order of trial court were affirmed pursuant to provisions of Penal Code. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Raymond P. Lovlee was convicted of an offense, and he appeals.

Affirmed.

Frederick H. Whitfield, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

April 8, 1940, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed was issued, returnable June 26, 1940. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code the judgment and order of the trial court are and each is hereby affirmed.

I concur: MOORE, P. J.

39 Cal.App.2d 677

MATTERN v. PEPSI COLA BOTTLING CO. OF CALIFORNIA.

Civ. 12723.

District Court of Appeal, Second District. Division 2, California.

June 26, 1940.

Appeal and error 🔑554(2), 607(1), 611

Where appellant failed to file with clerk of trial court a notice or request to prepare a transcript under statute or otherwise, and took no steps toward procuring a clerk's transcript or bill of exceptions or other record for use on appeal, no proceedings were instituted or were pending for the purpose of preparing or procuring a transcript or bill of exceptions or other record, and time in which a record on appeal might be prepared and filed pursuant to statute had expired, an appeal was dismissed on respondents' motion. Code Civ.Proc. §§ 650, 953a.

◆

Action by Ira L. Mattern against the Pepsi Cola Bottling Company of California and others. From a judgment for defendants, plaintiff appeals, and defendants move to dismiss the appeal.

Appeal dismissed.

John H. Klenke, of Los Angeles, for appellant.

Parker & Stanbury, of Los Angeles, for respondents.

PER CURIAM.

The above-entitled matter having come on for hearing upon respondents' motion to dismiss the appeal, and it appearing that the appellant has failed to file with the clerk of the trial court a notice or request to prepare transcript under section 953a of the Code of Civil Procedure, or otherwise, and that the appellant has taken no steps toward the procuring of a clerk's transcript or bill of exceptions or other record for use on appeal, and that no proceedings have been instituted or are now pending for the purpose of preparing or procuring any transcript or bill of exceptions, or other record, and that the time in which a record on appeal herein might be prepared and filed pursuant to section 650 of the Code of Civil Procedure or pursuant to section 953a of the Code of Civil Procedure, or otherwise, has expired;

Now, therefore, it is ordered and adjudged that the appeal herein be, and it is hereby, dismissed.

39 Cal.App.2d 678

PORTER et al. v. SEASIDE MEMORIAL HOSPITAL OF LONG BEACH, LIMITED, et al.

Civ. 12728.

District Court of Appeal, Second District, Division 2, California.

June 28, 1940.

Appeal and error 🔑554(2), 607(1), 611

Where appellants had failed to file with clerk of trial court notice or request to prepare transcript and had taken no steps toward procuring of a clerk's transcript or bill of exceptions, or other record for use on appeal, and no proceedings had been instituted or were pending for purpose of preparing or procuring a transcript or bill of exceptions or other record, and time in which a record on appeal might be prepared and filed had expired, appeal would be dismissed. Code Civ.Proc. §§ 650, 953a.

Action by Emma Porter and another against Seaside Memorial Hospital of Long Beach, Limited, and others. From an unsatisfactory judgment, plaintiffs appeal. On defendants' motions to dismiss the appeal.

Appeal dismissed.

Richard E. Ryan, of Long Beach, for appellants.

Joseph A. Ball, of Long Beach, for respondent Hospital.

W. I. Gilbert, of Los Angeles, for respondents Grant and Chaffee.

PER CURIAM.

The above-entitled matter having come on for hearing upon respondents' motions to dismiss the appeal, and it appearing that appellants have failed to file with the clerk of the trial court a notice or request to prepare transcript under section 953a of the Code of Civil Procedure, or otherwise, and that the appellants have taken no steps toward the procuring of a clerk's transcript or bill of exceptions or other record for use on appeal, and that no proceedings have been instituted or are now pending for the purpose of preparing or procuring any transcript or bill of exceptions, or other record, and that the time in which a record on appeal herein might be prepared and filed pursuant to section 650 of the Code of Civil Procedure or pursuant to section 953a of the Code of Civil Procedure, or otherwise, has expired.

Now, therefore, it is ordered and adjudged that the appeal herein be and it is hereby dismissed.

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40 Cal.App.2d 250

CAVALLI et al. v. LUCKETT.

Civ. 11100.

District Court of Appeal, First District,
Division 1, California.
July 29, 1940.

1. Statutes 🔑225¾

The judicial interpretation given sections of former Vehicle Act applies to reenactment of such sections in Vehicle Code. Vehicle Code, §§ 468, 758, St.1935, pp. 166, 243.

2. Automobiles 🔑11

A road is not within a business or residential district within Vehicle Code establishing speed limit on roads in such a district, unless it appears that there is within the district the required density of structures and that district is signposted at the boundary lines thereof. Vehicle Code, §§ 468, 511, 758, St.1935, pp. 166, 176, 243.

3. Appeal and error 🔑714(5)

Where evidence was summarized in narrative form in bill of exceptions upon which appeal was taken, District Court of Appeal was restricted to facts shown only by the bill, and could not consider factual matters referred to by both sides in their briefs and not shown by bill of exceptions.

4. Trial 🔑252(8)

In automobile accident case, instruction that prima facie speed limit for defendant at place of accident was 45 miles per hour, which was speed limit fixed by Vehicle Code for highways outside of business or residence district, was not error, where plaintiffs failed to prove that highway was signposted as required by Vehicle Code. Vehicle Code, §§ 468, 511, 758, St.1935, pp. 166, 176, 243.

5. Evidence 🔑83(1)

The presumptions that the law has been obeyed and that official duty has been regularly performed could not be relied on to prove signposting of district so as to make district a business or residential district subject to 45 mile per hour speed limit under Vehicle Code, where code required clear and competent evidence to prove fact of signposting. Vehicle Code, §§ 468, 511, 758, St.1935, pp. 166, 176, 243; Code Civ.Proc. § 1963, subds. 15, 33.

6. Automobiles 🔑242(4)

The provision in Vehicle Code that highway shall be conclusively presumed to be outside of business or residence district unless its existence within business or residence district is established by clear and competent evidence as to nature of district, and unless district is duly signposted, was not applicable only to criminal cases, notwithstanding that provision was placed in division of code relating to criminal cases, where code further provided that section headings should not modify scope of any provision in code. Vehicle Code, §§ 7, 758, St. 1935, pp. 94, 243.

7. Trial ⚷260(8)

In automobile accident case, refusal to give instructions embodying basic speed law declared by Vehicle Code was not error, where provisions of the basic speed law were sufficiently covered by other instructions. Vehicle Code, §§ 510, 511, St.1935, p. 176.

8. Automobiles ⚷246(60)

In automobile accident case, instruction based on rule as to burden of proof declared by provision of Vehicle Code relating to basic speed law would have been improper, where such provision was applicable only in criminal cases. Vehicle Code, § 511, St. 1935, p. 176.

9. Appeal and error ⚷1040(13)

In automobile accident case, overruling demurrer to that portion of defendant's answer pleading contributory negligence was not reversible error, where such ruling did not affect substantial rights of demurrant. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Serafino Cavalli and Lucia Cavalli against Elizabeth Luckett for personal injuries sustained by Lucia Cavalli in a collision between an automobile in which she was riding as a guest and an automobile owned and driven by the defendant. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

James A. Walker, of Salinas, for appellants.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

The plaintiff, Serafino Cavalli and Lucia Cavalli, husband and wife, sued to recover damages for personal injuries sustained by Mrs. Cavalli in a collision between an automobile in which she was riding as the guest of Paul Gianocca and one owned and driven by defendant Elizabeth Luckett. The complaint alleged in general terms that the collision resulted directly and proximately from the careless, negligent and reckless operation of the defendant's car. The answer denied the charges of negligence, and as an affirmative defense alleged that Mrs. Cavalli was guilty of contributory negligence in that she failed to take any care or caution for her own protection. A jury returned a verdict in favor of defendant, and from the judgment entered thereon plaintiffs appeal.

The accident happened about midnight in October, 1937, on the main through highway (U. S. 101) in Monterey county, just north of the unincorporated town of Greenfield, where said highway is crossed at right angles by Apple street. Defendant was driving northerly along the main highway and the car in which Mrs. Cavalli was riding was traveling easterly on Apple street. The collision occurred within the intersection. The main highway at this point is sixty feet wide, traversable almost the entire width, with a concrete pavement in the center about fifteen feet wide, and oiled shoulders on either side four and a half feet wide; while the width of Apple street is forty feet, with an oil pavement twenty feet wide in the center. The estimated speed at which defendant's car was traveling at the point of collision was not shown; but one witness testified that when it was about sixty feet south of the intersection it was being driven forty to forty-five miles an hour; and another fixed the speed at the same point at "approximately fifty to sixty miles per hour". Plaintiffs make no claim, however, that the evidence is insufficient to support the verdict. As ground for reversal they assign as error, first, the giving of an instruction, No. XLIV, proposed by defendant, based on section 511 of the Vehicle Code, St.1935, p. 176, which was as follows: "I instruct you that the prima facie speed limit for the defendant was forty-five miles per hour at the place of the collision involved in this action." Admittedly such is the prima facie speed limit outside of a business or residence district, as they are defined by sections 89 and 90 of the Vehicle Code, but plaintiffs claim that the evidence established that the place of collision was within a "residence district", and that therefore, since said section 511 fixes twenty-five miles an hour as the prima facie speed limit within such a district, the giving of the above instruction constituted prejudicial error. In connection with such claim and in furtherance thereof plaintiffs proposed two instructions based on the Vehicle Code sections defining a residence district and prescribing the prima facie speed limit therein, which instructions the court refused to give; and such refusal also is assigned as error. We find no merit in either of the foregoing assignments.

[1, 2] Section 758 of the Vehicle Code declares that "Every highway shall be *conclusively presumed* to be outside of a business or residence district unless its existence within a business or residence district is established by clear and competent evidence as to the nature of the district *and unless such district is duly signposted when and as required by this code.*" Those statutory requirements are set forth in section 468, and are as follows: "(a) Speed restriction *signs shall be erected* upon every principal thoroughfare *at the entrance thereof* into a business or *residence district* and may be erected upon any other highway at the entrance thereof into such a district. (b) The authorities having jurisdiction shall determine and select those principal thoroughfares entering a business or residence district which shall be so signposted. * * * (e) *Such signs shall be erected* at a height of not less than four nor more than ten feet from the ground and shall be placed on the right-hand side of the highway *at the entrance thereof into such district.*" (Italics ours.) Section 758 is a re-enactment of the provisions of subdivision (c) of section 28½ of the former Vehicle Act (Stats.1929, p. 510), and the subdivisions of section 468 above quoted are re-enactments of sections 115 and 116 of the former Vehicle Act (Stats. 1931, p. 2122); therefore, the judicial interpretation given the former sections applies to the re-enactments (Harris v. Barlow, 180 Cal. 142, 179 P. 682; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093; 23 Cal.Jur. 795); and the decisions construing and applying the former sections definitely held that if it was claimed that the accident happened on a stretch of highway within a business or residential district, and there was a failure to prove either sufficient density of structures or signposting as required by law, it would be conclusively presumed that said stretch of highway was outside of such district. Cunningham v. Cox, 126 Cal.App. 685, 15 P.2d 169; Wheeler v. Buerkle, 14 Cal.App.2d 368, 58 P.2d 230. Thus, as said in the former case [126 Cal.App. 685, 15 P.2d 171], "It is therefore clear that no road is deemed to be within a 'business or residence district' for the purposes of the act unless it appears first, that there is within the district the required density of structures, and, second, that the district is signposted 'at the boundary lines' thereof; and if the uncontradicted testimony affirmatively shows either an insufficient density of structures within the alleged district or a failure to post signs at the 'boundary lines' of the alleged district, then the district is outside of a 'business or residence district' for the purposes of the act."

[3] In the present case the evidence is summarized in narrative form in a bill of exceptions upon which the appeal was taken, and both sides complain that the bill does not include all of the evidence introduced at the trial. Consequently in the presentation of the appeal both sides in thier briefs have referred to factual matters not shown by the bill of exceptions. In the determination of the appeal, however, we are restricted to the facts shown only by the bill, and it appears therefrom that while plaintiffs introduced evidence showing a sufficient number of dwellings and business structures on both sides of said highway for a distance of a quarter of a mile south of the intersection to create a residence district as defined by said section 90, they failed entirely to prove that the highway running through it was signposted in conformity with the requirements of the statute. All that they proved in this regard was, quoting from the bill, "That at the time of said collision there was an 'end 25 mile zone' sign post located on the East side of said United States Highway No. 101 [facing south] about 20 feet South of the said intersection where the collision occurred." Plaintiffs in their closing brief have incorporated a map showing among other things the location of another signpost on the westerly side of the highway, facing north, opposite the one on the easterly side; but there is nothing whatever in the record showing, nor do plaintiffs claim, that said map was ever offered or received in evidence at the trial or referred to therein for any purpose.

[4] Even assuming, however, that there was an entrance signpost at the northerly end of the alleged residential district, the evidence wholly fails to show that the highway at the southerly entrance was signposted in any manner; consequently, so far as it here appears, there was nothing to warn motorists traveling, as defendant was traveling, in a northerly direction, that they were entering a residential district. Moreover and in any event, the conceded fact is that the collision took place in the intersection as least twenty feet beyond the "end 25 mile zone" signpost located at the northerly end of the alleged district.

In the foregoing state of the evidence the trial court was justified in instructing the jury that "at the place of the collision" the prima facie speed limit was forty-five miles per hour. In this respect the case is essentially no different from Cunningham v. Cox, supra, and there in disposing of the question the court went on to say: "In other words there was no sign at the westerly boundary line of the alleged district, which sign might have been viewed by traffic going easterly from Saratoga and in the direction which respondent was driving. It therefore affirmatively appears that there was neither sufficient density of structures nor sufficient signposting to make the district in question a 'residence district' within the meaning of the act * * *. Upon the record before us it would have been entirely proper to have instructed the jury that the scene of the accident was not within a 'business or residence district.'" To the same effect is People v. Okada, 14 Cal.App.2d 660, 58 P.2d 967, wherein an attempt was made to show that the locality involved therein came within the Vehicle Code definition of a business district, but there was no evidence that the alleged district was signposted as such; and the court held that under such circumstances it was improper to give instructions as to the prima facie speed limit fixed for a business district.

[5] Plaintiffs argue that they "were entitled to and did rely upon certain presumptions to assist them" in establishing that the alleged district was legally signposted, the presumptions relied upon being "That the law has been obeyed" (Code Civ.Proc., sec. 1963, subd. 33), and "That official duty has been regularly performed" (Code Civ. Proc., sec. 1963, subd. 15). Their argument in this respect is that "from the established 'end 25 mile zone' sign post it must be presumed that the duly constituted authorities of this State, in obedience to Section 468 of the Vehicle Code and other laws of this State, determined the district in question to be a residential district and duly erected an 'entrance 25 mile zone' sign post and an 'end 25 mile zone' sign post when and as required by the Vehicle Code of California." It is quite evident, however, that the presumptions relied upon cannot be extended to cover a factual situation of this kind, particularly in view of the decisions above cited and the wording of section 758 itself, which obviously, when read as a whole, requires clear and competent evidence to prove the fact.

[6] Plaintiffs make the further point that when in 1935 the provisions of subdivision (c) of section 28½ of the Vehicle Act were re-enacted into the Vehicle Code and given the number 758, the legislature intended to make the provisions thereof apply only to criminal cases. Such contention is based entirely upon the premise that in the re-enactment of said section 1935 it was placed in one of the chapters of division XII of the Vehicle Code which bears the heading "Parties, Procedure, Evidence And Penalties In Criminal Cases". The negative answer to plaintiffs' contention is to be found, however, in section 7 of the "General Provisions" of said code, which reads as follows: "7. Effect of Headings. Division, chapter, article, and section headings contained herein shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section hereof." It would seem, therefore, that the very purpose of the legislature in incorporating said section 7 in the code was to meet any contention such as plaintiffs are now making to limit the scope and effect of said section 758.

[7, 8] Plaintiffs also proposed and the court refused to give an instruction embodying the basic speed law declared by section 510 of the Vehicle Code, and most of the provisions of section 511. We find no error in the refusal for the following reasons: (1) The provisions of the basic speed law and the first paragraph of section 511 were sufficiently covered by other instructions, notably XXIII, XXIX, XXX, and XLI: (2) the rule as to the burden of proof declared by the second paragraph of section 511 has been held to apply only in criminal cases, and consequently an instruction based thereon in the present case would have been entirely improper (Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Akers v. Cowan, 26 Cal. App.2d 694, 80 P.2d 143; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995); and (3) the remaining portions of the instruction related to factual situations which were here in no way involved. In concluding this branch of the case it may be well to state that the court's charge to the jury was most comprehensive. It consisted of sixty-four separate instructions, more than half of which were given at the request of either the plaintiffs or the defendant, and fully covered the law of negligence, speed and traffic laws, and the mat-

ter of damages. It would seem, therefore, that no element involved in the case was omitted.

The points made in exception No. 5 in the bill of exceptions are merely incidental to those already disposed of and hence do not require separate attention.

[9] Nor do we find ground for reversal in plaintiffs' final point that the trial court erred in overruling their demurrer to that portion of the defendant's answer pleading contributory negligence, for it is well settled that to warrant a reversal on such a ground it must appear that the ruling affected the substantial rights of the demurrant. 2 Cal.Jur. 1014. In other words, as declared by the state Constitution (sec. 4½, art. VI), a judgment shall not be set aside for any error as to any matter of pleading unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. There is nothing in the bill of exceptions which would support the conclusion that the verdict herein has resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

STOCKTON SAVINGS & LOAN BANK v. MASSANET et al. *

Civ. 6310.

District Court of Appeal, Third District, California.

July 18, 1940.

Hearing Granted Sept. 16, 1940.

1. Contracts 🔑144, 167

A statute which was in effect at the time and place of the making of a contract became part of such contract.

2. Statutes 🔑172

The language of a statute providing "This act and the provisions of this section shall be effective to and until September 1, 1936," was so clear as to leave no opportunity for courts to inquire into legislative intent as to time limit of statute. St.1933, p. 1674, § 8.

3. Constitutional law 🔑53, 115

A subsequent Legislature cannot construe or interpret an act of a former Legislature, and cannot, by later amendment, remove a limited prohibition and thereby abrogate contracts entered into prior to amendment.

4. Mortgages 🔑375

The statute providing that no deficiency judgment shall lie after a sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty, and that provisions of such statute shall be effective to and until September 1, 1936, did not prohibit a deficiency judgment after sale under a deed of trust, where deed was executed on August 20, 1935, and sale thereunder was not had until May 4, 1938. Code Civ.Proc. § 580b, as added by St.1933, pp. 1673, 1674, § 8.

5. Mortgages 🔑375

The statute providing that no deficiency judgment shall lie after sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty and that such statute shall be effective to and until September 1, 1936, cannot be construed as taking away the right of a deficiency judgment in any deed of trust executed between effective date of statute and September 1, 1936. Code Civ.Proc. § 580b, as added by St.1933, pp. 1673, 1674, § 8.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Stockton Savings & Loan Bank against Chris Massanet and another to recover a deficiency resulting after the sale of property under a deed of trust. From a judgment for plaintiff, defendants appeal.

Affirmed.

Glensor & Schofield and H. W. Glensor, all of San Francisco, and J. Leroy Johnson, of Stockton, for appellants.

Nutter & Rutherford, D. R. Jacobs, Stephen Dietrich, and Philip Cavalero, all of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment in favor of plaintiff for a deficiency after sale under a deed of trust. The property here involved was a tract of land improved with a vineyard and buildings, including a bonded winery, in which was stored several thousand gallons of wine which belonged originally to Edna Gleason. The real property was subject to a deed of trust in favor of Stockton Savings and Loan Bank. Mrs. Gleason was in default, and the bank started to foreclose. Chris Massanet desired to acquire the property, and originally the plan was for Massanet to take a deed directly from Mrs. Gleason and assume the obligation to the bank and to give to Mrs. Gleason security for the repayment to her of certain moneys advanced by her to one Soler, a tenant on the premises, and for taxes and interest, and then Massanet was to lease the property to Mrs. Gleason. However, this plan was changed, and as finally consummated, the property was deeded by Mrs. Gleason to the bank, and the bank then deeded to Massanet, he executing a deed of trust to the bank, and a second deed of trust for $2,651.08 to reimburse Mrs. Gleason for the money advanced by her, and then Massanet leased the property to her.

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* Subsequent opinion 114 P.2d 592.

The papers were placed in escrow, and the entire transaction as outlined consummated at one time. To complete this deal Massanet borrowed $12,200 from the bank, executing, on August 20, 1935, a note and deed of trust on the property to a subsidiary of the bank. The note not being paid at maturity, the bank sold the property under the terms of the deed of trust, and then on May 20, 1938, brought this action for the deficiency.

The answer, by way of a special defense, set up that the deed of trust was given to secure the purchase price of the property, and the action was therefore barred by section 580b of the Code of Civil Procedure.

A motion to strike this special defense was granted, and judgment was entered in favor of the bank for some $4,500, being the deficit under the sale under the deed of trust. From that judgment this appeal is taken.

Two questions are presented by this appeal: First, does section 580b of the Code of Civil Procedure prohibit a deficiency judgment after sale under a deed of trust where the deed of trust was executed on August 20, 1935, and the sale thereunder was not had until May 4, 1938, and

Secondly, was the deed of trust in question given to secure payment of the balance of the purchase price of real property?

Section 580b of the Code of Civil Procedure, as enacted in 1933, Stats.1933, chap. 642, p. 1673, provided "No deficiency judgment shall lie in any event after any sale under a deed of trust or mortgage given to secure payment of the balance of the purchase price of real property."

This chapter included other sections concerning deeds of trust and mortgages, and provided (section eight), "This act and the provisions of this section shall be effective to and until September 1, 1936."

In 1935, Stats.1935, chap. 650, p. 1802, section 580b of the Code of Civil Procedure was re-enacted, and section 9 of chapter 650 declared it was the intent of the act to re-enact various sections of the Civil Code and Code of Civil Procedure, including section 580b of the Code of Civil Procedure, in order to continue the same in effect subsequent to September 1, 1936, and to remove any ambiguity created by chapter 642 of the Statutes of 1933, and expressly declared the legislative intent to make such sections effective without any time limitations thereon. This enactment of chapter 650 of the Statutes of 1935 became effective September 15, 1935. It will be recalled that the deed of trust with which we are here concerned was executed August 20, 1935, almost a month prior to the effective date of the amendment of 1935, and the present suit for deficiency was commenced May 20, 1938.

[1] It would seem clear, therefore, that we are not here concerned with the enactment of any statute subsequent to 1933, as the law, as it stood in August, 1935, became a part of the contract between the parties, and by the express provisions of that statute the only prohibition of a sale for any deficiency was effective up to and until September 1, 1936.

In Hales v. Snowden, 19 Cal.App.2d 366, 65 P.2d 847, an action was commenced to foreclose three purchase-money mortgages executed in April, 1927. The court, in refusing to set aside the order directing a deficiency judgment, pointed out that laws which were in effect at the time and place of the making of a contract enter into and form a part of it, as effectively as if incorporated in its terms, and the obligations of a contract were impaired by any law which released or extinguished them. Under the law then existing, the mortgagee, upon default, had the right to sue and obtain a judgment for any deficiency remaining after crediting the proceeds of the sale upon the indebtedness. This was a substantial right, the court held, and constituted an impairment of the contract, and in so far as the section purported to apply to mortgages executed before its enactment, was ineffectual.

Appellants do not seriously question this rule but predicate their argument upon the ground that the legislature did not intend the time limit to September 1, 1936, should apply to section 580b of the Code of Civil Procedure. It is pointed out by them that chapter 642 of the Statutes of 1933 was a group enactment of certain moratorium legislation and designed to meet the extraordinary social and economic conditions then prevailing, and which seem still to continue. Among the many bills thus pooled was one adding section 2924½ to the Civil Code, which was section 8 of chapter 642. This paragraph contained this final clause: "This act and the provisions of this section shall be effective to and until September 1, 1936."

An examination of the history of this particular bill shows that it was not included in chapter 642 until the final hearing in the Assembly. From these facts appellants claim that doubt is cast on the legislative intent in enacting chapter 642, and that there is nothing to show that it was the intention of the legislature to impose any time limit on any of the sections of chapter 642 other than section 2924½ of the Civil Code, and that sufficient doubt and ambiguity is created thereby, by the use of the words "This act and" as found in section 8 to justify and warrant a court in ascertaining and declaring the legislative intent.

In addition to the legislative history appellants point to section 9 of chapter 650, p. 1807, Statutes of 1935, where it was declared: "It is the intent of this act to reenact * * * sections * * 580b * * * of the Code of Civil Procedure in order to continue the same in effect subsequent to September 1, 1936, and remove any ambiguity created by the language of section 2924½ of the Civil Code as added by an act approved June 2, 1933, as to the time said sections shall be effective. It is intended that sections * * 580b * * * of the Code of Civil Procedure shall be effective without any time limitation thereon."

[2] However, the language of the statute: "This act and the provisions of this section shall be effective to and until September 1, 1936," is so clear and unambiguous as to leave no opportunity to inquire into the legislative intent. 22 Calif. Law Rev., p. 181; Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 5 P.2d 882; Braun, Bryant & Austin v. McGuire, 201 Cal. 134, 255 P. 808.

[3] Furthermore, a subsequent legislature is without power to construe or interpret an act of a former legislature, and cannot, by later amendment, remove that limited prohibition and thereby abrogate contracts entered into prior to the amendment. We are unable to find anything upon which a court could justify a right to declare the legislative intent in the instant case.

[4, 5] It is next urged by appellants that regardless of the time limitations in the statute, section 580b of the Code of Civil Procedure in effect when the deed of trust was executed, should in effect be embodied in the instrument and construed to read "no deficiency judgment shall lie after a sale under this deed of trust". In other words, appellants claim the statute took away entirely the right of a deficiency judgment in any deed of trust executed between the effective date of the act and September 1, 1936, and not merely that the right to obtain a deficiency judgment had been postponed or suspended until after September 1, 1936. The section does not justify this construction. The language is clear and unambiguous. A study of the principles dealing with statutory construction, as found in the many cases dealing with that subject, make it clear the position of appellants cannot be sustained.

If the foregoing is correct, it is not necessary to pass upon the question as to whether the deed of trust was given to secure payment of the balance of the purchase price. The judgment is affirmed.

I concur: THOMPSON, J.

40 Cal.App.2d 317

SCOTT v. LIPPMAN et al.

Civ. 2383.

District Court of Appeal, Fourth District, California.
Aug. 5, 1940.

1. Venue 🔑5(1)

Where party wall was erected so that it rested equally upon land of adjoining owners and builder agreed that adjoining owners should have right to use wall on payment of certain sum and adjoining owners used wall and committed no trespass on part of wall resting on builder's lot, builder was not entitled to maintain an action for injunctive relief and to recover cost of wall from adjoining owners in county wherein the wall was located but was required to bring the action in place of residence of the adjoining owners. Code Civ.Proc. § 392.

2. Party walls 🔑10

Where party wall was by agreement erected so that it rested equally upon land of adjoining owners and builder agreed that adjoining owners should have right to use the wall on payment of certain sum, right to enjoin use of wall until payment was made as agreed to, if such right existed, was waived by the builder who permitted the adjoining owners to use the wall before payment was made for a period of approximately three years before bringing action.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action to recover one-half the cost of a party wall and for injunctive relief by Carlotta B. Scott, also known as Lottie B. Scott, against Lazard Lippman and another. From an order granting a motion for a change of place of trial and transferring the action to the municipal court of Los Angeles, plaintiff appeals.

Affirmed.

Whitelaw & Whitelaw and Dorsey Whitelaw, all of El Centro, for appellant.

Harry W. Horton and George R. Kirk, both of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order granting a motion for a change of place of trial and transferring the action to the municipal court of Los Angeles, where the individual defendant resides and where the corporate defendant has its principal place of business.

The purpose of the action is to recover $1,350 for one-half the cost of a party wall erected under an agreement between the plaintiff and a predecessor of the defendants.

The complaint, which was filed on March 7, 1939, alleges that in 1920, and pursuant to the terms of this agreement, the plaintiff erected a building with its eastern wall on the dividing line between a lot owned by her and a lot owned by the other party to the contract; that in 1936 the defendants erected a building on the other lot and in connection therewith anchored joists in said wall and have continuously since thus made use of said wall; that the contract provided that the plaintiff should own said entire wall and that the other party should not use said wall unless and until she should pay the plaintiff the sum of $1,350; that this amount has not been paid to the plaintiff; and that the defendants will continue to use said wall to the damage of the plaintiff in the sum of $1,350 unless restrained therefrom. The prayer is for an order enjoining the defendants from using said wall unless and until they have paid $1,350 and for further relief.

The agreement in question, which is attached to and made a part of the complaint, provides that this plaintiff shall have the right to build a wall along the line between the two lots, the wall to be 18 inches thick and half of it to be on each side of the line. This plaintiff agrees that the other party shall have the right at any time to use the wall and to "sink joists into said party wall and make said wall a part of said building" provided the other party shall have paid one-half of the cost of the wall, which amount is fixed at $1,350. The other party agrees to pay that amount when said party "uses any or a part of said party wall". We can find nothing in this contract which provides that this plaintiff shall "own said entire wall".

The plaintiff's main contention is that this action involves the possession of real estate and is controlled by section 392 of the Code of Civil Procedure. As shown by the complaint nine inches of this wall stood upon the land owned and controlled by the defendants. While it is alleged that in the year 1936 they "sank and anchored joists or beams in said eastern wall" it in no way appears that these joists or beams extended over the line and into that part of the wall which rested upon the plaintiff's lot, so no question of possession in connection with that lot is raised. The contract gave the plaintiff the right to place one-half of the wall upon the defendants' property. This has been done, the plaintiff's use of the wall has not been interfered with, no one is trying to take away such possession as she had or to compel her to move the wall, and no question of possession, with respect to the nine inches of defendants' land which is occupied by the wall, is involved.

[1, 2] The plaintiff further contends that this action also involves the right of an owner of real property to prevent an encroachment or trespass thereon and that to this end an injunction was sought. It is difficult to see just what trespass upon real property is meant. Certainly there was no trespass on plaintiff's lot and plaintiff's only right with respect to defendants' lot is to be allowed to place a wall on nine inches thereof. This right has not been interfered with and any rights which plaintiff here has can hardly be said to arise from a trespass upon the defendants' real property. While the prayer of the complaint asks for an injunction, there are no allegations which would support such relief. The plaintiff maintains that under the contract, the defendants had no right to anchor joists in this wall or use the same until after the agreed amount had been paid. If it be assumed that a right to an injunction ever existed, it was waived when the plaintiff not only permitted the respondents to use the wall before the payment was made but permitted this use to continue for a period of approximately three years before the action was brought. Anaheim O. F. Hall Ass'n v. Mitchell, 6 Cal.App. 431, 92 P. 331. In that case, under similar circumstances, the court said: "The action does not fall within the provisions of section 392, Code Civ.Proc. It does not affect the real property upon which the wall is located, or any estate or interest therein. * * * Being clearly a personal action, wherein a money judgment is sought, appellant was entitled to a trial thereof in the county wherein she resided at the time of the commencement of the action."

The contract in question makes no provision as to where the $1,350 is to be paid in the event it should ever become payable and the complaint fails to allege any facts which bring the action within section 392 of the Code of Civil Procedure. It rather clearly appears that the action is one to recover a personal judgment for $1,350, and no error appears in connection with the order made.

The order appealed from is affirmed.

I concur: GRIFFIN, J.

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40 Cal.App.2d 229

In re WILSON'S ESTATE.

Civ. 11387.

District Court of Appeal, First District.
Division 1, California.
July 23, 1940.

Hearing Denied Sept. 19, 1940.

1. Estoppel ⚷39

If there are recitals or covenants in a deed showing an intention not to limit the interest conveyed to that merely which the grantor then had, or expressly or impliedly affirming existence of a particular estate which the parties intended should pass by conveyance, grantor may be estopped from asserting an after-acquired title or interest in contradiction of terms or implications of deed, even though granting clause is in form of a quitclaim.

2. Estoppel ⚷39

An ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, but if there is a distinct recital in the deed showing that the parties proceeded on the theory that a particular interest was conveyed, recital may be as effectual to create an estoppel as a warranty.

3. Descent and distribution ⚷86
Estoppel ⚷39

Where mother executed a quitclaim deed and assignment of all her rights, title, interest, estate and claim in the estate of her deceased daughter, including all property after discovered in favor of daughter's husband, instrument was sufficient to convey to the husband, mother's present interest in daughter's estate as well as any after-acquired title which the mother might have acquired upon the husband's death. Civ.Code, § 1386, subd. 8, now Probate Code, § 228.

4. Appeal and error ⚷1008(3)

Where the construction given an instrument by a trial court appears to be reasonable and consistent with the intention of the parties making it, reviewing court will not substitute another interpretation even though it seems equally tenable.

◆

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Proceeding in the matter of the estate of Charles J. Wilson, deceased, wherein Jennie Henderson and others asserted a claim to one-half of the deceased's estate, opposed by Maisie E. Field. From a decree for the defendant, the claimants appeal.

Affirmed.

I. F. Chapman and Tom F. Chapman, both of San Francisco, for appellants.

Jacobs, Blanckenburg & May, of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from the decree of final distribution entered in the matter of the estate of Charles J. Wilson, deceased, the question involved being whether under the provisions of section 228 of the Probate Code appellants were entitled to one-half of the estate.

Martha Wilson, the decedent's wife, died in 1920 in Alameda county, intestate and without issue. She was survived by her husband and her mother, Mrs. Enke, a resident of Denmark. Sixteen years later and on November 12, 1936, Charles J. Wilson died in Alameda county, a widower, intestate and without issue, leaving surviving him as sole heir and next of kin a sister, Maisie E. Field of San Francisco. During the administration of his estate and prior to the distribution thereof Mrs. Enke died. She was survived by five adult children, one living in Canada and the remaining four in Denmark; and following the death of their mother they asserted a claim to one-half of the Charles J. Wilson estate upon the ground that the property to be distributed therein was community property of the decedent and his predeceased spouse, Martha Wilson. The probate court held adversely to their claim. The basis of its decision was that Mrs. Enke by an instrument in writing theretofore executed and delivered by her to the said Charles J. Wilson, in consideration of the payment to her by him of the sum of $500, had deeded and assigned to him all of her rights and interests in and to all community property belonging to him and his predeceased spouse; and that since the provisions of said section 228 under which Mrs. Enke's children were claiming gave them no greater rights than she possessed thereunder, they were not entitled to any portion of the Charles J. Wilson estate. Thereupon the court distributed the residue of his estate, consisting of $4,365.97 in cash, a watch, two chains and a charm, to his sister, Maisie E. Field. We find no merit in appellants' contention that the probate court erred in its decision.

The facts of the case are not disputed, and for all purposes of the appeal they may be summarized as follows: Some considerable time after the death of his wife Martha, the exact date not appearing, Wilson obtained letters of administration in the matter of her estate, and on April 5, 1926, all property administered upon therein was distributed to him. It consisted of six lots in Berkeley, and approximately $7,500 in cash. The law of succession in effect at that time provided that upon the death of the wife the entire community property, without administration, belonged to the surviving husband (sec. 1401, Civ.Code); and in its decree of final distribution entered therein the probate court found that the whole of the estate of Martha Wilson was community property, but that at the time of her death, title thereto stood of record in her name, and that such was the reason for administering upon her estate. Furthermore, the court found that "if the same was separate property" Wilson as surviving husband was entitled to one-half thereof, and that Mrs. Enke as surviving mother was entitled to the remaining half, but that on February 26, 1925, she had executed and delivered to Wilson "a quitclaim deed and assignment of all her rights, title, interest, estate and claim of, in and to the property, real and personal, of the said estate of Martha Wilson * * * and to all residue thereof, including all property hereinafter discovered, and that said Charles J. Wilson is now the owner and holder of all right, title, and interest of said mother of said deceased in and to the estate of said deceased"; and accordingly all of said real and personal property was distributed to him. At the time of Wilson's death ten years later these same lots became a part of his estate, and during administration were sold for $4,250. The rest of his estate, except for the few personal articles above mentioned, consisted of a bank deposit of $1,468.66, which his administrator alleged "on information" was part of the money the decedent had received on final settlement of his wife's estate.

The instrument referred to by the probate court in the rendition of its decree in the Martha Wilson estate was before the probate court at the time of the distribution of the Charles J. Wilson estate, and is made part of the record on appeal herein. It appears therefrom that it was executed and delivered by Mrs. Enke to Charles J. Wilson in consideration of the payment to her by him of the sum of $500. By its terms Mrs. Enke first "remised, released, and forever quitclaimed" unto him "and to his heirs and assigns forever" said six lots, describing them; then followed the assignment in broad terms which reads: "And in further consideration of the money received as hereinbefore referred to, said first party does hereby transfer set over, and assign unto the said second party all of her right, title, and interest in and to all of the property, personal and otherwise of the estate of Martha Wilson, * * * and request that when distribution of said estate is made that the whole thereof be distributed to her surviving husband, Charles J. Wilson. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances and all of said interest in said personal property unto the said party of the second part, his heirs and assigns forever." From the evidence before it the probate court found that by the execution and delivery of said quitclaim deed and assignment the community property belonging to the decedent and his predeceased wife "was converted into separate property of Charles J. Wilson; that said instrument conveyed any and all after acquired title and it was the intention of the parties thereto so to do * * *."

[1, 2] The position taken by appellants is that the instrument in question is strictly a quitclaim deed, and that such a deed passes only a present title or interest in the grantor, and has no effect on an after-acquired title. In other words, appellants argue that by said instrument their mother surrendered only her right to succeed to a portion of her daughter's estate, without any intention thereby to pass any after-acquired title to any interest in the estate of her daughter's husband upon his death. As stated, however, in the note found in 58 A.L.R. at page 361: "* * * if there are recitals or covenants in the deed showing an intention not to limit the interest conveyed to that merely which the grantor then had, or expressly or impliedly affirming the existence of a particular estate which the parties intended should pass by the conveyance, the grantor may be estopped from asserting an after-acquired title or interest in contradiction of the terms or implications of the deed, even though the granting clause was in the form of a quitclaim. Thus, although an ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, yet a distinct recital in such a deed, showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create an estoppel as a warranty. And it has been said that, while as a general rule a conveyance by a quitclaim deed will not operate to pass a subsequently-acquired title of the grantor, this principle is applicable only to a quitclaim deed in the strict and proper sense of that species of conveyance; that, if the deed bears upon its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and the bargain proceeded upon such footing between the parties, then, although the deed may not contain covenants of title, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him with respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance."

[3, 4] Here it is apparent that the form and substance of the instrument in question take it beyond the limitations of a quitclaim deed. As pointed out by appellants, it is entitled "quitclaim deed *and assignment*" (italics ours); and as will be seen from a mere inspection of the instrument the entire last half thereof, including the habendum clause, covers subject-matter in no way essential to the validity

of a quitclaim deed. Obviously, therefore, if it had been intended that the legal effect and operation of said instrument was to be restricted to that of a quitclaim deed there would have been no reason whatever to add thereto the last half thereof embodying the assignment. Moreover, the broad terms employed in framing the assignment portion of the instrument in themselves clearly show an intention to convey all interest, present and prospective, which Mrs. Enke may have then had in any of the property about to be distributed in the Martha Wilson estate. Thus the instrument was made to read: "* * * said first party does hereby transfer set over, and assign unto said second party all her right, title, and interest in and to all of the property, personal and otherwise of the estate of Martha Wilson". Then again, as heretofore pointed out, under the law of succession as it stood at the time of Martha Wilson's death, all community property passed to her husband without administration; and at that time also subdivision 8 of former section 1386 of the Civil Code provided practically the same as section 228 of the Probate Code does now, so far as it could have affected the present situation; and that being so, the only apparent purpose Wilson could have had in obtaining a deed and assignment from Mrs. Enke to this same property, which already belonged to him by operation of law, was then and there to acquire from her any after rights which might accrue to her upon his death under the provisions of said subdivision 8 of section 1386. Such was the construction placed upon the instrument twice by the probate court, first at the time of the distribution of the Martha Wilson estate, and secondly at the time of the distribution of the Charles J. Wilson estate; and it is a well-settled legal doctrine that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intention of the parties making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable. Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193; Teater v. Good Hope Dev. Corp., 14 Cal. 2d 196, 93 P.2d 112; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049. After having considered all of the circumstances of the present case we find nothing in the arguments advanced by appellants which would justify the conclusion that the construction so given the instrument by the probate court is at all unreasonable or in any manner inconsistent with the intention of the grantor thereof.

The decree appealed from is affirmed.

We concur: PETERS, P. J.; WARD, J.

BACKUS v. SESSIONS et al. *

Civ. 2396.

District Court of Appeal, Fourth District, California.

Aug. 2, 1940.

Hearing Granted Sept. 30, 1940.

1. **Automobiles** 🔑244(11, 35)

In action arising out of intersectional collision, evidence that truck cut corner of intersection at speed of 25 miles an hour established negligence of truck driver.

2. **Automobiles** 🔑213

The rider of a motorcycle was under same duty to observe road in front of him and to look for danger as was driver of a truck which struck motorcycle at intersection.

3. **Release** 🔑57(1)

Evidence sustained finding that at time release was signed, party signing release of his claim for damages in automobile accident was not in possession of his faculties and was in a semiconscious condition, was wholly without capacity to contract and that he was unaware of contents of release and did not know its contents until time of trial.

4. **Trial** 🔑143

Conflicts in the evidence are addressed to and are to be settled by the trier of fact.

5. **Release** 🔑16

If an injury is known at time a release of claims for damages for such injury is signed, the release is binding, even if unknown or unexpected consequences result therefrom but if injury is unknown and parties purport to settle for all injuries sustained then the release will not be binding on the parties as to the unknown injury.

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* Subsequent opinion 110 P.2d 51.

6. Release ⚿16

Where injured person cashed and negotiated draft containing release of his claim for injuries, at time when he knew he was suffering from an eye injury, an unknown injury to optic nerve of eye which subsequently caused serious impairment of vision did not constitute a separate and distinct injury so as to entitle injured person to recover additional damages for loss of vision under the statute providing that general release does not extend to claims which the creditor does not know or suspect to exist in his favor at time of executing release. Civ.Code, § 1542.

7. Release ⚿16, 17(2)

A release may be invalidated by proof of fraud or mutual mistake of fact.

8. Release ⚿57(2)

To support a finding of fraud in procuring a release, evidence of fraud must be clear and convincing.

9. Release ⚿57(2)

Evidence was insufficient to warrant finding that a release of claims for injuries was procured by fraud and concealment of fact that optic nerve of person signing release was injured.

10. Automobiles ⚿247

In action arising out of intersectional collision, finding that intersection was an obstructed one as defined by statute, that plaintiff entered intersection at a speed of 25 miles an hour, and that plaintiff's negligence was not a proximate cause of the collision and was remote, was not a complete nor satisfactory finding on question of contributory negligence. Vehicle Code, § 511(a)(4), St.1935, p. 177.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by J. W. Backus against Milton Sessions and Edward J. Bonnin to recover damages sustained in collision between motorcycle and delivery truck. From a judgment for the plaintiff, defendants appeal.

Reversed.

Wright, Monroe, Harden & Thomas, of San Diego, for appellants.

Joseph S. Campbell, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in the sum of $3,500 in favor of plaintiff for injury to his left eye, being part of the personal injuries received in a collision between his motorcycle and a light delivery truck owned by Milton Sessions and driven by Edwin J. Bonnin.

The collision occurred at the intersection of India and Redwood streets in San Diego, shortly after 4 o'clock on the afternoon of April 5, 1939. Both streets are paved to a width of 52 feet between curbs. The intersection was obstructed to northbound traffic on India street and the permissive speed limit for vehicles so approaching the intersection was 15 miles per hour.

Plaintiff was traveling south on India street, and, after traversing about three-quarters of the length of the block south of Redwood street, reversed his course by making a "U" turn. Bonnin was driving the delivery truck south on India street and when about 16 feet north of the north line of the intersection, in commencing a left turn into Redwood street, crossed the center line of India street, "cut the corner" and proceeded across the northeast quarter of the intersection. Bonnin saw plaintiff approaching the intersection from the south when the motorcycle was about 25 feet south of the intersection. He swerved his truck to his left but the vehicles came together in the northeast quarter of the intersection. Plaintiff did not see the delivery truck until the moment of the impact. Both vehicles were traveling at about 25 miles per hour.

[1, 2] The foregoing statement of facts demonstrates that Bonnin was negligent. The freedom of plaintiff from contributory negligence is not so clear. The trial court found that when Bonnin was 100 feet north of the intersection he could have seen plaintiff had he looked. While there is no specific finding on the question, it would be equally true that, had plaintiff looked, he could have seen the truck for an equal distance. The only evidence in the record indicates that plaintiff traveled not less than 65 feet (probably more) on his course after Bonnin had started his left turn, and that during the time he was traversing this space he could have seen the danger in front of him had he looked. It should be trite to say that the rider of a motorcycle is under the same duty to observe the road

in front of him and look for danger as is the driver of a light delivery truck.

Plaintiff, a member of the United States Marine Corps, suffered serious injuries in the collision. He was taken to the United States Naval Hospital in San Diego where he was attended by Dr. Grindell who was attached to that institution. The bones in one leg and one arm were fractured and he had cuts and bruises around his left eye.

On the day following the accident an insurance adjuster for the company which carried the indemnity insurance on the delivery truck, called on plaintiff at the hospital. He was accompanied by Dr. Francis M. Findley, who, with Dr. Grindell, examined plaintiff's injuries. Plaintiff and the adjuster agreed on a complete settlement for all of plaintiff's damages in the sum of $800. The adjuster prepared and plaintiff signed a complete release of all his claims for damages. The adjuster prepared and delivered to plaintiff a draft for $800, on the face of which appeared: "In full satisfaction, compromise and discharge of all claims against Milton P. Sessione and Edwin Bonnin for damages as result of auto accident at India street and Redwood street, San Diego, San Diego County, California." On the reverse side of the draft was the following: "In full payment and complete satisfaction of all claims against Milton P. Sessions and Edwin Bonnin under policy No. 8130402 for damages as result of accident occurring 4/5/39 at Redwood and India Streets, San Diego County, San Diego, California.

"The endorsements must be in conformity with the name or names as written on the face of the draft.

"In consideration of such payment the said ——— payment Milton P. Sessions & Edwin Bonnin is hereby discharged from all further claim by reason of said settlement leaving ——— dollars, $——— only in force under said policy.

"Joe Wright Backus."

Plaintiff testified that he read the draft and the endorsement before he endorsed and cashed it on April 17, 1939; that he was then in possession of all his faculties; that he understood what he was doing; that he was accepting the $800 in full settlement for all his damages.

[3, 4] The trial court found that at the time the release was signed on April 6, 1939, plaintiff was not in possession of his faculties and was in a semi-conscious condition; that he was wholly without capacity to contract; that he was unaware of the contents of the release and did not know its contents until the time of the trial. There is evidence supporting this finding and we must accept it as final under the familiar rule that conflicts in the evidence are addressed to and settled by the trier of fact.

The trial court also found that at the time plaintiff endorsed and cashed the draft on April 17, 1939, he "was in full possession of his mental faculties and was aware of and intended to release all of his damages then known to him".

There is undisputed evidence in the record that plaintiff suffered a permanent injury to the vision of his left eye as a result of the accident; that the optic nerve has been pinched; that he has only a 20/100 vision in that eye; that there is partial atrophy of the left optic nerve; that there is little chance of his vision improving; that it may become worse.

Defendants argue that the release signed on April 6, 1939, and the draft, were parts of the same transaction; that admitting the incompetency of plaintiff when he signed the release, he was competent when he endorsed and cashed the draft; that the latter act was a ratification of the former. It makes no difference with the results to be reached in this case whether we adopt this ratification theory or regard the endorsement and cashing of the draft as an independent transaction, as the draft released all claims of plaintiff against both defendants. It is a sufficient release in itself and unless plaintiff can avoid its legal effect he must be held bound by it.

To escape the effect of this release plaintiff relies upon section 1542 of the Civil Code which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The theory upon which the judgment is based is fully disclosed by findings 8 and 9, and a conclusion of law which we quote as follows:

"VIII. The following injuries to plaintiff were proximately caused by the negligence of defendant Bonnin; plaintiff suffered severe mental and physical shock;

plaintiff's left ankle was fractured; his left wrist was fractured; his left arm and his back were severely bruised; his left eye was cut and bruised; the fluid of his left eyeball was diminished; the left optic nerve was partially atrophied impairing the vision of his left eye 80% as of the date of the trial, and which will result in blindness in the left eye; plaintiff was hospitalized from April 5th, 1939, to June 25th, 1939; his motorcycle was wrecked and made valueless.

"IX. Plaintiff's damage for injury to the left optic nerve and impairment of vision and future blindness of left eye are Three thousand five hundred Dollars ($3,500.00), and for all other damages are the sum of Eight Hundred Dollars ($800.00)".

The trial court drew the following conclusion of law: "That the draft for $800.00 was a full release and satisfaction of all of plaintiff's damages known at the time it was negotiated by plaintiff, and these include all damages except injury to optic nerve of his left eye and progressive loss of vision thereof."

It is established by uncontradicted evidence that his left eye was injured and its vision affected before he endorsed and cashed the draft on April 17, 1939. On his direct examination he testified:

"Q. Did you have any difficulty with that left eye before this injury? A. No.

"Q. Have you had difficulty with that eye ever since the injury? A. I have."

He also testified that his eye was bandaged for about eight days after the accident; that the bandage was removed every day and his eye treated.

Dr. George L. Kilgore, who examined plaintiff, testified as follows: "The following are the findings in the case of J. W. Backus, examined in my office on January 5th and 6th, 1940. The patient stated that before the accident on April 5, 1939, he had had no difficulty with the eyes whatsoever. There had been no general illness of any type. The vision of each eye was excellent. Following the injury of April 5, 1939, the left side of the face and left eye were covered with a bandage until about April 12th to 15th, 1939. The left side of the face and external adnexia of the eye were swollen and hemorrhagic. Upon removal of the bandage on or about April 12th to 15th, 1939, the vision of the left eye was seen to have an absence of the lower nasal half of the visual field. The vision of this portion of the field seemed to improve for approximately three months to reach the present stationary condition. There was no pain in the eye at any time."

This evidence, and other testimony, fully supports the findings which we have quoted as to the injury to plaintiff's eye. It is clear that plaintiff knew that his eye was injured and his vision affected before April 17, 1939. It is also clear that neither plaintiff nor any one else knew of the injury to his optic nerve and his prospective loss of all or a large part of the vision of his left eye before that date.

[5, 6] The question remains, Was the injury to the optic nerve, as distinguished from other eye injuries, a separate and distinct injury from the others suffered by plaintiff of which he had knowledge, and was it the basis of a claim for damages which he did "not know or suspect to exist" sufficient to bring it within the rule of section 1542 of the Civil Code?

When we return to a consideration of the findings and conclusion which we have quoted, it is evident that the trial judge was of the opinion that on April 17, 1939, when the draft was endorsed and cashed, plaintiff knew of all his injuries "except the injury to the optic nerve of his left eye and progressive loss of vision thereof"; that plaintiff knew then that "his left eye was cut and bruised"; that "the fluid of his left eyeball was diminished". It is also true that plaintiff knew that the vision in that eye was affected to some extent at that time though the injury to the optic nerve and the full extent of his probable loss of vision was not then known.

We believe the case of O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 335, 60 A.L.R. 1381, decisive of this phase of this case. In that case the seven-year-old son of plaintiff was struck and injured on September 14, 1922, by an automobile owned by defendant Haiden and driven by his employee. The child was confined to his bed for two weeks when he returned to school. His attending physician testified that on October 4, 1922, the child seemed to have made a recovery. He was taken sick early in April, 1923, and died on April 13th, "from a complication of the bruised condition of the spleen and the infection of measles". The Supreme Court remarked that on November 1, 1922, when plaintiff signed a general release of damages neither party believed that the child "had sustained any more than superficial wounds or bruises by reason of the accident". It appears from the opinion that when the release was signed there was not even a suspicion that the child had suffered an injury to his spleen.

In this respect the O'Meara case differs from the instant case in that Backus knew that his eye was injured and that its vision was affected to some extent. It is true that he did not know that the optic nerve would atrophy and that he might suffer partial or even total loss of vision of the injured eye.

In the O'Meara case the Supreme Court laid down the following rules for our guidance:

"It is quite evident that the settlement made by the defendant and the delivery and acceptation of the release was simply for the injuries sustained by the boy, and which were then known to the parties, and from which, from the testimony of the doctor, the boy had recovered.

"A further distinction is made in the case of Richardson v. Chicago etc. Ry. Co., supra [157 Minn. 474, 196 N.W. 643], between the injury sustained and the effects or results from such injury. If the injury is known at the time of the settlement, the release is binding upon the parties, even if unknown or unexpected consequences result therefrom; but, if the injury is unknown, and the parties purport to settle for all injuries sustained, then the release will not be held to be binding upon the parties as to the injury which was unknown to the parties at the time of executing the release: 'To avoid such a release, the rule requires clear and convincing proof that a substantial injury, which was not discovered until after the settlement, had in fact been sustained in the accident and existed at the time of the settlement. That unknown and unexpected consequences resulted from known injuries is not sufficient.' Richardson v. Chicago etc. Ry. Co., supra. The testimony of Dr. Nichols is that the boy died from an injury to his spleen received at the time he was run over by the defendant's automobile, and that such injury was not visible to the naked eye. The only conclusion to be drawn from his testimony as recited in this opinion is that he did not know of the injury to the boy's spleen at the time he ceased his visits to the boy on October 4, 1922; that his first knowledge that the boy had sustained any such injury was after the boy had come down with the measles, which was the following April, and which was long after the execution of the release. It is not contended, nor is there any showing, that the plaintiff had any knowledge of this injury except as he was informed thereof by the doctor. It appears, therefore, beyond question, that at the date of the release the injury which was the cause of the boy's death was not known to either party. It was not in the minds of the parties at the time of the settlement which resulted in the execution of this written release. Accordingly, although the release may purport upon its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality it does not do so. Section 1542, Civ. Code."

Since Backus knew his eye was injured and its vision affected before he endorsed and cashed the draft, the conclusion follows that he should have suspected that there might be some future effects from this injury not then evident. The injury to the eye was known at the time of the settlement and his subsequent serious loss of vision was an unknown and unexpected consequence resulting from his known injury. Such facts are not sufficient to avoid the release. O'Meara v. Haiden, supra.

[7-9] It is well established that a release such as we have before us may be invalidated by proof of fraud or mutual mistake of fact. O'Meara v. Haiden, supra; Miller v. Brode, 186 Cal. 409, 199 P. 531. The trial court found that, through the examination made by Dr. Findley, the insurance carrier of Sessions "thereby became acquainted with the fact of plaintiff's permanent and progressive injuries to the optic nerve, and having such knowledge, and concealing the same from plaintiff, who first discovered the fact in June, 1939, left at the hospital on April 6, 1939, a draft for Eight Hundred Dollars ($800.00) for plaintiff, which was in release of all claims for injuries on account of the accident". We presume this was an attempt to find fraud on the part of defendants.

The only real evidence in the record bearing on the question of fraud, or concealment of facts disclosed by the examination of plaintiff by Dr. Findley, is found in the testimony of that physician and of A. B. Severance, the adjuster for the insurance company. This evidence stands uncontradicted. Dr. Grindell, who assisted in the examination, was not called as a witness.

We find the following in the testimony of Severance: "Well, to start in with, I had called the hospital to see if I could see Mr. Backus and they told me that it was possible and I taken Dr. Francis Findley to examine him and the two of us proceeded to the ward in which he was located and the doctor met the attending physician there and asked permission to examine him and the two doctors and myself came into the ward and after the examination of Mr. Backus by Dr. Findley, I walked around to the side of the bed and I said, 'I want to give you my card.' I says, 'I don't suppose you are in any position to talk about a settlement of this case at this time.' I said, 'When you feel better, I will come back to see you,' and he indicated that he was willing to talk about the case at that time. * * * I said, 'There is no use of our arguing about the case. If you can tell me what you think you ought to have, I will try and get it for you.' Well, he said he thought he ought to have a new motorcycle and a thousand dollars for his injury. So I told him I didn't think I could get that much for him but I would call Los Angeles and see if the company wanted to pay that much money, so I went out to the telephone and called Los Angeles and got an authorization up to five hundred dollars for his injuries and for his new motorcycle, making a total of eight hundred dollars, * * * I told him that I was sorry that I could not get him a thousand dollars for his injury but I could get him five hundred dollars for his injuries and a new motorcycle. So he said, well, that if he was sure that his eye was not serious, he would take it, but he wasn't sure. Well, the doctor that was in the ward there was not an eye specialist nor was Dr. Findley whom I had brought to examine him. Well, he said he would like to talk to the attending physician again, so the attending physician in the ward there came in and there was some conversation about whether his eye injury was serious and permanent or whether it was minor, and the attending doctor stated that he was not an eye specialist and could not go on record one way or the other. So after some hesitation, Mr. Backus said he would make the settlement. I wrote up the papers and signed the draft and gave it to him and he sat up in bed. He says, 'Do you know that is more money than I ever had in my life?' and I said I hoped he would get along with his injuries and hoped he would recover all right, and left after getting witnesses to the release. * * *

"Q. How did it happen that you discussed his eye? A. I did not discuss it—he is the one that discussed it with me.

"Q. And he told you if he was sure about his eye, that he might be willing to settle? A. Yes, sir.

"Q. But he was not sure about it? A. No. * * *

"Q. Mr. Severance, at the time of making the settlement, I will ask you to state what was done with reference to the preparation and signing of the release? A. Well, I first made out the release, filling in the blank spaces while this service man was talking to Mr. Backus, asking him questions, and then after he got through talking to him, I showed him the release and started writing out the draft. He said, 'Well, if I knew my eye injury was, whether it would be permanent or temporary, I would settle the case but,' he said, 'I don't know.' 'Well,' I said, 'that is a gamble you have got to take.'"

Dr. Findley testified as follows: "He (Backus) states that he is unable to see clearly with his left eye. * * * The patient's head was bandaged. These bandages were removed by the attending Naval Surgeon, that is, this Dr. Grindell, I believe his name is that went with us—which shows considerable swelling around the left side of the forehead the left temple and the left eye. Apparently he had gotten—the force of this blow had come more on the left side of the face than the right. There were three superficial lacerations or cuts, involving the left temple, the left side of the forehead and the left eyebrow, each about one inch long. These had been sutured and should heal with very little deformity. Then there was a superficial abrasion of his left temple, half an inch in diameter, and he was quite tender over his left cheek bone and my notes state that there is probably—that this is probably due to soft tissue swelling and not to a definite fracture. There is a marked discoloration of the left eyeball from recent hematoma or in plain English, a blood clot; in other words, he had a black eye. There were no other disfiguring marks noted about the head, neck or face * * * and then as to his eyes, both pupils react to light. That is one of the tests we do to see whether it contracts to light and it did it perfectly normal, but there is a very definite impairment of vision in the left eye. The patient is unable to see a light or count fingers unless the hand and light are held above the forehead, that is, if I may explain that, he was lying sort of propped up in bed and when you took your light and held it down here below his eye saw the fingers, he didn't seem to see it but as you got up here (indicating) he could see it perfectly distinctly and my notes say there is apparently some loss of vision in the lower half of the left eye whereas vision in the upper half of the eye is normal and vision in the right eye apparently is normal to rough tests, that is, such as you do with your finger or your light. * * * The patient suffered the following injuries: Lacerations and abrasions of the face; some impairment of vision of the left eye; * * * He may have some permanent disturbance of his vision. More accurate prognosis could be given at a later date. * * * After I had finished my examination, my questioning and my examination which took approximately fifteen minutes, I remember very distinctly Mr. Severance going over to Mr. Backus, to the side of the bed and taking out one of his cards and saying, 'Well, now when you get to feeling all right and want to talk settlement, why, let me know and I will come and see you,' and Mr. Backus said, 'I am ready to talk settlement now,' and Mr. Severance said, 'Well, do you know what you want?' and he said, 'Yes, I want a thousand dollars for my injuries and a new motorcycle,' and about that time Dr. Grindell, the Naval Doctor, and I went out into the ward. We had finished—I had finished my work and went out."

To support a finding of fraud, evidence of fraud must be clear and convincing. The quoted evidence is not sufficient to support a finding of fraud or concealment on the part of defendants' representatives in concealing knowledge of injury to the optic nerve. The optic nerve is not mentioned in the evidence. There is nothing in the evidence to support the finding that the examination disclosed to Dr. Findley that plaintiff had suffered "permanent and progressive injuries to the optic nerve" and that this information had been concealed from plaintiff as it is not established that Dr. Findley knew of any injury to the optic nerve. The finding on fraud and concealment is unsupported by the evidence. Dr. Grindell, the only person present at the examination who could have contradicted the quoted evidence of Dr. Findley and Mr. Severance on this question, did not testify.

As the case should be tried again we should briefly consider the sufficiency of the findings on the question of contributory negligence which was interposed as a defense.

[10] The trial court found the intersection was an obstructed one as defined in subsection (4) of subdivision (a) of section 511 of the Vehicle Code, St.1935, p. 177. It found that plaintiff entered the intersection at a speed of 25 miles an hour. It then found that "Plaintiff's negligence was not a proximate cause of the collision and was remote." This is neither a complete nor a satisfactory finding on the question of contributory negligence.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN. J.

16 Cal.2d 57

PETERSEN v. STATE BAR OF CALIFORNIA.

S. F. 16360.

Supreme Court of California.

Aug. 14, 1940.

1. Attorney and client ⚷58

In fixing the degree of discipline of an attorney, his past record in similar proceedings may be considered.

2. Attorney and client ⚷46, 58

Where monthly installments of support money paid attorney for client for whom he had procured a divorce were not paid over promptly by him, but were either wholly or partially withheld for considerable periods of time, and where attorney had previously been suspended for one year, attorney would again be suspended for one year, notwithstanding explanation that his conduct was due to troubled mental condition brought on by marital difficulties, that several installment payments had been temporarily lost, and that some payments had allegedly been made directly by husband to client.

3. Attorney and client ⚷48

Where attorney had already been granted two continuances which allowed him approximately three months within which to obtain counsel and prepare for hearing before Board of Governors, refusal of further continuance was not improper.

◆

In Bank.

Proceeding by Cedric W. Petersen against the State Bar of California to review a recommendation of the Board of Governors that petitioner be suspended from the practice of law for a period of one year.

Petitioner suspended from practice of law in the state for a period of one year.

Cedric W. Petersen, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

The Board of Governors of the State Bar has recommended to this court that petitioner be suspended from the practice of the law for a period of one year. This recommendation is based on the adopted findings and conclusion of the local committee that conducted the hearings and, in part, upon the fact that petitioner in 1929 had suffered a prior one-year suspension. In re Petersen, 208 Cal. 42, 280 P. 124.

[1] It is settled that in fixing the degree of discipline of an attorney his past record in similar proceedings may be considered. Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920. We are of the opinion that the record in this proceeding, particularly when considered in the light of petitioner's prior discipline, warrants a present suspension of one year.

[2] No useful purpose would be served by a detailed narrative of the facts giving rise to this disciplinary proceeding. There is abundant evidence disclosing that monthly instalments of support money paid to petitioner for and on behalf of a client for whom he had procured a divorce were not paid over promptly by him but, on the contrary, were either wholly or partially withheld by him for considerable periods of time. Despite petitioner's prior denials of the receipt thereof some of such instalments were immediately paid over by him when his client threatened to cite her estranged husband to appear before the district attorney because of his assumed delinquency. Such action was prevented by the petitioner paying over certain of the instalments theretofore received with the explanation that the money had just come to hand. On other occasions, and in an effort to quiet his client's demands for action to recover what she assumed to be delinquent payments, petitioner went through the form of preparing affidavits, which he had his client sign, for an order to show cause why her husband should not be adjudged in contempt for failure to make support payments which actually were not in default, petitioner theretofore having received them. While these papers were prepared and signed they were never filed, petitioner ultimately making the procedure unnecessary by paying over certain of the money theretofore received by him. At the committee hearings the petitioner attempted to explain or justify his conduct by narrating a troubled mental condition brought on by personal marital difficulties and by telling of the temporary loss in his crowded office safe of several of the instalment payments received by him. He also attempted to establish that some confusion arose as to the exact status of the account by reason of a few payments having been made directly to his client by

her estranged husband. Petitioner's defense of his conduct is neither convincing nor satisfactory. Without more, we are satisfied that the record discloses adequate violation of the rules of professional conduct and of his oath and duties as an attorney to warrant the recommended suspension.

[3] Petitioner had ample notice of and opportunity to obtain counsel for the hearing before the Board of Governors. No error appears in the action of the board in refusing a continuance beyond October 27, 1939. Petitioner already had been granted two continuances and had approximately three months within which to obtain counsel and to prepare for the hearing before the board.

It is therefore ordered that petitioner Cedric W. Petersen be suspended from the practice of the law in all the courts of this state for a period of one year, commencing thirty days after the filing of this opinion.

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15 Cal.2d 692

LEVY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 17421.

Supreme Court of California.

July 23, 1940.

1. Arbitration and award 🔑3

The courts are not justified in defining the term "labor" within statute providing that statutes with reference to arbitration shall not apply to contracts pertaining to labor in its broadest sense when obviously to do so would not be within legislative intent. Code Civ.Proc. § 1280.

See Words and Phrases, Permanent Edition, for all other definitions of "Labor".

2. Arbitration and award 🔑3

Under statute providing that statutes with reference to arbitration shall not apply to "contracts pertaining to labor", legislature had in mind contracts pertaining to actual hiring of labor between employer and laborer, "contract pertaining to labor" meaning a promise to perform labor and a promise to pay therefor a stipulated price. Code Civ.Proc. § 1280; St.1937, p. 197, § 200(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Contracts Pertaining to Labor".

3. Master and servant 🔑16

A "collective bargaining agreement" whose function is to lay down relative duties or obligations to be observed between employer and union and which contemplates that contract of hiring shall be a distinct and separate transaction is not a "contract pertaining to labor" within statute providing that statutes with reference to arbitration shall not apply to contracts pertaining to labor, and hence arbitration award made pursuant to collective bargaining agreement was enforceable. Code Civ.Proc. § 1280.

See Words and Phrases, Permanent Edition, for all other definitions of "Collective Bargaining Agreement".

4. Specific performance 🔑80

Generally, specific performance of arbitration award will be enforced only when the thing ordered by award to be done is such as a court of equity would specifically enforce if it had been agreed upon by parties themselves.

5. Master and servant 🔑16

The statutory declaration that negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees evidences existence of a policy to uphold freedom of employees to organize and to enter into collective bargaining contracts for their own protection. St.1937, p. 208, § 923.

6. Master and servant 🔑16

A collective bargaining agreement was not a "contract pertaining to labor" within statute providing that statutes with reference to arbitration shall not apply to contracts pertaining to labor, because the agreement and arbitration award based thereon provided that employer should re-employ certain specified union members, where agreement and award contemplated that wage to be paid was a matter for adjustment between employee and employer subject to certain standards and that there should be no compulsion in so far as either was concerned, and hence designation of employees by name was immaterial. Code Civ.Proc. § 1280.

In Bank.

Mandamus proceeding by Louis Levy, as Vice-President of the International Ladies' Garment Workers' Union, an unincorporated and voluntary labor association, against the Superior Court of the State of California in and for the County of Los Angeles, the Honorable Thomas C. Gould, Presiding Judge thereof, and the Honorable Lewis Howell Smith, Judge thereof and Judge presiding in Department 27 thereof, to require the respondents to entertain jurisdiction of a petition to confirm an arbitration award and of a motion to vacate the award, wherein respondents filed a demurrer.

Peremptory writ issued.

Charles J. Katz, Alfred Gitelson, and Samuel W. Blum, all of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel, Douglas De Coster, Deputy County Counsel, and Horowitz & McCloskey, all of Los Angeles, for respondents.

SHENK, Justice.

This proceeding in mandamus presents the question whether the provisions of title X of part 3, section 1280 et seq., of the Code of Civil Procedure apply to an arbitration award made pursuant to a collective bargaining agreement.

On November 3, 1939, a collective bargaining agreement was entered into between David Shann Corporation, women's garment manufacturer, as the employer, called the firm, and International Ladies' Garment Workers' Union, called the union, acting on behalf of all its members. Prior to that date and in August, 1939, a labor dispute arose between the union and the firm with reference to working conditions. A strike ensued, which was called by the union. A settlement of that dispute and strike resulted in the agreement of November 3d, which named the International Ladies' Garment Workers' Union as the sole collective bargaining agent for all production employees. The union agreed to terminate the strike called on August 22, 1939, and to cease all activities in connection with a secondary boycott. The firm agreed to rehire all former union employees who were out on strike. The agreement permitted retention by the firm of certain nonunion workers, and provided that all workers then members of the union and all thereafter to be employed must be and remain members of the union. The firm agreed to call upon the union for and the union agreed to supply all future workers required. The agreement contained provisions for maintaining hour, day, wage, piece work and garment price schedules, and divisions of labor between union and nonunion workers. The contract was to be in force until June 30, 1941, the parties agreeing that in the meantime there would be no strike, lockout, walkout, shop strike, or shop stoppage for any reason or cause whatsoever, and the union agreed to refrain from printing or distributing any matter which might cause damage to the firm. Both parties named Anthony G. O'Rourke as impartial chairman and final arbitrator to whom all complaints, controversies, questions of interpretation of the agreement, and all other differences of the parties should be heard and determined if the parties could not in the first instance dispose of the matter. It was provided that the decision of the arbitrator should be final and binding upon the parties to the agreement, and that the expenses and fees of arbitration should be shared equally by the parties. Special provisions called for the return to work of certain named persons who were members of the union, the retention as employees of certain named workers who were not members of the union, the number of each group being about equal, and for the equal division of work among employees union and nonunion. A general provision of the agreement, designated as number 10, reads: "During such times as the firm is unable to provide full time work for the workers of the shop, the work shall be equally divided, without favoritism, and as nearly uniform as is possible."

During the strike the firm was employing approximately thirty nonunion workers. When the striking union workers reported back to work following the execution of the agreement the firm insisted on retaining 12 nonunion workers and reemploying only 3 union workers. A dispute immediately arose, which was heard by the arbitrator, who rendered his decision that pursuant to paragraph 10 of the agreement above quoted the firm should divide the available work by employing one union worker for each nonunion worker, and continue so to divide the work without favoritism during slack times.

On November 14, 1939, further charges of favoritism to nonunion workers and discrimination against union members were made and a hearing thereon was had before the arbitrator on the day following. On November 22, 1939, he made his findings and his decision to the effect that the firm should reemploy, on an equal basis with other workers, nine union members who were some of those specifically named in the agreement as workers whom the firm would so reemploy. The arbitrator also found the firm guilty of discrimination against union workers and of favoritism toward nonunion workers in the enforcement of regulations relating to working conditions. He made his award directing correction of the conditions without favoritism and stating that, if the firm failed to report within a specified time that such conditions had been corrected, it would "be his unpleasant duty to declare the firm in breach of its contract."

The award of the arbitrator dated November 22, 1939, incorporating the prior award, was duly acknowledged and filed on November 30, 1939, in the Superior Court in Los Angeles County, in proceeding numbered 447044, together with the petition of the union for an order confirming the award of the arbitrator pursuant to section 1287 of the Code of Civil Procedure. Notice in writing was duly served on David Shann Corporation, the defendant in said proceeding. The defendant filed a demurrer upon the principal ground that the superior court was without jurisdiction because the award was made under a contract "pertaining to labor", which by the proviso of section 1280 of the Code of Civil Procedure was excepted from the operation of the arbitration statute consisting of sections 1280 et seq. of that Code. The superior court sustained the demurrer solely on the ground that the collective bargaining agreement involved was a contract "pertaining to labor", and as such was not a contract of arbitration which could be enforced pursuant to the provisions of the Code of Civil Procedure. This proceeding in mandamus followed, wherein the union seeks to have the respondent court directed to entertain jurisdiction of the petition to confirm the award, and of the motion to vacate the award made on other grounds by the corporation.

The alternative writ issued. The matter is submitted on the petition and the demurrer and answer filed by the respondents. The petitioner is aided by briefs amici curiae representing the California State Federation of Labor (A. F. of L.) and by the Los Angles Industrial Union Council (C. I. O.). By the answer it appears that prior to the filing of the petition in said proceeding numbered 447044, the David Shann Corporation filed an action, numbered 446961, in the superior court in Los Angeles County, against the International Ladies' Garment Workers' Union and others for rescission and cancellation of the collective bargaining agreement and for damages. However, none of the questions involved in said action or in the motion to vacate the award filed by the corporation in proceeding numbered 447044 is before this court for consideration at this time. The sole question now to be determined is whether the respondent superior court has jurisdiction to entertain the petition to confirm the award of the arbitrator. This is a question of first impression in this state. It is assumed, for the purposes of considering the question, that the collective bargaining agreement was entered into voluntarily by both parties and that no causes exist which would be grounds for the interposition of a court of equity in an independent proceeding or for the exercise of the powers vested in the court by the statute here considered, under the motion now before it or otherwise.

Part 3, title X of the Code of Civil Procedure, as added to and amended by Statutes of 1927, page 404, and subsequent amendments, deals with the validity and enforcement of arbitration agreements and of awards pursuant thereto. Section 1280 provides that a provision in a written contract to settle by arbitration a dispute which may thereafter arise out of the contract, or to submit to arbitration an existing controversy, is valid, enforceable and irrevocable except on grounds existing at law or in equity for the revocation of contracts, with the proviso that "the provisions of this title shall not apply to contracts pertaining to labor". Other provisions of the title are that within three months after an award is duly made by an arbitrator under a valid agreement to submit a dispute to arbitration, any party to the arbitration may apply to the superior court for an order confirming the award and such court is directed to grant the order of confirmation (sec. 1287), unless it is vacated, modified, or corrected as prescribed by sections 1288 or 1289. By section 1291 judgment may be entered upon the confirmation of the original award, or as modified or corrected. The judgment so entered has the same force and effect as a judgment rendered in an action and it may be enforced as if it had been rendered in an action in the court in which it was entered (sec. 1292), and an appeal may be taken therefrom (sec. 1293).

The petitioning union contends that a collective bargaining agreement is not a contract pertaining to labor within the proviso of section 1280 of the Code of Civil Procedure; that a contract pertaining to labor within the meaning of that section is one for the performance of manual labor and payment therefor, made between the worker and his employer; that the collective bargaining agreement is not such a contract, but is one entered into on the one hand by the bargaining agent or trade union and, on the other, by the employer, not for performance of labor and payment therefor, but to settle the working conditions of union members who may be hired by the employer, the character of the shop, whether "closed" or otherwise, and to establish wage and hour standards. Such a contract usually provides against lockouts, strikes called by the union against the employer during the period of the contract, and secondary boycott activities. The contract also customarily contains provisions to submit any dispute arising out of the contract to a named arbitrator and for the finality and binding effect of the settlement by the arbitrator of any dispute submitted to him.

The respondents' view is that the word "labor" in connection with the applicability of the arbitration statute should be interpreted in its broadest sense; that is, if in any aspect the contract pertains to "labor" the court should consider that it is excluded by the proviso in said section 1280; that the present case involves such a contract; and that the legislature intended by the proviso to restrict the statute to arbitration of commercial disputes, as distinguished from industrial disputes.

[1] This court has heretofore had occasion to consider the meaning and effect of said proviso. In Kerr v. Nelson, 7 Cal.2d 85, 59 P.2d 821, a complaint was filed to confirm an arbitration award under a contract employing the services of the plaintiff as a sales or general manager of a corporation. It may not be doubted that an actor, or an artist, a clergyman, a general manager, sales manager or other executive, secretary, attorney, or judge, labors; but this court, following what was said in Universal Pictures Corporation v. Superior Court, 9 Cal.App.2d 490, 50 P.2d 500, 501, determined that it was the obvious intention of the legislature that contracts involving individuals whose principal efforts were directed to the accomplishment of some mental task were not to be classified as contracts "pertaining to labor"; that the word "labor" as used in the section meant "that kind of human energy wherein physical force, or brawn and muscle, however skillfully employed, constitute the principal effort to produce a given result, rather than where the result to be accomplished depends primarily upon the exercise of the mental faculties". The court concluded that the contract was not one pertaining to labor, as contemplated by the proviso of section 1280 of the Code of Civil Procedure. The courts are not justified in defining the term in its broadest sense when obviously to do so would not be within the legislative intent. This has long been a settled rule of statutory construction. In re Mitchell, 120 Cal. 384, 386, 52 P. 799; People v. Merrill, 24 Cal.App. 206, 210, 140 P. 1075, quoting from 2 Sutherland on Statutory Construction (2d Ed.) sec. 363; 23 Cal.Jur., p. 766. The case of Rector, etc., Church of the Holy Trinity v. United States, 143 U.S. 457, 12 S.Ct. 511, 512, 36 L.Ed. 226, involved the interpretation of the act of February 26, 1885, 23 Stats. 332, prohibiting the importation of aliens under contract to perform "labor or service of any kind", as applied to an alien minister residing in England who had contracted to remove to New York and become the pastor of the church. In reversing a judgment based on a broad definition of the terms of the statute the court said: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application."

[2, 3] The considerations bearing upon the question of the intent of the legislature in excluding contracts "pertaining to labor" from the arbitration agreement enforcement statutes lead to the conclusion that the legislature had in mind contracts pertaining to the actual hiring of labor between employer and laborer. The legislature did not itself define what is a contract pertaining to labor. It was left for

interpretation by the courts. But the legislature has since defined labor (sec. 200(b), Labor Code, St.1937, p. 197) as including "labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment". That definition plainly indicates that a contract pertaining to labor means a promise to perform labor and a promise to pay therefor a stipulated price. The elements involved in that definition are absent from a collective bargaining agreement, which is distinct and separable from a contract of hiring. The function of the collective bargaining agreement is to lay down the relative duties or obligations to be observed between the employer and the union, and itself contemplates that the contract of hiring shall be a distinct and separate transaction.

Prior to 1927 the provisions of the Code of Civil Procedure permitted parties to submit to arbitration only existing controversies (except specified questions relating to real property) which might be the subject of a civil action between them; and while the submission to arbitration remained executory and there was no stipulation that it be entered as an order of court, it was revocable by either party. See California Annual Conference v. Seitz, 74 Cal. 287, 291, 15 P. 839; Sidlinger v. Kerkow, 82 Cal. 42, 46, 22 P. 932. The former provisions were based upon a public policy then existing which was averse to permitting parties to deprive themselves of their right of resort to the courts.

[4] In 1927 (Stats.1927, p. 404), the legislature added sections 1280 and 1291–1293 to the Code of Civil Procedure, and enlarged the provisions of the remaining sections of title X, part 3, to encompass a procedure for enforcement of awards under voluntary arbitration agreements. The statute has been held to be constitutional (Pacific Ind. Co. v. Ins. Co. of North America, 9 Cir., 25 F.2d 930) and no question of its constitutionality is here involved. There was undoubtedly a basic reason for excluding labor agreements. A contract to perform labor is not specifically enforceable, with certain exceptions not pertinent here. Sec. 526(5), Code of Civil Procedure; secs. 3390, 3423(5), Civil Code. The same considerations pertaining to the personal relations between employer and employee would indicate that contracts between them should not be subject to the provisions of the arbitration title in the Code of Civil Procedure. But the considerations which would except contracts to perform labor from such proceedings do not exclude collective bargaining agreements. The general rule stated in connection with the specific enforcement of arbitration awards is found in 5 Cor.Jur., page 228, where it is stated: "An award being looked upon as a contract of the parties, so far as relates to specific enforcement, reference should be had to the general treatment of that subject in determining the right to specific performance. It has been said that many, if not all, the principles applicable to ordinary suits for the specific performance of agreements apply to suits for the specific performance of awards. Broadly speaking, specific performance will be enforced only when the thing ordered by the award to be done is such as a court of equity would specifically enforce if it had been agreed upon by the parties themselves." Voluntary collective bargaining agreements, including awards made under arbitration provisions therein, have been held to be specifically enforceable. Harper v. Local Union No. 520, Tex.Civ.App., 1932, 48 S.W.2d 1033; Kaplan v. Bagrier, 12 Pa.Dist. & Co. R. 693, 697; Grassi Contracting Co. v. Bennett, 174 App.Div. 244, 160 N.Y.S. 279, and cases cited; Schlesinger v. Quinto, 201 App.Div. 487, 194 N.Y.S. 401; Goldman v. Cohen, 222 App.Div. 631, 227 N.Y.S. 311; Ribner v. Racso Butter & Egg Co., Inc., 135 Misc. 616, 238 N.Y.S. 132; Farulla v. Ralph A. Freundlich, Inc., 152 Misc. 761, 274 N.Y.S. 70.

It has also been held that a statute providing for enforcement of arbitration awards which excludes contracts pertaining to "personal services" does not have reference to collective bargaining agreements. The case of Kaplan v. Bagrier, supra, involved an action to confirm an arbitrator's award under a collective bargaining agreement between a bakers' association and a union of employees. The court said: "It is to be presumed that the descriptive term 'personal service' was used in section 1 of the Arbitration Act in its ordinary and commonly accepted meaning as applicable to a situation where one performs personal services; that is to say, having reference to a servant or employee who voluntarily agrees to subject himself at all times during the period of service to the control, orders and directions of another, his employer, with reference to certain services to be performed. There is no personal service element in the contract of May 1, 1928, in so far as the rights and obligations of two groups, the Union and the Association, are concerned. The contract is not confined to the usual relationships between master and servant, but has a much wider and broader scope, being a collective bargaining agreement intended to fix certain rights and obligations between the two groups mentioned, one the group of employers and the other the group of employees, for their mutual interests. It is not a direct personal service contract within the contemplation of the exception in the act." The respondents here assert that that case does not represent the rule of decision in the state of Pennsylvania. It may be that the result would be deemed to have been modified by the decision of the Supreme Court of that state in Goldstein v. International Ladies' Garment Workers' Union, 328 Pa. 385, 196 A. 43, wherein the court pointed out that the arbitration statute was so worded as to be restricted to cases wherein a judgment at law could be entered and enforced as such. It said that many states had adopted arbitration statutes but that only in Pennsylvania and Rhode Island was the statute so worded. In that case the labor union proceeded under the arbitration statute to seek confirmation of an arbitration award under a collective bargaining agreement. The award involved equitable relief against removal of the employer's factory contrary to express agreement. The court said that the union could have proceeded on the basis of common law arbitration, but because of the limitation in the arbitration statute confirmation of an award which included equitable relief could not be procured by the statutory procedure. The reasoning of the opinion in the case of Kaplan v. Bagrier, supra, however, is worthy of note where the statutory procedure, such as in this state, is not limited to legal as distinguished from equitable remedies.

In Harper v. Local Union No. 520, supra, the court held that mutuality of remedy for equitable relief by injunction existed under a collective bargaining agreement because the agreement in its collective aspect is not one for personal service.

In Schlesinger v. Quinto, supra (decided in 1922) the court observed [201 App.Div. 487, 194 N.Y.S. 409]: "The cases thus far decided have been at the suit of the employer against combinations of labor, for the simple reason that this is the first time that labor has appealed to the courts. * * * The remedies are mutual; the law does not have one rule for the employer and another for the employee."

In Goldman v. Cohen, supra, decided in 1928, the court said [222 App.Div. 631, 227 N.Y.S. 313]: "Usually in the past it has been the employer who has sought the help of the courts for the protection of his rights, but obviously the same principles of law apply equally to both employer and labor union. Where a strike is threatened by a labor union in violation of its contract with an employer, the right of a court of equity to issue an injunction to prevent such contractual violation is well settled. * * * Likewise, where an employer is threatening to order a lockout of his employees in violation of his contract with the labor union in behalf of the employees, the right of a court of equity to prevent such contractual violation is necessarily measured by the same principle. * * * If the union has not the right to invoke the aid of a court of equity to prevent the unlawful violation of a contract such as exists in the case at bar, then such a contract loses most of its force, and the rights of collective bargaining are narrowed, and the economic benefits to the community from collective bargaining to a great extent lost."

In the same vein, in the case of Ribner v. Racso Butter & Egg Co., supra, the court said [135 Misc. 616, 238 N.Y.S. 136]: "* * * the right of a labor union to enforce the terms of a lawful contract such as exists between the parties in the instant case should not be determined by the character of the services to be performed by the members of the union, but should rest upon the mutual rights and obligations of the parties under their contract. It is well settled that an employer may avail himself of the relief afforded by a court of equity to enforce his rights under such a contract with a labor union. Conversely, the union should be afforded reciprocal relief to enforce its rights under the contract with the employer. * * * To deny to the plaintiff union the right to invoke the aid of a court of equity to prevent an unlawful violation of its contract, it must necessarily follow that the right of collective bargaining will be seriously impaired, leaving the labor union to resort solely to strikes and picketing, which would entail, not only serious financial loss, but also protracted and needless friction and possible breaches of the public peace and security. It is fitting that industrial struggles be settled by modern methods of procedure as now laid down by the courts. * * * Legislatures and courts recognize the right of labor unions to enter into lawful contracts on behalf of their members with the employer for the purpose of promoting the welfare of their members, and in furtherance thereof such agreements should be clothed with legal sanction and afforded the mutual protection of the law. It is in the interest of good government that labor unions * * * should be afforded this reciprocal protection in their lawful contractual undertakings. It is proper and praiseworthy that a union, as in the instant case, having entered into a contract with the employer and feeling aggrieved because of an alleged breach thereof by the employer, should come into a court of equity and there seek the protection of its rights rather than to resort to picketing and strikes to redress its wrongs, with the resultant effect upon the orderly conduct of business and inconvenience to the public. Under the terms of the contract here presented there is mutuality of obligation. There should be mutuality of remedy. The contract is valid. The power of a court of equity to issue an injunction to prevent such alleged violation is well established. Plaintiff's prayer for an injunction during the pendency of the action restraining the defendant from hiring none but members of the union in its establishment is granted."

[5] Our conclusion that the arbitrator's award pursuant to the terms of a voluntary collective bargaining agreement is enforceable and that it was not the legislative intent to exclude such contracts from the provisions of sections 1280 of the Code of Civil Procedure, is in harmony with legislative declarations. In the Labor Code adopted in 1937, by section 923 thereof, St. 1937, p. 208, the legislature declared the public policy of the state with reference to labor organizations as follows: "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This declaration evidences the existence of a policy to uphold the freedom of employees to organize and to enter into collective bargaining contracts for their own protection. This policy had previously been declared in 1933 (Stats.1933, p. 1478). Again, in 1939 (Stats.1939, ch. 810, p. 2368), the legislature added section 65 to the Labor Code, which vested in the department of industrial relations power to investigate labor disputes and mediate, arbitrate, or arrange for the selection of boards of arbitration, providing all bona fide parties to such disputes join in a request for intervention by the department. It would be difficult to uphold such a policy without recognizing the right of enforcement of collective bargaining contracts when voluntarily entered into by the unions.

It is further brought to our attention that arbitration under collective bargaining agreements has been one of the most potent factors in establishing and maintaining peace and protection in industry (see National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 57 S.Ct. 645, 630, 81 L.Ed. 921, 108 A.L.R. 1352, 17 Ore.Law Rev., pp. 263–288); and that organized labor is more and more resorting to the courts for recognition of the lawfulness and enforceability of collective bargaining agreements, rather than electing to settle its disputes by other methods. See 44 Har. Law Rev., pp. 601–608; 51 Har.Law Rev., pp. 520–533; see, also, reports of Standing Committee on Commerce, Trade and Commercial Law, vol. 51, Reports of Am. Bar Assn., 394 et seq.; and vol. 53, Rep. of Am. Bar Assn., pp. 351–372.

The respondents present no legislative history which indicates that the proviso was inserted in section 1280 for the purpose of excluding collective bargaining contracts. The bill introducing the measure without the proviso was before the Assembly in January, 1927, designated as Assembly Bill No. 460. The proviso was inserted by amendment in the committee on March 1, 1927. It is asserted that in the movement for uniform state legislation on arbitration, both commercial and industrial, a form of State Arbitration Act contained the proviso that "the provisions of this Act shall not apply to collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment", and that such a draft was tendered to the California Legislature in 1927. It is stated that such a provision has been included in the statutes of Arizona, New Hampshire, Rhode Island and Oregon. The respondents argue that by the omission of such specific provision from the California statute and the use of the proviso excluding contracts "pertaining to labor", the legislature intended also to exclude collective bargaining contracts. But it would seem more reasonable to expect a specific provision to that effect if the legislature intended to exclude collective bargaining contracts from the operation of the statute.

[6] Lastly, the respondents point out that the contract and the award here involved provide that the corporation should reemploy certain specified union members who had been regular employees of the corporation prior to the inception of the dispute. They contend that because of those provisions the considerations are present which exclude from specific enforcement contracts to perform labor or personal services, and which therefore designate this collective bargaining agreement as a contract pertaining to labor.

We do not agree that the possible effect of any confirmation which the court may grant will be to enforce specifically a contract or award for the performance of labor. Courts have enjoined the discharge of union workers, where there was no dispute as to their competency, and the employment of nonunion workers in their stead, in violation of collective bargaining agreements. Note, 51 Har.Law Rev., p. 526, citing Harper v. Local Union No. 520, supra; Ribner v. Racso Butter & Egg Co., supra, and other cases. See, also, Comment in 19 Cal.Law Rev. at p. 192. The present collective bargaining agreement and the award contemplate that the wage to be paid the worker is a matter for adjustment between him and the employer, subject to certain standards; that there shall be no compulsion in so far as either is concerned—the worker may quit his job, and the employer may discharge him for cause. If the employer, therefore, under his contract with the union may be compelled to employ an ascertainable number of union members so long as the agreement subsists and he remains in business—and the decisions herein cited so indicate—then there can be no objection to the contract or the award merely because such workers are designated by name. No distinction can be accorded such a contract or award because it happens to name the particular workers when, if unnamed, the employer would be compelled to accept the same workers. Any showing which may be made that they are unacceptable because incompetent is not a question going to the jurisdiction of the court.

It follows from what we have said that the respondent superior court has jurisdiction to entertain the proceeding before it and that the alternative writ of mandate heretofore issued herein should be made peremptory.

It is ordered that the peremptory writ issue accordingly.

We concur: GIBSON, C. J.; CURTIS, J.; EDMONDS, J.; CARTER, J.

15 Cal.2d 678

PEOPLE v. NEWLAND.

Cr. 4292.

Supreme Court of California.
July 22, 1940.

1. Criminal law ⚷1159(2)

The appellate court will not attempt to determine weight of evidence, but will decide only whether on face of evidence sufficient facts could not have been found by jury to warrant inference of guilt.

2. Criminal law ⚷741(1), 1160

It is function of jury in first instance and of trial court after verdict to determine what facts are established by evidence, and before verdict of jury which has been approved by trial court can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

3. Criminal law ⚷562

The determination of charge in criminal case requires proof that offense charged was committed and that offense was perpetrated by person or persons accused thereof.

4. Criminal law ⚷1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

5. Criminal law ⚷1159(2)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of jury.

6. Gaming ⚷98(5)

Evidence warranted conviction for keeping a room with books for registering of wagers on horse races. Pen.Code, § 337a, subd. 2.

* * *

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

John Newland was convicted for keeping for gain or reward a room with books for the registering of wagers on horse races, and he appeals.

Affirmed.

Prior opinion, 97 P.2d 972.

Martin S. Ryan, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHENK, Justice.

The defendant was tried by the court without a jury and found guilty on a charge of keeping for gain or reward a room with books for the registering of wagers on horse races. (Sec. 337a subd. 2, Pen.Code.) He applied for probation, which was granted. Judgment of conviction was entered on September 13, 1939, but sentence of six months in the county jail was suspended for a period of two years on condition that he serve the first thirty days in the county jail, that he have nothing to do with bookmaking or gambling activities of any kind, and that he make the usual reports.

The case was submitted to the trial court on the transcript of testimony taken at the preliminary examination. On this appeal from the judgment the defendant contends that the evidence was insufficient to support his conviction.

The arrest of the defendant was made at 3167 Cahuenga boulevard in the city of Los Angeles. Two officers entered the premises about 3:30 o'clock on the afternoon of June 15, 1939. The place was a U-shaped court on the street side of which were stores and over which was a lodging house containing a living room, kitchen, several bedrooms, and what is designated as lavatory and bath. The defendant and one Miller were coming out of the lavatory when the officers entered. The officers ordered them to go back where they had been. The defendant led the way back but, instead of obeying the command, he continued down a dark hallway and escaped into the street. The officers found a home-made ladder behind the lavatory leading through a false door to a room over the lavatory. In that room, reached only by the ladder, were five telephones and a tele-flash, counter, chairs, some A B C betting markers, and "rundown sheets" commonly used in recording bets accepted on scheduled horse races. A check of numbers found on the sheet tallied with the names of horses scheduled to run that day. Also found on the sheet were amounts wagered, the bets made, and the results of the races. The telephone receivers were off the hooks. When they were replaced by the officers the telephones started ringing, and the teleflash started working.

The defendant Newland returned to the premises about 6:45 o'clock that evening. The officers watched him enter the house and go through the living room to the lavatory. He was coming from the vicinity of the lavatory when he was arrested. At the time of his return several men in an intoxicated condition were occupying the living room and the bedrooms. One of the officers testified: "I first asked him why he had escaped from the officers, I said, 'now you will have two charges, book-making and escape'. He said he didn't have anything to do with book-making. I said, 'How did you know there was book-making up there?' He said, 'Well, I heard about it.' I asked him what he was doing up there. He said he come over to see some friends. I asked him which ones. He didn't say or wouldn't say the names."

The officers found on the person of the defendant A B C markers similar to those on the counter in the room over the lavatory, with pencil notations on them; $52 in currency; and keys, one of which fitted the lock of the front door of the premises. The defendant asked to be released because his little girl was graduating that night, and he was supposed to meet her in thirty minutes. He refused to state the name of the school where he claimed the graduation exercises were to take place. He was a married man, and lived with his wife a short distance from the premises described herein. He did not testify at the trial or at his preliminary examination.

The defendant contends that the evidence was insufficient to connect him with the book-making paraphernalia and activities found on the premises where he was arrested. Reliance is placed on the cases of People v. Staples, 149 Cal. 405, 86 P. 886, and People v. Lamson, 1 Cal.2d 648, 36 P.2d 361. In the Staples case it was attempted to prove the defendant physician guilty of the murder of his wife by administering poison. There was no proof that the wife died of poisoning. There had been an epidemic of typhoid fever and she had contracted the disease. It was held that the corpus delicti had not been established and that the evidence was therefore insufficient to prove guilt. It was declared [149 Cal. 405, 86 P. 894] that "where the evidence is of such a [circumstantial] character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt. The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed."

As to the Lamson case, it may be said that nothing was decided in that case except that the judgment be reversed. On no other question involved on the appeal was there a concurrence of a majority of the members of the court. Therefore that portion of the first opinion in that case which quoted and approved the above excerpt from the Staples case, cannot be considered an adjudication or an effective approval of the declaration in the prior case.

[1-5] The holding of the Staples case is to be strictly confined to situations where the reviewing court as a matter of law must conclude that there is no evidence, circumstantial or otherwise, that a crime has been committed, and therefore the evidence of guilt is insufficient. The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal "will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury

in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground" of insufficiency of the evidence "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631, 635; People v. Tom Woo, 181 Cal. 315, 184 P. 389; also, People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Bresh, 33 Cal.App.2d 161, 91 P.2d 193; People v. Wilson, 33 Cal.App.2d 194, 91 P.2d 207. In the Perkins case this court expressly rejected the application of the statement from the Staples case to a situation which involved only circumstantial evidence. As pointed out by the court the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. It said: "The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury." Also, in People v. Smith, 35 Cal.App.2d 73, 94 P.2d 633, 634, involving facts similar to those presented in the case at bar, where the trial was without a jury, it was stated that "it is a matter for the trial judge to be persuaded beyond a reasonable doubt and not this court."

As early as the case of People v. Muhly, 15 Cal.App. 416, 114 P. 1017, the correctness of the statement in the Staples case was questioned and limited, in view of the constitutional provision making the jurors the exclusive judges of the facts. It was there said, 15 Cal.App. at pages 418, 419, 114 P. at page 1018: "The principle enunciated in the Staples Case is undoubtedly proper to be given as an instruction to the jury * * *. But we do not think it can be accepted, or was intended to be accepted, as a rule of universal application to guide the appellate court in all cases arising out of or dependent upon circumstantial evidence. * * * We do not understand that case to hold that, where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere. This must be so, or the weight of the circumstantial evidence, and the inferences to be drawn from it in almost every case, must finally be determined by the appellate court, thus making the court the arbiter of both law and fact. In our judgment a verdict of a jury, and the judgment of conviction based upon circumstantial evidence, come to us as any other verdict and judgment, clothed with like presumption of support; and, unless we can say that the inference of guilt drawn from the evidence was wholly unwarranted, we cannot interfere."

In People v. Martinez, 20 Cal.App. 343, 128 P. 952, 953, it was said: "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence. In neither case will the verdict be disturbed. We are not unmindful that the Supreme Court in People v. Staples, 149 Cal. 405, 86 P. 886, employs language seemingly inconsistent with this view, and upon which appellant claims that, if upon review this court is of the opinion that the circumstances are reasonably compatible with defendant's innocence, then, notwithstanding the fact that they reasonably justify the inference of guilt drawn therefrom by the jury, he is entitled to a reversal of the judgment." The court's reply was taken from the quotation hereinabove made from the case of People v. Muhly, supra.

In People v. Clark, 70 Cal.App. 531, 233 P. 980, the defendant relied for reversal on the fact that the corpus delicti was not established except by circumstantial evidence. The circumstances indicated that the defendant had murdered the deceased and disposed of the remains by burning them. The court pointed out that it would only be necessary for the murderer to dispose of the remains in order to escape the penalty. It cited and relied upon many authorities, including People v. Wilkins, 158 Cal. 530, 111 P. 612, 615, to the effect that the corpus delicti may be established by circumstantial evidence. The court in the Wilkins case quoted with approval from Rice on Evidence, volume 3, pages 465, 466, as follows: "Nor is it necessary that the corpus delicti should be proved by direct and positive evidence. It would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up." See, also, People v. Bonilla, 114 Cal. App. 219, 225, 299 P. 784; People v. Baker, 94 Cal.App. 628, 271 P. 765. Likewise, in People v. Patello, 125 Cal.App. page 480, 13 P.2d 1068, 1069, it was said: "Taken literally and in its strict construction, it may not be denied that, if applied to the facts of the instant case, either piece by piece, or as an entirety, the principle of law announced in the Staples Case, supra, would indicate that purely from a legal standpoint the evidence was 'compatible with innocence' of the accused. But it is common knowledge that in practically every criminal prosecution that is dependent for its success upon circumstantial evidence each fact adduced is not only susceptible of a 'rational hypothesis' of innocence of the accused, but also is possibly as compatible with his innocence as it is with his guilt"; that if the rule of that case applied with the effect contended, "then must fail a very large majority of the prosecutions for the perpetration of crimes which are secretly committed, wherein the proof not only as to the corpus delicti, but as well of the criminal participation therein of the accused, must be presented, not by eyewitnesses, or by direct evidence of their commission, but perforce by facts which in their nature are wholly circumstantial. But as a legal proposition it is unthinkable that the language employed by the court in the Staples Case * * * was ever intended by its author, or by the court as a whole, to have placed upon it such a construction as hereinbefore has been indicated."

[6] From the foregoing it follows that on appeal and in this case the defendant's contention that the circumstantial evidence which is incriminating is insufficient to establish his guilt because such evidence might also be deemed compatible with innocence, cannot be sustained. The evidence against defendant herein is clearly sufficient to support the trial court's conclusion that he was the keeper of the book-making apparatus above the lavatory. People v. Borrego, 211 Cal. 759, 297 P. 17; People v. Smith, 35 Cal.App.2d 73, 94 P.2d 633; People v. Roseberry, 23 Cal.App.2d 13, 71 P.2d 944; People v. Helt, 100 Cal.App. 279, 279 P. 1046; People v. Schneider, Cal.App. 98 P.2d 215.

The defendant places special reliance on the cases of People v. Yoder, 35 Cal. App.2d 347, 95 P.2d 470; People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142, and People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707, wherein judgments of conviction of similar offenses were reversed because of insufficiency of the evidence to connect the defendant with book-making activities. As reiterated in the cases hereinbefore cited, the decision whether there is sufficient evidence to support the judgment of conviction must depend upon the circumstances of each case. There is nothing presented by the cases specially relied upon which would justify a reversal in this case. Anything stated in those cases which is inconsistent with the views herein expressed is disapproved.

The judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; CARTER, J.; EDMONDS, J.

16 Cal.2d 50

In re KINNEY'S ESTATE.

KINNEY v. GARDELLA et al.

Sac. 5299.

Supreme Court of California.
Aug. 12, 1940.

1. Wills ⚿133

The testator's authenticating signature is not required to be at end of holographic will, but may be found elsewhere in the body of such will. Probate Code, § 53.

2. Wills ⚿386

It is for the probate court in the first instance to say whether holographic will was "signed" by decedent, and probate court's determination will not be disturbed unless without support in the evidence. Probate Code, § 53.

3. Wills ⚿133

A holographic testamentary instrument, appearing to be a completed declaration of decedent's desires, will be admitted to probate, notwithstanding that decedent wrote his name only in the beginning of the declaration and used no expression affirmatively adopting the name so placed as his signature to the will. Probate Code, § 53.

4. Wills ⚿133

Completeness of holographic will is sufficient evidence of testator's adoption of testator's name placed at the beginning of the declaration as the authenticating signature of testator and as a compliance with statute requiring such will to be "signed" by testator. Probate Code, § 53.

5. Wills ⚿133

A document entirely in deceased's handwriting, containing deceased's name in the first line, and stating that deceased bequeathed all her possessions to four sisters who were living in a certain year, and giving the addresses of such sisters, was properly admitted to probate as a "holographic will", notwithstanding that document was not signed at the end thereof. Probate Code, § 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

6. Wills ⚿83

Formal provisions, including appointment of executor, are not necessary to a completed will.

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Proceeding to secure revocation of probate of will of Anna Leona Graves Kinney, deceased, by Keith Kinney, as administrator of the estate of Grant Kinney, deceased, opposed by John B. Gardella, administrator with the will annexed of the estate of Anna Leona Graves Kinney, deceased, and others. From an order dismissing the petition for revocation of the order admitting the will to probate and confirming the previous order admitting the will, Keith Kinney, as administrator of the estate of Grant Kinney, deceased, appeals.

Order affirmed.

For prior opinion, see 97 P.2d 478.

Taft & Spurr, of Ukiah, for appellant.

Clark, Nichols & Eltse, of Berkeley, and Snyder & Snyder, Chas. P. Snyder, and Geo. F. Snyder, all of San Andreas, for respondents.

SHENK, Justice.

A document was admitted to probate as the holographic will of Anna Leona Graves Kinney, deceased. The court denied a petition filed by the surviving husband for revocation of the order. A motion for a new trial was also denied. This appeal is from the order dismissing the petition for revocation of the order admitting the will to probate and confirming the previous order admitting it.

The writing, including the date thereon, is entirely in the hand of the decedent. The principal question is whether it was signed so as to entitle it to be filed as a will. The writing is as follows:

"July 19–1934
"I, Anna Leona Graves Kinney,
do bequeath all my possessions
to my four sisters who were
living in 1923.
"They are:
"Mrs. Joe Ella Graves Yeargin
"Nashville, Tenn.
"Mrs. Cora Graves Hall
"Sunnyside Davidson Co. Tenn.
"Mrs. Maggie Odessie Graves Englishman,
"Nashville Tenn.
"Miss Mary Almedia Graves,
"Nashville Tenn."

The writing covered one side of a sheet of paper of a light grey color. It was begun close to the top of the page and extended without margin on either side. A margin of over two inches remained at the bottom of the sheet. The only place where the decedent wrote her name was at the beginning, as shown above. The writing when found was enclosed in an envelope of the same color, texture and width. On the outside of the envelope was written in the decedent's handwriting, "The will of Mrs. Anna Leona Graves Kinney."

[1] As to a holographic will the statute requires that it be "entirely written, dated and signed by the hand of the testator himself". Sec. 53, Prob.Code, formerly sec. 1277, Civ.Code. Unlike a witnessed will, which must be "subscribed at the end thereof" (sec. 50, Prob.Code, formerly sec. 1276, Civ.Code), the authenticating signature of the testator is not required to be at the end, but may be found elsewhere in the body of the testamentary document. Estate of Johnson, Myr.Prob. 5; Estate of Barker, Myr. Prob. 78; Estate of Donoho, Myr.Prob. 140; In re Estate of Stratton, 112 Cal. 513, 519, 44 P. 1028; Estate of Camp, 134 Cal. 233, 237, 66 P. 227; Estate of McMahon, 174 Cal. 423, 163 P. 669, L.R.A.1917D, 778; Estate of Streeton, 183 Cal. 284, 191 P. 16; Estate of Morgan, 200 Cal. 400, 253 P. 702; Estate of Brooks, 214 Cal. 138, 4 P.2d 148; Estate of England, 85 Cal.App. 486, 259 P. 956; Estate of Sullivan, 94 Cal.App. 674, 271 P. 753; Estate of Bauman, 114 Cal.App. 551, 300 P. 62; see, also In re Estate of Norris, 221 Mich. 430, 191 N.W. 238, 29 A.L.R. 884, and cases cited in note.

The contestant relies on Estate of Manchester, 174 Cal. 417, 163 P. 358, L.R.A. 1917D, 629, Ann.Cas.1918B, 227; Estate of Hurley, 178 Cal. 713, 174 P. 669; Estate of Bernard, 197 Cal. 36, 239 P. 404; Estate of Devlin, 198 Cal. 721, 247 P. 577, and Estate of Leonard, 1 Cal.2d 8, 32 P.2d 603. In each of those cases it was determined that the holographic testamentary writing involved was not entitled to be filed as a will because it was not signed by the author thereof. The rule followed in those cases is stated in Estate of Manchester at page 421 of 174 Cal., at page 360 of 163 P., L.R.A.1917D, 629, Ann.Cas.1918B, 227 as follows: "The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature." In that case the decedent placed his name at the beginning of the first sentence, but the order admitting the writing to probate as a will was reversed because the instrument on its face showed that he intended to sign it at the end and then failed to do so. In Estate of Hurley, supra, likewise, the order refusing to revoke probate was reversed. There the name of the decedent was placed by her at the beginning of the writing, but the face of the document showed that she had ceased writing before she had completed the declaration of her intentions, and therefore that she did not regard the instrument as a completed testament. The same may be said of Estate of Leonard, supra, where the court affirmed an order denying admission to probate of a proffered holographic writing. In Estate of Bernard, supra, the decedent wrote her name at the beginning of her declaration, but the instrument ended abruptly without a punctuation mark, indicating that she had not completed her testamentary declaration. This court affirmed the order revoking the order admitting the instrument to probate as a will. In Estate of Devlin, supra, an order admitting a holographic writing to probate as a will was reversed. The decedent had placed his name at the beginning of the writing but the instrument likewise showed on its face that he had not completed the testamentary act.

It is the contention of the contestant that there must be some affirmative expression by the person writing the holographic document to the effect that the name written at a place other than at the end was adopted as and for an executing signature. The cases relied upon by the contestant are not to be construed as holding that such an affirmative expression is required where otherwise the will appears to be a completed testamentary expression. This court obviously did not intend to extend the rule of the Manchester case by what was said in Estate of McMahon, supra. In the latter case the language of the testator did affirmatively express the adoption of her name written at the beginning as her signature to the will.

[2-4] It is for the probate court in the first instance to say whether the document was "signed" by the decedent, and its determination will not be disturbed unless it is without support in the evidence. Estate of Manchester, supra; Estate of Streeton, supra; Estate of Brooks, supra; Estate of Bernard, supra, at page 42, of 197 Cal., 239 P. 404, citing additional cases. Whenever it has appeared that a holographic testamentary instrument was a completed declaration of the decedent's desires, such an instrument has been admitted to probate although the decedent wrote his name only in the beginning of the declaration. This has been so even where there was no expression by the testator affirmatively adopting the name so placed as his signature to the will. Completeness alone has been held sufficient evidence of the adoption of the name so placed as the authenticating signature of the testator and as a compliance with the statute which requires the will to be "signed". Estate of Donoho, supra; Estate of Streeton, supra; Estate of Brooks, supra; Estate of Bauman, supra; also Estate of England and Estate of Sullivan, supra.

In Estate of Brooks, supra, as also in Estate of Morgan, Estate of Bauman and Estate of Sullivan, supra, the cases relied upon by the contestant were distinguished by reason of the fact that it did not appear from the instruments offered in probate therein that the declarants had done everything they intended to do; that for that reason the writings were shown not to be completed; and that therefore it could not be inferred therefrom that the decedents intended that their names placed elsewhere than at the end should be executing signatures.

[5, 6] The writing here involved appears to be a complete testamentary declaration. It was written with studied care, indicated by the fact that the decedent copied into her will the names and addresses of her sisters who were living at the time stated; by the correction of the year in that respect from 1933 to 1923; and by the manner in which certain letters were retraced. The fact that sufficient space remained on the paper to include additional writing if the decedent intended any further declaration is also some evidence of finality and completeness. Formal provisions, including the appointment of an executor, were not necessary to the completed will. See Estate of Brooks, supra.

The contestant contends that the envelope in which the writing was found should not be received as a part of the will nor be entitled to consideration in determining whether the name written on the testamentary document was an executing signature. In the case of In re Manchester, supra, it was held that such an inscription could not cure any defect in the execution of the will. The respondent refers to In re Sullivan, supra, and Alexander v. Johnston, 171 N.C. 468, 88 S.E. 785. However, the probate court in the present case did not receive the envelope in evidence nor admit it as a part of the will. It appears that it was not considered by the court and is not a part of the record for the purpose of determining whether there is support for the finding that the instrument was signed, or that it constituted a completed declaration. Inasmuch as the court did not receive the envelope for any purpose whatsoever, we deem it unnecessary to discuss the points raised by counsel in connection therewith. The written testamentary declaration alone was sufficient support for the court's determination that it was a completed declaration and therefore that the name written at the beginning thereof was so written with authenticating intent and the instrument was signed within the meaning of the statute.

From the earliest consideration of the question, completeness of the testamentary declaration has been deemed sufficient evidence of the "signing" of the writing, even though the declarant's name was written by him at a place other than at the end. The injunction that statutory requirements must be complied with is, of course, to be fully observed, but where the statute does not require that the will be subscribed or signed at the foot or end thereof, courts in other jurisdictions have likewise held such instruments to be validly executed wills. See 1 Jarman on Wills, 6th ed., p. 109; Lemayne v. Stanley, 3 Lev. 1, 83 Eng. Reprint 545; Lawson v. Dawson's Estate, 21 Tex.Civ.App. 361, 53 S.W. 64; In re Johnson's Estate, 209 Iowa 757, 229 N.W. 261; see, also, Thrift Trust Co. v. White, 90 Ind.App. 116, 167 N.E. 141, 168 N.E. 250; Meads v. Earle, 205 Mass. 553, 91 N.E. 916, 29 L.R.A.,N.S., 63; Ex parte Cardozo, 135 Md. 407, 109 A. 93.

The order is affirmed.

We concur: GIBSON, C. J.; CARTER, J.; CURTIS, J.; HOUSER, J.; EDMONDS, J.; SPENCE, Justice pro tem.

16 Cal.2d 1

MOGLE et al. v. MOORE et al.

L. A. 16802.

Supreme Court of California.

Aug. 1, 1940.

1. Appeal and error 🔑907(3)

Where appeal was on the judgment roll, reviewing court was required to presume that the evidence supported the findings in every particular.

2. Evidence 🔑10(1)

The Supreme Court could take judicial notice of the topographical facts concerning an area in the vicinity of the city of Upland, where facts were commonly and universally known to inhabitants of the vicinity.

3. Waters and water courses 🔑38

Creek did not lose its character as a "water course" nor did its waters lose their character as stream waters, because stream bed was dry for periods of time, since a constant flow of water is not essential to the existence of a water course, but it is sufficient if, during some seasons, water does in fact flow in the stream bed.

See Words and Phrases, Permanent Edition, for all other definitions of "Water Course".

4. Waters and water courses 🔑115

"Surface waters" are waters falling on and naturally spreading over lands, and they may come from seasonal rains, melting snows, frosts, or springs, or from all of them.

See Words and Phrases, Permanent Edition, for all other definitions of "Surface Water".

5. Waters and water courses 🔑115

"Surface waters" consist of surface drainage falling on or flowing from or over a tract or tracts of land before such waters have found their way into a natural watercourse.

6. Waters and water courses 🔑38

A "stream" is a water course having a source and terminus, banks, and channel, through which waters flow at least periodically, and it usually empties into other streams, lakes, or the ocean, but it does not lose its character as a water course even though it may break up and disappear.

See Words and Phrases, Permanent Edition, for all other definitions of "Stream".

7. Waters and water courses 🔑38

Streams are usually formed by surface waters gathering together in one channel and flowing therein, and the waters then lose their character as surface waters and become "stream waters."

8. Waters and water courses 🔑115

"Flood waters" are distinguished from "surface waters" by the fact that the flood waters have broken away from a stream, while surface waters have not yet become part of a water course.

See Words and Phrases, Permanent Edition, for all other definitions of "Flood Water".

9. Waters and water courses 🔑38, 115

The term "flood waters" is used to indicate waters which escape from a water course in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully, or depression does not affect their character as "flood waters" or give to the course which they follow the character of a natural "water course."

10. Waters and water courses 🔑115

Flood waters escaping from a stream are not "surface waters" and do not lose their character as flood waters while flowing wild over the country.

11. Waters and water courses ⚿115, 118

One has no right to obstruct the flow onto his land of what are technically known as "surface waters," but the term does not include all waters which may be on or moving across the surface of the land without being collected into a natural water course, being confined to waters falling on the land by precipitation or arising thereon in springs.

12. Waters and water courses ⚿115, 118

One has the right to protect himself and his land against "flood water," that is water escaping from a natural water course in time of flood or overflow, and for such purpose may obstruct the flow onto his land, even though such obstruction causes it to flow onto the land of another.

13. Waters and water courses ⚿38, 51, 78

One may not obstruct or divert the flow of a natural water course, "water course" not meaning the gathering of errant waters while passing through a low depression, swale, or gully, but a real stream with definite channel, with bed and banks within which it flows, at the times when the streams of the region habitually flow.

14. Waters and water courses ⚿38, 115, 118

A natural channel which extended from canyon, and into which surface waters ran, was a "water course," and the waters flowing in it constituted a "stream," and when the waters left the creek in times of flood and ran wild over the adjacent country, they became "storm waters," and hence landowners had a right to protect themselves from those waters, even though to do so would cause the waters to flow onto the lands of others.

See Words and Phrases, Permanent Edition, for all other definitions of "Storm Waters".

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Frank Mogle and Richard Mogle against Oliver B. Moore, Marjorie E. Moore, and others, to restrain the named defendants from protecting their property from overflow of surface waters and from waters which escaped from a water course. From a judgment in favor of the plaintiffs, the named defendants appeal.

Reversed.

For prior opinion, see 96 P.2d 147.

Stead & Boileau, Charles R. Stead, and R. Bruce Findlay, all of San Bernardino, and Will G. Fields, of San Dimas, for appellants.

James L. King, of San Bernardino, for respondents.

PER CURIAM.

The appeal in this case was originally heard by the Fourth District Court of Appeal. Following a decision by that court, a petition for hearing by this court was granted. Consideration of the several points of law that have been presented by the respective parties to the litigation has resulted in a conclusion that the appeal was correctly decided by the District Court of Appeal. 96 P.2d 147. Its opinion rendered therein, which was prepared by Mr. Justice Marks of that court, is therefore adopted by this court as its own. It is as follows:

"This is an appeal from a judgment restraining Oliver B. Moore and Marjorie E. Moore, whom we will refer to as the defendants, from protecting their property from overflow from surface waters and from waters which escape from a watercourse known as West Cucamonga creek.

[1] "The appeal is on the judgment roll. Under well-settled rules of law we are required to presume that the evidence supports the findings in every particular.

"Plaintiffs are owners of two tracts of land lying about seven miles southerly from the city of Upland in San Bernardino county. These parcels of land are separated by a strip of land called 'Comet Avenue'. Defendants own two parcels of land adjoining plaintiffs' property on the north. These two parcels are also separated by Comet avenue.

"Comet avenue is a strip of land twenty feet wide and extends in a northerly and southerly direction. We are not informed as to the location of its termini. From the findings we gather that there was no evidence showing it had been either dedicated or accepted as a public street or road.

[2] "The country in question here is practically level with a general slope to the southwest from north of the city of Upland to beyond the properties of the parties involved in this controversy. While there are no findings on this point, the following facts are of such common and universal every-day knowledge to people living near to or familiar with the general

topography of this country that we may take judicial notice of them. People v. Tossetti, 107 Cal.App. 7, 289 P. 881. A range of mountains extending in a general easterly and westerly direction rises abruptly from the valley floor a few miles north of the city of Upland. Many canyons empty from these mountains in a general southerly direction. The grade of descent of the land southerly is sharp at the base of this range but is reduced as the distance from the mountains increases. Numerous washes, streams and watercourses from the canyons emptying from the mountains extend into and some of them across the valley floor and during periods of heavy rains carry a considerable volume of water. With these general observations we may proceed to a consideration of the findings of fact made by the trial court.

"Comet avenue, as it runs between the two parcels of land of defendants, is marked, in its center, with a row of eucalyptus trees. It is unmarked between the lands of plaintiffs and has been cultivated and used by them and their predecessors. The natural surface of Comet avenue has about the same elevation as the abutting property. The trial court found that 'there is no natural water channel, ditch or course upon' Comet avenue as it extends between the parcels of land owned by the respective parties hereto.

"The rainy season of 1936-1937 commenced in November, 1936, and ended in March, 1937. Between those dates defendants constructed a fence along their property abutting on the west side of Comet avenue. This fence was constructed of 'wooden posts and strands of woven and barbed wire' and tended to obstruct the flow of the 'surface waters' on Comet avenue 'from flowing along the general slope of defendants' land lying west of said fence, by reason of the collection and accumulation of weeds, grass, debris, sand and silt lodging against the same, and diverting the natural flow of said surface water into and along said "Comet Avenue" and down to and upon the lands of plaintiffs'.

"The trial court also found that during the rainy season of 1936-1937, surface waters carried onto and deposited upon Comet avenue extending between defendants' parcels of land, and on the east one hundred fifty feet of the north two-thirds of their west parcel, large quantities of sand and silt; that this deposit ranged in depth between one and two feet; that defendants removed this sand and silt from Comet avenue, to the original surface of the ground with a width of from three to five feet, thereby creating an artificial channel in Comet avenue; that through such channel 'a large portion of said surface waters flowed to and upon plaintiffs' said land in a manner and at points where it had not theretofore flowed, and carried with it large quantities of sand, silt and debris, depositing the same upon plaintiffs' said land; that said artificial channel or ditch together with said fence obstruction prevented said surface waters from flowing in a south and southwesterly direction across defendants' land along the general slope thereof'; that defendants 'threaten to continue to construct, dig and maintain said artificial ditch and channel' so that the 'surface waters' would continue to flow to and over defendants' [plaintiffs'?] land to their serious damage. The trial court further found that the waters flowing from the channel on Comet avenue over plaintiffs' property were not flood waters; that part of those waters arose upon and came from three named sections of land; that none of those waters were flood waters which arose in the foothills north and east of Upland.

"The trial court further found that there had existed since time immemorial in Cucamonga valley a natural creek bed known as West Cucamonga creek which 'was a branch or a portion of the creek or stream of water running out of Cucamonga Canyon'; that at all times there was a continuous stream of water in the stream bed flowing out of Cucamonga canyon and that 'prior to 1916 a portion of the waters from said stream flowed down through that certain channel known as West Cucamonga Creek'.

" 'That in or about 1916 the waters from the stream flowing out of Cucamonga Canyon were artificially diverted and checked by dams and spread over large areas of land at the foot of the mountains, and that at all times since 1916 by reason of said artificial diversion, the waters of said stream no longer flow into the channel of West Cucamonga Creek, except infrequently in times of storm, and when the waters break over or out of the check dams in said spreading ground, or at such infrequent times as the waters are turned into said channel through flood gates.

" 'That said channel formerly carrying the waters of said West Cucamonga Creek, now exists upon the surface of the land as it has existed from time immemorial, but that there are no longer waters flowing in said channel, nor has there been since about 1916, except as hereinbefore found, and except after rain periods, at which times a flow of water, originating largely from the rain waters falling on the streets of the City of Upland, and surrounding territory, by natural flow drain into said channel, and at which time said waters accumulate into a large body of water, and flow down through said channel to a point where said channel reaches Comet Avenue, extended north to the property of John G. Clock, which said point is approximately six miles south of the City of Upland and approximately one mile north of the lands of the defendants.

" 'That at the point where said channel intersects Comet Avenue upon the property of John G. Clock as aforesaid, the said stream originally flowed in a southwesterly direction. That since the year 1926, Comet Avenue, from said point of intersection southerly, has been cleared out and artificial dikes have been constructed from time to time along the sides thereof by the adjacent property owners southerly to the defendants' property, and that by the year 1935, all the waters flowing in said channel flowed directly south along Comet Avenue to the north boundary of the defendants' property which adjoins Schaefer Avenue on the south thereof.

" 'All of the waters so flowing in said channel, flow in a well-defined body from a point where they enter the said channel at or near the City of Upland, California, to the defendants' property, and that none of the said waters once having reached said channel escape therefrom from the time that they enter therein until they reach the intersection of Comet Avenue and the north line of the defendants' property. All of said waters, except such as are lost by percolation in the stream bed, flow in a continuous stream through said channel as aforesaid to the north line of defendants' said property, where said channel ceases to exist and such quantities of water as has flowed out of the end of said channel, has continued down Comet Avenue on the surface of the ground, for a short distance south of Schaefer Avenue and then spread out and flow southwesterly across defendants' said property, on the surface of the ground, following the natural slope of his said land.

" 'That no waters of any appreciable amount enter said stream south of the City of Upland, which said point is approximately six (6) miles distant from the lands of the defendants.'

"The findings clearly show that West Cucamonga creek is a natural watercourse extending from the mouth of Cucamonga canyon southerly and southwesterly to its intersection with Comet avenue on the John G. Clock property; that during or prior to 1926 its southwesterly course from that point had been obstructed and the stream waters turned south on Comet avenue and that since 1926 Comet avenue has been developed by neighboring property owners into a stream bed one mile long, extending from West Cucamonga creek to the north line of defendants' property; that in 1937 the waters of West Cucamonga creek followed the natural stream bed to Comet avenue, and through Comet avenue to defendants' property where their confinement into a stream of water ended; that they then spread, joining with the surface waters originating on the three named sections, and did the damage complained of.

"There is no definite finding or conclusion of law that the waters were surface waters after they left the original stream bed of West Cucamonga creek or the confinement of the channel on Comet avenue, but the trial judge described them as surface waters, and his ultimate decision cannot be rationalized under any theory other than that he reached the conclusion that those waters were all surface waters when they reached the properties of the defendants. The sole question necessary for consideration here is the character of those waters. Were they surface waters, stream waters or flood waters? We are not concerned with vagrant waters as such waters are not mentioned in the findings or in the briefs.

[3] "West Cucamonga creek did not lose its character as a watercourse nor did its waters lose their character as stream waters after 1916, because the stream bed was dry for periods of time. Cederburg v. Dutra, 3 Cal.App. 572, 86 P. 838. It is thoroughly established in California that 'A constant flow of water is not essential to the existence of a watercourse.' 25 Cal. Jur. 1036, and cases cited. It is sufficient if, during some seasons, water does in fact flow in the stream bed.

[4, 5] "Surface waters are defined as waters falling upon and naturally spreading over lands. They may come from seasonal rains, melting snows, swamps or springs, or from all of them. Surface waters consist of surface drainage falling on or flowing from and over a tract or tracts of land before such waters have found their way into a natural watercourse. 26 Cal.Jur. p. 279, and cases cited.

[6, 7] "A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear. Hellman, etc., Bank v. Southern Pacific Co., 190 Cal. 626, 214 P. 46. Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters. Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Gray v. Reclamation District No. 1500, 174 Cal. 622, at page 650, 163 P. 1024. As we have observed, a continuous flow of water is not necessary to constitute a stream and its waters stream waters. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200.

[8, 9] "Flood waters are thus correctly described in 26 California Jurisprudence 280; 'Flood waters are distinguished from surface waters by the fact that the former have broken away from a stream, while the latter have not yet become part of a watercourse. The term "flood waters" is used to indicate waters which escape from a water course in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as flood waters or give to the course which they follow the character of a natural watercourse.'

[10] "It is also thoroughly settled that flood waters escaping from a stream are not surface waters and do not lose their character as flood waters while flowing wild over the country. In Horton v. Goodenough, supra, it was said [184 Cal. 451, 194 P. 37]: 'The waters are plainly flood waters breaking out of their channel and running wild, and as such each property owner threatened has the right to protect himself against them as best he can, under the authority of the decisions we have already cited, the most notable of which is Lamb v. Reclamation District [73 Cal. 125, 126, 14 P. 625, 2 Am.St.Rep. 775], supra. The waters are not surface waters in the technical sense, for they have already been gathered into a stream whence they have escaped.'

"A similar rule is announced in LeBrun v. Richards, 210 Cal. 308, 291 P. 825 [828], 72 A.L.R. 336, with the added remark that 'Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory.'

"The rules governing the right to obstruct the flow of the three classes of waters with which we are here concerned are clearly set forth in Horton v. Goodenough, supra, as follows:

[11-13] " 'First, one has no right to obstruct the flow on to his land of what are technically known as surface waters. Heier v. Krull, 160 Cal. 441, and authorities therein cited at page 444, 117 P. 530. But by "surface waters" are not meant any waters which may be on or moving across the surface of the land without being collected into a natural water course. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural watercourse, but which yet were once a part of a stream and have escaped from it, "flood waters" in other words. McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 8 L.R.A. 575; Farnham on Waters, § 278. Second, one has the right to protect himself against "flood waters," that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. Barnes v. Marshall, 68 Cal. 569, 10 P. 115; Lamb v. Reclamation District, 73 Cal. [125] 126, 14 P. 625, 2 Am.St.Rep. 775; De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169. Third, one may not obstruct or divert the flow of a natural watercourse. But by a "water course" is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a

definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow. Los Angeles, etc., Ass'n v. Los Angeles, 103 Cal. [461], 466, 37 P. 375; Sanguinetti v. Pock, supra; San Gabriel Valley Country Club v. Los Angeles County [182 Cal. 392] 188 P. 554 [9 A.L.R. 1200]; Simmons v. Winters, 21 Or. 35, 27 P. 7, 28 Am.St.Rep. 727.'

[14] "When we apply these rules of law to the facts found by the trial court the following conclusions are inevitable: (1) West Cucamonga creek is a watercourse and the water flowing in it constitutes a stream; (2) The surface waters running off from Upland and vicinity become stream waters when they gather in West Cucamonga creek; (3) When the stream waters of West Cucamonga creek leave its watercourse in times of flood they become storm waters; (4) Those waters remain storm waters when running wild over the adjacent country.

"It makes no difference in the ultimate decision of this case, on the facts found, whether we do or do not regard the man-made channel on Comet avenue as a part of West Cucamonga creek and a watercourse. The facts found are not sufficient to determine that question. We will therefore assume that it was not a watercourse. The flood waters escaped from the original channel of the West Cucamonga creek at the John G. Clock property. They then became flood waters, the common enemy against which threatened property owners had the right to protect themselves. Those flood waters followed the man-made channel to the lands of defendants. On leaving that man-made channel they remained flood waters. Defendants had the right to protect their property against those flood waters even to the damage of plaintiffs, their lower neighbors. There is no finding that what defendants did to protect their property was improperly done. It follows that in so far as the judgment enjoins defendants from properly protecting their property from the waters escaping from West Cucamonga creek through the channel on Comet avenue, it cannot be sustained.

"The trial court, however, found that part of the damage to plaintiffs' property was caused by the obstruction of the flow of the surface waters originating on three named sections. This defendants had no right to do. Switzer v. Yunt, 5 Cal.App. 2d 71, 41 P.2d 974. At another trial this phase of the case should be considered under the rules announced in Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am. St.Rep. 169.

"Plaintiffs rely on such cases as Thomson v. La Fetra, 180 Cal. 771, 183 P. 152; Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143; Board of Trustees v. Rodley, 38 Cal. App. 563, 177 P. 175, and Jaxon v. Clapp, 45 Cal.App. 214, 187 P. 69. These cases have only to do with the obstruction of the natural flow of surface waters. They cannot be controlling where, as here, we are principally concerned with the flow of flood waters.

"Plaintiffs also urge that the waters which flooded their property cannot be classified as flood waters because they did not escape over the banks of West Cucamonga creek during a period of great storms, but, either through an opening at the end of the creek, or through the end of the man-made channel on Comet avenue.

"We are not impressed with this argument. As we have already seen, stream waters escaping from the channel of a watercourse during periods of great storms become flood waters. That they cannot fall within any accepted definition of surface waters is clear whether they escape over the stream banks or at the end of the channel. Therefore, they are not surface waters. That they are not stream waters when they leave the channel is fully settled by the cases already cited. By this process of elimination we are forced to the conclusion that the waters which escaped from West Cucamonga creek could have been only flood waters. We are fortified in this conclusion by Sanguinetti v. Pock, supra, where it was held that storm waters which filled a natural swale, not a watercourse retained the character of flood waters. A property owner may protect his property from overflow from flood waters.

"If we understand the effect of the judgment correctly, defendants are permanently restrained from removing the deposit of sand and silt which was precipitated by the storm waters onto Comet avenue and the northeasterly portion of their westerly tract of land thereby raising the natural grade between one and two feet. We know of no rule of law that would sustain such an order preventing property owners from removing such a foreign deposit and restoring the surface of their lands to their natural grades."

The judgment is reversed.

CARTER, Justice (dissenting).

I dissent.

By adopting the opinion of the District Court of Appeal in this case, 96 P.2d 147, a majority of this court has held, that waters which constitute the natural and normal flow of a stream, when artificially diverted from said stream, and conveyed a distance of over a mile away from said stream by means of an artificial watercourse, then become flood waters, and that an owner of land affected thereby has the right to discharge such waters upon the land of his neighbor with such destructive force as to cause irreparable damage to the latter, and that a person so damaged has no recourse either by injunction or an action for damages.

I cannot subscribe to such a doctrine. It is obviously unsound. It is unsupported by any decided cases either in this or other jurisdictions. It is predicated upon a misconception of the doctrine of damnum absque injuria as applied to the facts found by the trial court in this case.

The majority opinion correctly states that this appeal is before us on the judgment roll alone. Therefore, we must look to the pleadings and the findings of the trial court exclusively for the determination of the issues involved.

The trial court found in substance that West Cucamonga creek is a natural stream or watercourse rising at the base of the mountains north of the city of Upland in San Bernardino county and flows in a general southwesterly direction; that at a point about six miles south of the city of Upland on the property of John G. Clock during the year 1926 by artificial means the waters naturally flowing in said stream were diverted therefrom in a southerly direction into an artificial watercourse constructed on a strip of land twenty feet wide known as "Comet Avenue"; that this watercourse was extended from time to time a distance of about one mile in a southerly direction to the property of defendants or to what is known as Schaefer avenue at the north boundary of defendants' property, and there said waters were permitted to spread out over defendants' land and were not confined in any channel or watercourse; that this condition existed until the rainy season of the years 1936-37; that thereafter the defendants dug a ditch upon and in said Comet avenue where the same extended through defendants' property and extended said ditch or channel to the property of plaintiffs. Defendants also placed a fence along the west boundary line of Comet avenue extending from the north boundary to the south boundary of defendants' property which fence was for the purpose of and did tend to obstruct the flow of the waters from said Comet avenue upon the lands of defendants and to confine the same within said Comet avenue and the artificial ditch or channel constructed therein; that as a result of the construction and extension of said artificial channel by defendants, the said waters, sand and debris were confined therein and cast in large quantities upon the land of plaintiffs immediately to the south thereof; that the construction and maintenance of said artificial channel or ditch by the defendants and the precipitation of said waters, sand and debris therefrom upon the land of plaintiffs, did damage to plaintiffs' said land; that such waters, sand and debris had never theretofore flowed upon the lands of plaintiffs, except such portion of the water as might flow southwesterly upon the surface of the ground over the southwest portion of plaintiffs' property.

The court expressly found that all of the water discharging on and over defendants' land was surface water, and that none of the waters which flowed on or over defendants' land were flood waters.

The court also expressly found that the ditch or channel extending from West Cucamonga creek on the John G. Clock property to defendants' property was not a natural watercourse.

The court also found that all of the water flowing in West Cucamonga creek to the point where it was diverted on the John G. Clock property, was confined within the channel of said creek and that after the diversion of said waters into the ditch or canal constructed on Comet avenue, the same were confined therein.

There is no finding that there was any excessive or extraordinary flow of water in said creek or that the water flowing therein was anything other than the natural and normal flow which usually and customarily flowed therein.

Before proceeding further, I will quote the exact language of the findings of the trial court:

"That said channel formerly carrying the waters of said West Cucamonga Creek, now exists upon the surface of the land as it has existed from time immemorial, * * *."

"That at the point where said channel intersects Comet Avenue upon the property of John G. Clock as aforesaid, the said stream originally flowed in a southwesterly direction. That since the year 1926, Comet Avenue, from said point of intersection southerly, has been cleared out and artificial dikes have been constructed from time to time along the sides thereof by the adjacent property owners southerly to the defendants' property, and that by the year 1935, all the waters flowing in said channel have flowed directly south along Comet Avenue to the north boundary of the defendants' property which adjoins Schaefer Avenue on the south thereof."

It is clear from the foregoing findings that had said waters not been diverted from West Cucamonga creek by artificial means into Comet avenue, said waters would have continued to flow on down the channel of West Cucamonga creek in a southwesterly direction and none of said waters would ever have reached the property of either defendants or plaintiffs.

The court further found:

"All of the waters so flowing in said channel, flow in a well-defined body from a point where they enter the said channel at or near the city of Upland, California, to the defendants' property, and that none of the said waters once having reached said channel escape therefrom from the time that they enter therein until they reach the intersection of Comet Avenue and the north line of defendants' property. All of said waters, except such as are lost by percolation in the stream-bed, flow in a continuous stream through said channel as aforesaid to the north line of defendants' said property, where said channel ceases to exist, and such quantities of water as has flowed out of the end of said channel, has continued down Comet Avenue on the surface of the ground for a short distance south of Schaefer Avenue and then spread out and flow southwesterly across defendants' said property, on the surface of the ground, following the natural slope of his said land."

Thus, it appears from the findings of the trial court that the waters in question at no point or place overflowed the banks of West Cucamonga creek or the banks of the artificial channel constructed in Comet avenue, but when said waters reached the end of said artificial channel, they simply spread out and flowed over the surface of the land in a southwesterly direction in accordance with the natural slope thereof.

In view of the foregoing findings, there is no basis whatever for the conclusion reached by the majority of this court in the opinion approved by it, that the waters which defendants caused to discharge and flow upon plaintiffs' property with destructive force constituted flood waters to which the rule applicable to waters which are a "common enemy" can be invoked by defendants in order to relieve themselves of liability to plaintiffs for the damage caused to the latter's land as the result of the acts of said defendants in causing the discharge of such waters upon plaintiffs' land with such destructive force that it resulted in the damage thereto found by the trial court to have been caused thereby.

Notwithstanding the finding of the above and foregoing facts by the trial court, the opinion adopted by the majority of this court is based upon the erroneous assumption that the waters overflowed or escaped from the natural creek bed or channel upon the property of John G. Clock, and thus became flood waters; that thereafter, each property owner to the south constructed an artificial channel on Comet avenue to control such flood waters and to protect his or her property from such flood waters until the channel arrived at the north boundary of defendants' property; that such waters, upon arriving at the north boundary of defendants' property, continued to be flood waters, and for that reason, defendant had the legal right to extend said artificial channel upon and along Comet avenue and cast such waters upon the land of plaintiffs. It is obvious that the conclusion reached in said opinion is based upon the erroneous assumption that the waters of West Cucamonga creek which constituted the natural and normal flow of said creek overflowed the natural banks of said creek upon arriving at the property of John G. Clock and thereafter became flood waters. As stated above, this assumption is directly contrary to the express findings of the trial court to the effect that the waters of said creek were diverted therefrom on the property of said John G. Clock by artificial means into an artificial channel constructed on and along Comet avenue, which channel was from time to time extended in a southerly direction to the lands of defendants and by defendants extended to the lands of plaintiffs.

The opinion adopted by the majority of this court concludes with the erroneous assumption that because the waters in question were once confined within the channel of West Cucamonga creek they could not be classified as surface waters thereafter and that since these waters were the result of storm and escaped from the natural channel of West Cucamonga creek, they could not be classified as stream waters, and must therefore be classified as flood waters. This conclusion is clearly erroneous, because it fails to take into consideration the facts found by the court that these waters were diverted by artificial means from West Cucamonga creek on the John G. Clock property and conveyed in an artificial and man-constructed channel to defendants' property where the same were permitted to spread out over defendants' land until they saw fit to extend the artificial channel on Comet avenue through their property to plaintiffs' land.

While the factual situation as disclosed by the findings of the trial court may not be such as to support the conclusion reached by the trial court that the waters flowing in the artificial channel on Comet avenue became surface waters when the same spread out over defendants' land, such factual situation clearly does not support the conclusion reached in the opinion of the majority of this court that such waters thereby became flood waters or enemy waters which the defendants were entitled to use any means available to divert away from their land notwithstanding such diversion might result in damage to the lands of defendants' neighbors onto which such waters were discharged with such destructive force that such lands were damaged thereby.

It is obvious that so long as the waters in question were confined in the natural channel of West Cucamonga creek, they constituted stream waters regardless of the source from which they eminated. After their diversion into the artificial channel constructed in Comet avenue, they remained stream waters but the rules of law applicable to waters flowing in a natural stream or watercourse cease to be applicable to such waters after the same were diverted by artificial means from said stream.

If the citation of authority were necessary to support the position of the plaintiffs in this action, the case of Thomson v. La Fetra, 180 Cal. 771, 183 P. 152, 153, furnishes ample authority for the conclusion reached by the trial court that plaintiffs are entitled to injunctive relief to protect their property against the continued discharge of such waters thereon. The factual situation in that case is quite similar to that in the case at bar.

In that case this court held that waters flowing in a natural watercourse which are diverted and discharged by artificial means onto adjacent land could not be classified as flood waters and that the rule applicable to waters which are a "common enemy" could not be invoked under the factual situation there found to exist. In that case this court said:

"That rule has application only to flood waters in the strict sense that is to say, to waters escaping because of their height from the confinement of a stream and running over the adjacent country. The waters here involved are not of that sort.

"The water not being in any sense flood water, the defendants, by changing its course and casting it upon the lands of the plaintiff, were guilty of a trespass. The fact that the water may have threatened injury to the defendants affords no justification or excuse to palliate the wrong done. If the injury threatened to the defendants' lands was the result of wrongful artificial changes made by upper proprietors, resulting in an increased, accelerated, or concentrated flow of water upon and across the lands of the defendants, their remedy was to proceed by appropriate action against the wrongdoers to enjoin such changes or to have the nuisance abated, and not by an attempt to shift the burden of the wrong upon an innocent third party who but for their intervening willful act would have suffered no injury at all. Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143; Castle v. Reeburgh [75 Okl. 22], 181 P. 297.

"The damage suffered by the plaintiff not having resulted from a lawful act, it cannot be considered damnum absque injuria. The view which we have taken of the case makes it unnecessary for us to discuss and decide the plaintiff's contention that the upper proprietors had acquired a prescriptive right to have the water in question carried off over the defendants' lands."

In view of the inevitable conclusion that the waters which defendants caused to be discharged upon plaintiffs' lands were not flood waters and that the rule applicable to waters which are a "common enemy" cannot be invoked by defendants under the facts found by the trial court, I am of the opinion that the judgment of the trial court should be affirmed.

15 Cal.2d 731

PEOPLE v. KYNETTE et al.

Cr. 4289.

Supreme Court of California.

July 30, 1940.

Rehearing Denied Aug. 29, 1940.

1. Explosives 🔑5
Homicide 🔑256, 257(1)

Evidence *held* to authorize conviction of police officer of malicious use of explosives, and conviction of other officer of attempted murder, assault with intent to murder, and malicious use of explosives, committed by bombing.

2. Jury 🔑108

Where indictment charged conspiracy to commit murder, attempted murder, assault with intent to murder, and malicious use of explosives, trial court properly excused prospective jurors entertaining conscientious scruples against infliction of death penalty, since conspiracy to commit murder can only be conspiracy to commit first degree murder. Pen.Code, §§ 182, 187–190, 1074, subd. 8.

3. Conspiracy 🔑51

A conspiracy to commit murder can only be a conspiracy to commit murder of the first degree, and hence conspirators are punishable by death or life imprisonment. Pen. Code, §§ 182, 187–190, 1074, subd. 8.

4. Conspiracy 🔑46

In prosecution for attempted murder and other offenses committed by bombing, evidence showing that police intelligence unit, of which defendants were members, as part of its espionage of victim, had tapped telephone wires leading to victim's home, was admissible to show overt acts pursuant to alleged conspiracy in preparing for assault on victim, irrespective of whether particular defendant was actually present when wires were tapped. Pen.Code, §§ 640, 1104.

5. Criminal law 🔑369(2)

The rule against admission of evidence of other crimes does not exclude such evidence when it tends to prove any fact necessary or pertinent to the proof of crime for which defendant is being tried.

6. Criminal law 🔑706

In prosecution of members of police intelligence unit for attempted murder and other offenses committed by bombing, interrogating other members of the intelligence unit who had already asserted their rights against self-incrimination in previous examinations, and continued to assert such rights, was not prejudicial, and court did not err in refusing to strike the questions from the record.

7. Witnesses 🔑308

A witness may not constitute himself an arbitrary or exclusive judge of whether evidence called for by a question may tend to incriminate him, but the matter is for trial court to decide in the light of all the evidence.

8. Criminal law 🔑788, 806(1)

Where witness refused to testify on ground of self-incrimination, trial court properly charged that jury should not draw inference concerning guilt or innocence of defendants from the refusal to testify, and court was not required to restate the same instruction as the situation repeated itself throughout the trial.

9. Criminal law 🔑720(1)

Argument of district attorney that jury should not draw any inference of defendants' guilt from refusal of others on constitutional grounds to testify, but might consider such refusal in connection with the credibility to be given to defendants in view of defendants' positive denial of the matter inquired about, was not error.

10. Criminal law 🔑829(1)

Refusal of requested instruction on effect of witnesses' refusal to testify on ground of self-incrimination, covering all witnesses, including defendants, was proper, where court carefully instructed jury on extent to which such refusal to testify could be considered.

11. Criminal law ⚿783(2)
Witnesses ⚿309

Trial court did not err in admitting in evidence a portion of grand jury transcript showing that defendants refused to testify on particular matter on ground of self-incrimination, on ground that such refusal was inconsistent with claim of innocence and could be considered in determining credibility of witnesses, and instructing that such evidence was admitted for the limited purpose of impeachment and as evidence affecting credibility.

12. Witnesses ⚿319

There is no distinction so far as impeachment is concerned between the rights of witnesses in civil and in criminal actions, including a defendant who takes the stand in his own defense. Const. art. 1, § 13.

13. Witnesses ⚿309

The use, solely for impeachment purposes, of defendant's prior refusal to testify before grand jury because of fear of self-incrimination does not destroy the constitutional privilege against self-incrimination. Const. art. 1, § 13.

14. Criminal law ⚿1172(2)

Error in instruction on effect of defendant's standing mute in face of an accusatory statement was not prejudicial where it could not have confused jury into believing that it had application to occasions where defendants had asserted constitutional privilege against self-incrimination, since court fully and clearly instructed jury with respect thereto.

15. Witnesses ⚿286(2)

The extent of redirect examination of a witness is largely within discretion of trial court.

16. Witnesses ⚿288(1)

When a witness is questioned on cross-examination on matters relevant to the subject of the direct examination but not elicited on direct examination, he may be examined on redirect as to such new matters.

17. Witnesses ⚿288(2)

In prosecution of members of intelligence unit of police force for offenses arising out of bombing, wherein witness was asked on cross-examination but not on direct examination concerning activities of the intelligence unit, redirect examination to show that intelligence unit was employed principally in political rather than criminal work was not error.

18. Witnesses ⚿277(4), 380(2)

In prosecution of members of police intelligence unit for offenses arising out of bombing of political enemy, wherein defendant attempted to show that surveillance of victim was in performance of legitimate police activity, cross-examination to show other activities of the intelligence unit against persons apparently hostile to the city administration, and use of files of intelligence unit in furtherance of cross-examination, were not error. Pen.Code, § 1323.

19. Criminal law ⚿1170½(5)

In prosecution of members of police intelligence unit for offenses arising out of bombing, reference in cross-examination to defendant's temporary suspension from the police department earlier in his career was not prejudicial.

20. Witnesses ⚿268(1, 6)

Cross-examination of a witness may extend to all matters about which he was examined in chief, and may be directed to the eliciting of any matter which may tend to overcome or qualify effect of the testimony given by him on direct examination. Pen. Code, § 1323.

21. Witnesses ⚿395

Where principal witness for prosecution testified that he had been beaten by defendants, and was cross-examined in attempt to show that his story was probably of recent fabrication and influenced by payments received from district attorney's office, admitting testimony of two persons to whom such witness had made statements consistent with his testimony was not error, where trial court admonished jury that such evidence was limited to the credibility of the principal witness.

22. Witnesses ⚿395

When a witness has been charged with improper motives of interest, improper influences, or recent fabrication, hearsay statements may be introduced to show that the same and consistent statements had been made at a time prior to the fabrication or to the time when motive of interest existed.

23. Witnesses ⚿376

Where principal witness for prosecution was placed under police protection and was paid money by district attorney's office because of resulting loss of business and needs of family, testimony concerning conversation between bodyguard of witness and district attorney, showing dire financial condition of witness, was admissible as bearing upon credibility of witness, and to refute innuendo arising from minute cross-examination of witness, that payments to witness might have been made to influence his testimony.

24. Criminal law ⚷419(1)

If an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply.

25. Witnesses ⚷288(2)

By cross-examination concerning a possible $3,000 bribe of witness, the defense opened the door to redirect examination resulting in testimony that $3,000 bribe had been offered witness by stranger not to testify for prosecution.

26. Witnesses ⚷252

In prosecution arising out of bombing, wherein experts testified extensively concerning fragments of bomb found, admitting in evidence a model bomb representing approximately the type of bomb apparently used by defendants, to illustrate the expert testimony, was not error.

27. Criminal law ⚷404(2), 437, 438

The use of maps, models, diagrams and photographs as testimony to the objects represented rests fundamentally on theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method.

28. Criminal law ⚷404(4)

In prosecution arising out of bombing, exhibit containing pieces of wire identified as wires picked up at scene of explosion was admissible, notwithstanding alleged violation of rules and regulations of police department in "booking" the wire with property clerk.

29. Criminal law ⚷338(1)

Temporary retention of pieces of wire picked up at scene of explosion, for examination and proper marking for identification purposes, did not violate rules of police department requiring property to be "booked" with property clerk without unnecessary delay, and hence exclusion of department rules and regulations from evidence was not error, where wire was positively identified.

30. Criminal law ⚷432

In prosecution arising out of alleged bombing of political enemy by members of police intelligence unit, newspaper published by person who had been under investigation and surveillance by the intelligence unit was admissible for limited purpose, to show that real purpose of intelligence unit was elimination of persons hostile to city administration.

31. Criminal law ⚷829(9)

Refusal of instructions on presumption of innocence and other matters was not error, where the subjects were covered by other proper instructions given by the court. Pen.Code, §§ 1096, 1096a.

32. Criminal law ⚷715

Counsel may illuminate his argument by illustrations which may be as various as the resources, of his talents, and may refer to matters of common knowledge, not special to the case, and to well-known historical incidents.

33. Criminal law ⚷715, 720(1)

Argument of district attorney referring to well-known New York trial wherein the prosecution kept witnesses in order to insure their protection, and stressing necessity of keeping witness under guard and making payments to him, was not improper.

34. Witnesses ⚷414(1)

In prosecution of members of police intelligence unit for offenses arising out of bombing of person under surveillance by the unit, allegedly because such person was believed hostile to the city administration, rejecting indictments of victim and other supporting documents to corroborate defendant's testimony indicating that his intent in keeping victim under surveillance was pursuant to ordinary police purposes, was not error.

35. Criminal law ⚷1166½(12)

A remark made by the court in absence of jury and after it had returned its verdicts could not have prejudiced defendants.

36. Criminal law ⚷1169(6)

In prosecution for conspiracy to commit murder and other offenses arising out of bombing, admission in evidence of defendant's conversations and declarations allegedly occurring either before defendant came into the conspiracy or after conspiracy had terminated was not prejudicial error, where indictment was amended to conform to proof, and all defendants were acquitted on the conspiracy charge.

37. Indictment and Information 🔑160

In prosecution for conspiracy to commit murder and other offenses arising out of bombing, allowing amendment of indictment to conform to proof, so as to make conversations or declarations admitted in evidence become material to the conspiracy alleged, was not error. Pen.Code, § 1008.

38. Criminal law 🔑423(1)

The acts and declarations of one conspirator in furtherance of the conspiracy are admissible against his coconspirators.

39. Criminal law 🔑878(4)

Verdicts finding defendant guilty of attempted murder and assault with intent to murder were not inconsistent with verdict finding defendant guilty of malicious use of explosives, since there is no repugnancy between intent to kill and intent to injure. Pen.Code, § 601; St.1939, p. 785, § 12354.

40. Indictment and Information 🔑132(5)

The prosecution was not required to elect between counts charging attempted murder and assault with intent to murder, and count charging malicious use of explosives with intent to injure. Pen.Code, §§ 601, 954; St.1939, p. 785, § 12354.

41. Homicide 🔑86

Intent to injure is of necessity a part of an intent to kill, particularly where intent to kill is attempted to be effectuated by means of an explosive. Pen.Code, § 601; St.1939, p. 785, § 12354.

42. Criminal law 🔑1216(2)

Where convictions of attempted murder, assault with intent to murder, and malicious use of explosives were all traceable to particular bombing, judgments imposing concurrent sentences for attempted murder and for assault with intent to murder, and consecutive sentence for malicious use of explosives, should be modified to make all sentences run concurrently.

43. Criminal law 🔑1184

Where sentences should appropriately be made to run concurrently, reviewing court may modify the judgments without interfering with trial court's normal discretion to determine whether judgments should run concurrently or consecutively. Pen.Code, §§ 601, 654, 669, 1260.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Earle E. Kynette was convicted of attempted murder, assault with intent to murder, and malicious use of explosives, and Roy J. Allen was convicted of malicious use of explosives, and they appeal.

Modified and affirmed.

Prior opinion, 97 P.2d 287.

John Oliver, of Los Angeles, Max E. Gilmore, of Hollywood, and George W. Rochester, of Los Angeles, for appellant Kynette.

Richard H. Cantillon and John E. Glover, both of Los Angeles, and Max E. Gilmore, of Hollywood, for appellant Allen.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Jere J. Sullivan, and Eugene D. Willliams, Deputy Dist. Attys., all of Los Angeles, for respondent.

PER CURIAM.

On February 18, 1938, the grand jury of Los Angeles county indicted the defendants Kynette, Allen and one Browne, charging them jointly in four counts with conspiracy to commit murder, attempted murder, assault with intent to murder and malicious use of explosives. A demurrer was interposed to the indictment. Upon motion of the prosecution the trial court made certain minor amendments therein and disallowed the demurrer. At the arraignment defendants entered pleas of not guilty to each of the four charges and proceeded to trial before a jury. At the conclusion of a protracted joint trial, the jury returned verdicts finding Kynette guilty of attempted murder, assault with intent to murder, and malicious use of explosives. Allen was found guilty on the charge of malicious use of explosives. Browne was acquitted on all charges. Motions for new trial and in arrest of judgment were made and denied. Judgment was thereupon entered against Allen, sentencing him to the state prison on count four for the term prescribed by law. Following the overruling of objections to the pronouncement of judgment against him on counts three and four, judgments and sentences were entered against Kynette for attempted murder and assault with intent to murder, which sentences were to run concurrently, and for the malicious use of explosives, the latter sentence to run consecutively. Thereafter Kynette moved to vacate the sentences on the charges of attempted murder and assault with intent to murder on the ground that the verdicts thereon were inconsistent with that on the charge of malicious use of explosives. The motion was denied. Kynette and Allen thereupon appealed from the judgments and orders denying their motions for new trial.

A voluminous record is before us. The reporter's transcript is approximately 5,000 pages in length. Briefs in excess of 2,000 pages have been filed. An examination of this involved record discloses that many of the assignments are common to both appeals, and these will accordingly be considered together. However, contentions peculiar to either appeal will be so designated.

We shall first consider the sufficiency of the evidence to sustain the convictions. Sharp conflicts exist in the great mass of evidence adduced upon the trial. These conflicts have been resolved by the jury's verdicts in favor of the prosecution and against the appellants as to the offenses of which the latter stand convicted. We shall therefore state only so much of the evidence and background as appears necessary to demonstrate that the verdicts of the jury are adequately supported therein.

It appears from the evidence that for some time prior to the commission of these offenses there existed in the police department of the city of Los Angeles an organization known as the Special Intelligence Unit, which had its headquarters separated from the rest of the department. For approximately two years, Kynette, a police officer, was in charge of this special unit as acting captain. Allen, also a police officer, likewise had been a member of this special unit for some time. Throughout the trial and upon these appeals, the prosecution has repeatedly asserted that the membership of this special unit, consisting of some eighteen or twenty men, was largely engaged in setting dictaphones, spying upon, "tailing" and in general conducting an extensive espionage of persons who might engage in any political activities opposed to the interests of the then incumbent city administration.

On January 14, 1938, one Harry Raymond, who was then being subjected to surveillance by this special intelligence unit, was almost fatally injured as a result of an explosion which occurred when he pressed the starter button on his automobile, in the garage of his home. It appears that Raymond had much to do with both the appointment and subsequent resignation of one Harry Munson as a police commissioner of the city of Los Angeles under the administration that assertedly employed the intelligence unit of the police department for its political protection. Munson had become indebted to one Ralph Gray for campaign work and the latter upon nonpayment procured a judgment therefor. Gray was attempting to collect the money and satisfy the judgment while Munson claimed to be without financial resources to discharge it. On June 17, 1937, a hearing was scheduled on an order to examine into Munson's financial status. Raymond, friend of the judgment creditor Gray and then enemy of the debtor Munson, was thought to possess certain information as to the latter's finances which would "put the heat" on the administration and "blow the lid off the city hall". Raymond attended the hearing, as did Kynette, then acting captain of the intelligence unit of the police department. Kynette inquired of Raymond as to the nature of the matter and was invited by the latter to take a seat and listen to the court proceedings. However, the hearing was postponed and all persons left the hearing room in the hall of records. When on the sidewalk Kynette, according to Raymond's testimony, came over to him and after an exchange of preliminary remarks stated: "this thing has got to stop. You can't turn any heat on the administration. * * * There is nothing going to happen to Munson. * * * Now, if there is any further trouble or any further bothering of Munson, you know I am the head of the intelligence squad. * * * I hope you don't try to get too tough, because you remember what happened to that little boy Red Foster." The evidence showed that "Red" Foster had been "bombed out in his room". When on the stand in his own defense, Kynette admitted attending the Munson hearing and corroborated Raymond as to the substance of their conversation in the courtroom. He also admitted having a later conversation on the sidewalk but denied that the substance thereof was as related by Raymond.

Almost immediately thereafter Kynette, with the aid of certain members of his intelligence squad, set up an espionage upon Raymond. At the direction of Kynette a "spy house" was rented by one of the members of the squad acting under an assumed name. This house was in the immediate neighborhood of Raymond's home and commanded a view thereof. It was obtained for the purpose of installing a dictaphone in Raymond's home and to observe his every move. Practically every activity of Raymond from the time he arose in the morning until he retired at night was under the surveillance of members of the intelligence squad detailed in shifts to the "spy house" or engaged in "tailing" him as he moved about the city. Allen was assigned to the "spy house" in October, 1937, and did his share toward covering every move of Raymond. In January, 1938, Kynette stated to a witness that he was tracing Raymond's career in an effort to ascertain why he was giving information to the civic committee, and stated that Raymond was giving false information as to vice establishments in order to collect money from the city administration. On occasions Kynette and Allen were observed examining Raymond's parked automobile. In December, 1937, a man resembling Kynette was observed by Mrs. Raymond in the middle of the night examining the door of their garage with the aid of a flashlight. Raymond testified that as he passed Kynette and some other men on the street early in January, 1938, Kynette declared that "it won't be long until I take care of him". A foundryman having his place of business in the city of Los Angeles testified that early in January, 1938, Kynette, accompanied by a tall man, came to his foundry and inquiry was made by them about pipe or tubing stating that they wanted "something thin that will break easy in small pieces". They were directed elsewhere by the witness. On the night of January 13th and until approximately 4 o'clock on the morning of January 14, 1938, the neighbors testified that there was considerable activity in the "spy house". The witness Sakalis, a fruit and vegetable peddler who lived across the alley from the "spy house", testified that he was awakened by three men who were talking in the alley and who immediately went into the "spy house" after the witness remonstrated with them. His wife testified that she later heard footsteps going down the alley from the "spy house" toward Raymond's home and in about one-half hour heard return footsteps. Apparently this was the only night that there had been such late activities at the "spy house" for the neighbors had not previously heard the occupants. Allen admitted being on duty there with the acquitted officer Browne on that night. Allen claims, however, to have left the "spy house" at about 11 p. m. —a matter which the jury undoubtedly considered and determined in the light of all the evidence.

On the morning following this unusual activity at the "spy house", the explosion of a bomb occurred when Raymond pressed the starter button of his automobile. Fragments of iron pipe and wire were found in the vicinity of the car and garage after the bombing. Experts who had studied these fragments concluded that the bomb used was "a three inch malleable wrought iron pipe with a cast iron cap at each end, the pipe of unknown length". Here, it should be recalled that a foundryman testified that Kynette and another man had previously inquired about piping that would "break easy in small pieces". Under the routine theretofore followed at the "spy house" when Allen and his partner left the house on the night preceding the bombing, they would normally reopen the house and resume their surveillance of Raymond the following morning. Instead they did not return the following or any other day, and such espionage as was thereafter carried on from the house was done by other members of the unit who apparently did not know what had happened. Sakalis, the vegetable peddler who had remonstrated with three men for their activity in the alley late on the night preceding the bombing, also testified that a few mornings thereafter while proceeding on his vegetable route he was followed into the hills in back of Glendale by two men in an automobile who stopped him, dragged him from his truck, beat him and told him to keep his mouth shut as to what he knew concerning the Raymond bombing. Sakalis definitely identified these men as Kynette and Allen and referred to them as his "neighbors" in the "spy house". The jury might reasonably infer that the only persons who would have any interest in silencing Sakalis as to any knowledge he might possess pertinent to the bombing would be the participants therein. As stated, Sakalis was assaulted in the morning. Later that same day Allen left the city for a mountain resort. Although while there he had been in telephonic communication with Kynette and had been informed that he was wanted by the police and the district attorney, he remained away for several days. He attempted to explain his absence as a vacation. It is significant that while the homicide squad of the police department was exerting every effort to solve the bombing outrage and track down the perpetrators thereof, the members of the intelligence unit, including Kynette as acting captain thereof, failed to disclose that for months they had had the victim thereof under constant surveillance and were familiar with the movement of all persons and vehicles in and about the Raymond home, which information, if disclosed, conceivably might have been of assistance in the solution of the crime. The prior espionage of Raymond by the intelligence unit came to light as a result of the efforts of the homicide squad. In view of this the jury may well have reasoned that innocent men, occupying positions as police officers, would not have remained silent but would have come forward and immediately advanced all of their information in the hope of apprehending the offenders.

While a suspect, Kynette, in response to inquiry by members of the homicide squad as to his whereabouts on the night preceding the explosion stated that until 10 o'clock he had been at a reserve officers' meeting and that thereafter he "was on a secret mission" for the mayor, the nature of which mission he would not divulge. Upon the trial, he testified to attending a reserve officers' meeting in the early evening (and in this he was corroborated by others there attending) and that from the meeting he went to his office for a brief period before retiring to his home where he assertedly arrived at approximately 11:45 o'clock. Contrary to Kynette's original testimony on the point, it appears from testimony of telephone company employees that on the night following the day of the bombing he made two or three unsuccessful efforts to telephone to the brother of the then mayor who was in Mexico City and from whom he assertedly received his orders as head of the intelligence unit. Failing to make the desired connection he spoke with the then chief of police, also in Mexico City. The purpose of such a call and any inconsistencies in the testimony of Kynette with respect thereto were matters for the jury to consider. Among other things, the witness Gray, whom the victim Raymond prior to his injuries was attempting to assist in collecting an indebtedness from the ex-police commissioner Munson, testified that while he was visiting with Raymond at the hospital on the day following the bombing he received a telephone call from a person whose voice he recognized as Kynette's, and that the caller, after learning that the victim Raymond was "resting better" declared "That's too bad. Next time we will do a better job. You're next, Mr. Gray, maybe tomorrow, next day or next week, but we will get around to you and we will do a better job on you than we did on Mr. Raymond." The audacity of such a statement is appalling, but the jury may well have concluded that the author thereof, deeming himself secure in his political entrenchment, felt safe in making these threats.

During a search of Kynette's home by members of the homicide squad and the police chemist, certain wire was found by the latter on the work bench in the garage. It was found to consist of two strands, one white covered and the other black covered, of California Cap Company detonator leg wire, a type of wire produced only by the named company and attached to and constituting leg wires for electric detonators. Such wire is not readily available on the market. As stated earlier, fragments of wire and other substances had been picked up by investigators at the scene of the bombing. Experts segregated and examined these fragments and among them found what was determined to be both white and black covered California Cap Company detonator leg wire, similar to that found in appellant Kynette's garage. There was evidence as to gauge, insulation wrappings, enamel color of insulation, lengths of wires, etc., from which the jury might infer that the wire found in Kynette's garage represented the unused portions of the detonator leg wire employed in the Raymond bomb. The testimony of prosecution experts would support such inference. The opinions of these experts were also based, among other things, upon the similarity as to the quantity of impurity in the copper of the black covered wires found in Kynette's garage and at the scene of the explosion and of the similarity of impurity in the white covered wires found at each place, though singularly enough the black and white wires regardless of where found were not similar in quantity of impurity. The prosecution experts testified that there was no substantial dissimilarity between the wires found at the scene of the bombing and those found in Kynette's garage.

[1] Enough of the evidence has been set forth to illustrate that there exists therein ample support for the jury's verdicts, and we shall hereinafter refer to such other portions as are pertinent to the consideration of appellants' assignments of error. By way of recapitulation, there was proof of the corpus delicti, proof of sufficient motive, proof of opportunity for the appellants to commit the offenses and lack of opportunity for others (because of the close surveillance of the victim by the appellants), and proof of acts and declarations of the appellants tending to disclose a consciousness of guilt. From all of this the jury reasonably could conclude that the appellants were guilty in the particulars indicated by the verdicts.

[2] Appellants next assert that they were deprived of due process of law and equal protection of the law when the trial court excused certain talesmen who declared that they had conscientious scruples against voting for the inflicting of the death penalty. The contention is that inasmuch as there are no degrees of conspiracy, the jury was powerless to fix the degree of the murder the appellants had assertedly conspired to commit and therefore was equally powerless to impose the death penalty. The appellants were ultimately acquitted on the conspiracy charge and upon final selection of the jury had not fully exhausted their peremptory challenges. Aside from this, however, we find no merit in the contention. Under subdivision 8 of section 1074 of the Penal Code, "A challenge for implied bias may be taken * * * 8. If the offense charged be punishable with death, the entertainment of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror". Count one of the indictment charged the appellants with conspiracy to commit murder. Under section 182 of the Penal Code, criminal conspiracy is "punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony". Section 187 of the Penal Code defines murder as the "unlawful killing of a human being, with malice aforethought". Such malice, under section 188, may be express or implied, and is express when "there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature". Section 189 divides murder into degrees and declares that all murders perpetrated by certain designated means, and "any other kind of willful, deliberate, and premeditated killing" are of the first degree. Murder of the first degree, under the provisions of section 190, is punishable either by death or life imprisonment in the discretion of the jury.

[3] We are satisfied from an examination of the above-cited Code sections that a conspiracy to commit murder can only be a conspiracy to commit murder of the first degree for the obvious reason that the agreement to murder necessarily involves the "willful, deliberate, and premeditated" intention to kill a human being. A murder committed in pursuance of such an agreement would unquestionably be a "willful, deliberate, and premeditated" murder of the first degree and punishable by death or life imprisonment. Consequently, if the fact of a conspiracy to commit murder is established, the first punishment clause of section 182 applies and the conspirators are punishable in the manner prescribed by section 190, i. e., by death or life imprisonment. This being so, the court below properly excused prospective jurors entertaining conscientious opinions against infliction of the death penalty. In so doing, the court merely complied with the mandate of subdivision 8 of section 1074, supra.

[4, 5] Appellants next challenge the propriety of certain rulings of the trial court admitting evidence tending to establish that the intelligence unit as a part of its espionage of Raymond had tapped the telephone wires leading into his home. Upon examination by the prosecution, several members of the intelligence unit refused to answer questions as to wire tapping at the Raymond home on the ground it might tend to incriminate them. Among others, the prosecution then called certain residents of the bungalow court wherein the "spy house" was situated. These witnesses generally testified to seeing one of the members of the intelligence unit up on a nearby telephone pole, to noticing wires thereafter running from the "spy house" to the telephone pole and to observing one of the occupants of the house sitting at a telephone and writing. The testimony of telephone company officials established that no telephone had been ordered for or established in the "spy house". The obvious inference for the jury to draw was that telephone wires leading to the Raymond home had been tapped. Appellants' argument is

that since wire tapping is an offense under section 640 of the Penal Code, it was error to permit the introduction of evidence tending to show the commission of this separate and distinct crime. The rule relied upon is of course well established, but the evidence was clearly admissible under the equally well-established exception thereto. The rule against the admission of evidence of other crimes does not exclude such evidence when it tends to prove any fact necessary or pertinent to the proof of the crime for which a defendant is being tried. 8 Cal.Jur. 60–73; People v. Burkhart, 211 Cal. 726, 731, 297 P. 11. In other words, the commission of another crime in no way connected with the crime charged cannot be proved. Under the prosecution's theory, the asserted wire tapping was in furtherance of the original conspiracy to murder Raymond as charged in count one of the indictment. Section 1104 of the Penal Code requires that "one or more overt acts" must be alleged in the indictment, and proved, to warrant a conviction for criminal conspiracy. But "other overt acts not alleged may be given in evidence". Here, in compliance with the Code section, the indictment alleged commission of certain overt acts toward accomplishment of the conspiracy, and proof of such other overt acts as wire tapping was clearly admissible. By their pleas of not guilty the appellants denied the conspiracy and other charges and any evidence showing preparation therefor or tending to establish their commission was proper. Under the prosecution's theory, for the espionage of Raymond it was essential that those spying upon him have full knowledge of his actions and contemplated movements. Information gathered from the tapping of his telephone would materially assist in this respect, particularly in view of the disclosed inability to place a dictaphone in Raymond's home. People v. Glass, 158 Cal. 650, 682, 112 P. 281, relied on by the appellants, is not inconsistent with our holding. While factually distinguishable that case recognizes the exception to the general rule. As stated, the wire tapping was a part of the conspiracy alleged, and an overt act in preparation of the assault on Raymond. At the time of the admission of evidence thereon it was for the jury to determine under all the evidence whether Allen's connection with the conspiracy antedated or followed such wire tapping incident. His actual presence at the "spy house" at the very moment of the wire tapping incident was not indispensable. The "listening-in" on the Raymond telephone occurred, at least in part, when Allen was assigned to the "spy house".

[6, 7] As another phase of the wire tapping incident, appellants urged that the prosecution was guilty of prejudicial misconduct in calling to the stand officers Phegley, McDonald and Draper, members of the intelligence unit who concededly had done surveillance duty at the "spy house", and interrogating them, over objection, upon their activities at that place, particularly with reference to any tapping of the Raymond telephone. These witnesses consistently and repeatedly stood upon their constitutional right and refused to divulge such information upon the ground it might tend to incriminate them. Inasmuch as the witnesses are claimed to have asserted the same right prior to trial when they were examined in the district attorney's office and before the grand jury, appellants charge that the prosecution acted in bad faith in calling as its witnesses these persons who assertedly were or should have been defense witnesses and then discrediting them before the jury by interrogating them upon the subject of wire tapping knowing that they would, as on previous occasions, stand on their constitutional right not to answer upon the ground that it might tend to incriminate them. We find nothing of a prejudicial nature in the questions propounded, the rulings on the objections thereto, or in the occasional remarks of counsel. With respect to the latter, the trial court when necessary admonished the jury to disregard them. The fact that these witnesses previous to the trial had asserted extrajudicially their constitutional right to refuse to answer did not preclude the prosecution from calling them upon the trial and interrogating them under oath, upon the subject of wire tapping in the hope that in the interim they might have undergone a change of mind and be willing to disclose such information. Moreover, a witness may not constitute himself an arbitrary or exclusive judge as to whether evidence called for by a question may tend to incriminate him. The matter is for the trial court to decide in the light of all the evidence. Ex parte Stice, 70 Cal. 51, 53, 11 P. 459; In re Berman, 105 Cal.App. 37, 49, 287 P. 126; Overend v. Superior Court, 131 Cal. 280, 283, 63 P. 372. The fact that the cited cases were civil in character does not alter the soundness of the principle

therein enunciated. As stated in Wharton's Criminal Evidence, section 469, quoted in the last-cited case, "The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer." Obviously in the absence of questions to the witnesses by the prosecution, the court below would not be in a position to rule on the matter. Nowhere is complaint made that any witness was improperly compelled by the trial court to answer interrogatories tending to incriminate him.

[8] In view of our conclusion on the assignment last considered, there can be no merit in appellants' next contention that the court below erred in refusing to grant their motion to strike from the record all questions which the above-named three witnesses had refused to answer based on the constitutional privilege. Nor do we find any merit in the contention that the trial court erroneously refused to inform or instruct the jury as to the effect, if any, of the refusal of witnesses other than the appellants to respond to questions upon assertion of their constitutional privilege against self-incrimination. The point arose when the first of the three named officers, Draper, took the stand. At that time, in response to appellants' request, the trial court correctly stated: "I will instruct the jury that no inference is to be drawn from the fact that the witness refused to testify, especially no inference reflecting on the defendants. As to the witness himself, why, you are the sole judges of his credibility in other matters, and he stands before you merely as a witness in the case, but I do repeat what I said, that no inference as to the guilt or innocence of the defendants is to be drawn from his refusal." In view of this proper and clear instruction, it was not necessary for the court below to restate the same upon every request by the appellants as the situation repeated itself throughout the trial. The case of People v. Black, 73 Cal.App. 13, 29–34, 238 P. 374, cited by the appellants, is clearly distinguishable, for there under the contention of the district attorney and the admonitions of the trial court the jury was permitted to draw such inferences "as the case may justify" and "as you desire" from the refusal of a witness to answer questions on the ground that they might tend to incriminate him. As there pointed out, the jury was thereby permitted to draw any inference it chose as to the guilt or innocence of the defendant from the refusal of a witness other than the defendant to testify on the constitutional ground of privilege. Here, no such inference was permitted. The trial court expressly instructed the jury it could draw no inference as to the appellants' guilt or innocence from the refusal of others to testify on the constitutional ground.

[9] Appellants also challenge the propriety of the action of the district attorney in referring in his closing argument to the claim of privilege asserted by said witnesses with respect to the subject of wire tapping. They concede that no objection was voiced by them at the time which would have afforded the trial court opportunity to rectify any asserted error. But, apart from this, we find no error in the argument of the district attorney. It conformed with the trial court's earlier instruction. The district attorney generally argued that the jury was not to draw any inference "against these defendants to the effect that they are guilty of anything" from the refusal of others on constitutional grounds to answer questions relative to wire tapping. But that it might consider "in connection with the credibility to be given to these defendants" the fact that while others who had been habitués of the "spy house" had refused to answer questions relative to wire tapping on the ground it might tend to incriminate them, the appellants had positively denied that there had been any wire tapping. No impropriety appears in the suggestion that the jury consider this circumstance in passing upon the credibility of the appellants. People v. Glass, supra, merely precludes an inference as to the guilt or innocence of a defendant from the refusal of others to testify on constitutional grounds.

[10] What we have said answers appellants' ancillary contention that the court below erred in refusing to give a requested instruction having to do with the effect of witnesses refusing to testify on the constitutional ground. So far as witnesses other than the appellants are concerned, the instruction or admonition given by the court during the trial, and above quoted, was, as already stated, adequate and correct. The refused instruction was too broad. It covered all witnesses in the case, including the appellants, and in view of our conclusion on the contention next following was properly refused.

[11-13] At the trial appellants took the stand in their own defense and related exculpatory stories in which they denied any and all criminal activity at the "spy house" and disclaimed any knowledge of or participation in the Raymond bombing. However, before the grand jury they had asserted their constitutional privilege against self-incrimination in response to many questions as to the subject of which upon the trial they unqualifiedly asserted their innocence. In view of this, the prosecution, over objection, was permitted to put in evidence for the limited purpose of impeachment the pertinent portion of the grand jury transcript on the ground that it was inconsistent with the appellants' claimed innocence upon the trial and could be considered by the jury in determining their credibility. Both in its ruling on the objection and in its subsequent instructions, the trial court carefully stated that such evidence was not generally admitted as having any bearing on the question of the guilt or innocence of the appellants, but was admitted for the limited purpose of impeachment and as evidence going to the credibility of the appellants as witnesses upon the trial. We find no error in the ruling or the instruction. The effect was not, as asserted, to destroy the constitutional privilege afforded appellants of answering as they did before the grand jury. In Nelson v. Southern Pacific Co., 8 Cal.2d 648, 654, 67 P.2d 682, 685, it was held that a question as to prior refusal to testify on ground of privilege against self-incrimination was proper "for impeachment purposes since the claim of privilege gives rise to an inference bearing upon the credibility" of the witness' statement of lack of negligence upon his part. Among others, Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350, is there cited. Although these were civil cases, we see no distinction so far as impeachment is concerned in the rights of witnesses in civil and criminal actions, including a defendant who, as here, takes the stand in his own defense. Particularly is this so since the 1934 amendment to section 13 of article I of the Constitution which, contrary to earlier practice, permits the court and counsel to comment upon and the jury to consider a defendant's "failure to explain or to deny by his testimony any evidence or facts in the case against him", and this "whether the defendant testifies or not". By analogy, the use solely for impeachment purposes of a defendant's prior refusal to testify before a grand jury because of fear of self-incrimination, no more destroys that constitutional privilege than does the right to comment upon and consider a defendant's failure to explain evidence against him tend to destroy his equally valuable constitutional right to refuse to be a witness against himself. In this latter connection, see People v. Byers, 5 Cal.2d 676, 685, 55 P.2d 1177. It is accordingly unnecessary for us to discuss the authorities from other jurisdictions cited by appellants. And People v. O'Bryan, 165 Cal. 55, 130 P. 1042, also cited, is clearly distinguishable. The testimony of the defendant therein before the grand jury was not admitted for the limited purpose of impeachment but as evidence on the general issue of guilt or innocence. Under the conditions then existing and for the reasons there stated, the evidence was improperly admitted on the general issue. However, the error was even there held not to be prejudicial.

[14] Conceding that the instruction as to the effect of a defendant standing mute in the face of an accusatory statement had no proper place in the cause and should not have been included in the charge to the jury, we fail to perceive wherein under all of the evidence the appellants could have been prejudiced thereby. It could not have confused the jury into believing that it had application to those occasions when the appellants had asserted their constitutional privilege against self-incrimination for the court fully and clearly instructed the jury with respect thereto.

[15-17] It is next urged that the trial court erred in certain rulings made during the redirect examination of the chief of police, who had been called as a prosecution witness. On direct examination he was generally interrogated as to his position and service with the police department, Kynette's connection therewith, to which superior officer the latter was answerable, and whether the witness had any knowledge of the surveillance of Raymond and of the use of the "spy house" in connection therewith. At no time during his direct examination was the witness asked any questions as to the activities of the intelligence unit commanded by Kynette. However, on cross-examination by defense counsel he was asked such a question and he answered in substance that it was its function "to check on the activities of various criminal elements in the community * * * and criminal political elements

* * * where there appear to be criminal connections * * *." Thereupon, on redirect examination, the prosecution in line with its theory that the intelligence unit theretofore had been employed principally in political work rather than criminal work, launched into an extensive examination of the witness with a view to determining whether the intelligence unit had not from time to time investigated certain named persons who were wholly free of criminal tendencies but who apparently had been inimical to the then incumbent city administration. As stated by the district attorney during the trial, the evidence was pertinent to the subject opened by the cross-examination and had a tendency to establish a motive for the appellants' desire to do harm to Raymond who apparently was causing embarrassment to the city administration or members thereof. The extent of the redirect examination of a witness is largely within the discretion of the trial court. Appellants frankly concede that they know of no case wherein a reversal was had because of the action of a trial court with respect thereto. It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he may be examined on redirect as to such new matter. People v. Corey, 8 Cal.App. 720, 97 P. 907, cited by the appellants, recognizes this rule.

[18-20] The contention is made that the trial court committed prejudicial error during the cross-examination of Kynette by permitting the prosecution, over objection, to interrogate him as to matters assertedly not touched on direct examination, and to so conduct the cross-examination as to degrade Kynette and violate his constitutional privilege against self-incrimination. For example, in an effort to refute the theory underlying the prosecution, Kynette on his direct examination attempted to establish, in effect, that the surveillance of Raymond was in the performance of legitimate police activity and that the function and activities of the intelligence unit were confined to legitimate police work. Under the circumstances, there was no error in the rulings of the court below which permitted the prosecution on cross-examination to interrogate the witness concerning other activities of the intelligence unit, of which he was in command, with respect to persons who apparently had been hostile to the city administration. The district attorney clearly declared the purpose of such cross-examination, which unquestionably was related to the direct examination and to Kynette's knowledge of the purpose and activities of the intelligence unit. In furtherance of this cross-examination it was proper to permit the use of the files of the intelligence unit which had been procured under court subpoena. Again the reference to Kynette's temporary suspension from the police department earlier in his career and at a time remote from the Raymond bombing, while perhaps immaterial to the issues of this case, cannot be said to have been prejudicial. We do not deem it necessary to deal in detail with the many other matters of which complaint is made. The cross-examination of a witness may extend to all matters about which he was examined in chief and may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination. People v. Tyren, 179 Cal. 575, 579, 178 P. 132; People v. Ryan, 199 Cal. 513, 521, 250 P. 164; Pen.Code, sec. 1323.

[21, 22] As related earlier in this opinion, the witness Sakalis, a vegetable peddler, and one of the principal prosecution witnesses, had testified to remonstrating with three men in the immediate vicinity of the "spy house" because of their activity late on the night preceding the bombing, and had further testified that a few days thereafter he was followed into the hills while on his vegetable route and was beaten by two men whom he positively identified as Kynette and Allen. It further appeared from the evidence that Sakalis was thereafter placed under police protection and that because of his resulting loss of business and the straitened financial condition of his family he was paid fifty dollars every two weeks by the district attorney's office for a limited period. During the course of a minute and searching cross-examination by defense counsel Sakalis was repeatedly questioned as to whether he had immediately reported the beating and the identity of the perpetrators thereof to anyone and he was likewise closely questioned as to the payments he had been receiving from the office of the district attorney. The undoubted purpose of such cross-examination was to impeach the credibility of the witness and to attempt to establish that his story was probably of recent fabrication and perhaps influenced by the pay-

ments so received. Accordingly, on redirect examination the prosecution properly asked Sakalis, without objection, whether he had reported the matter to anyone and he answered in the affirmative, naming two persons. These two persons were produced by the prosecution and testified, over objection, in a manner indicating that Sakalis had made statements to them prior to the trial which were consistent with his testimony upon the trial. It is urged that the trial court erred in admitting the testimony of these witnesses as to conversations occurring out of the presence of appellants. When a witness has been charged with improper motives of interest, or improper influences, or with recent fabrication, the law allows hearsay statements to be introduced for the purpose of showing that the same and consistent statements had been made at a time prior to the fabrication or prior to the time the motive of interest existed. Such evidence is then admitted, not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purposes of the case. Clark v. Dalziel, 3 Cal.App. 121, 124, 84 P. 429; People v. Billings, 34 Cal.App. 549, 554, 168 P. 396; 27 Cal.Jur. 178, sec. 153. The trial court both at the time of its admission and at the close of the trial admonished the jury, as required by the authorities, that this particular evidence was limited to the credibility of Sakalis.

[23, 24] Along this same line, the appellants contend that the court below erred in permitting the prosecution, over objection, to put in evidence a conversation out of their presence between one of the bodyguards of the witness Sakalis and the district attorney in which the former narrated to the latter the dire financial condition of Sakalis as a result of the interruption of his business by reason of the police protection essential to him as a potential witness. As a result of this report, the office of the district attorney commenced the bi-weekly fifty dollar payments above mentioned. The conversation was testified to by the bodyguard who participated therein and by the witness Sakalis in whose presence it was held. This testimony was offered by the district attorney and admitted by the court as bearing upon the credibility of Sakalis. It tended to indicate the information upon which the office of the district attorney ordered the payments to be made to the witness while under guard and to refute the innuendo arising from the minute cross-examination of Sakalis that the payments may have been made to influence his testimony or to cause him to fabricate a story against the appellants. We find no error in its admission. As stated in 6 Wigmore on Evidence, 3d Ed., 177, section 1766, "If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply." In the cases cited by appellants the hearsay testimony related either to the corpus delicti or to the defendant's connection therewith. Such is not our case.

[25] During the cross-examination of Sakalis by defense counsel he was asked whether he had told a named individual that in addition to the above payments he was getting "$3,000 for testifying here". The witness denied having made such a statement and at no time was the named person produced by the defense to refute his denial. However, on redirect examination of Sakalis the prosecution, apparently in an effort to clarify the impression created by such cross-examination, asked the witness if at any time any one had offered him $3,000 and he replied that at a designated time and place a stranger had offered him $3,000 "to shut my mouth, not say anything". On recross-examination the defense inquired as to the identity and description of said person. No objection was immediately interposed to the quoted redirect testimony but a day later the defense unsuccessfully moved to strike it out, the court reserving a final ruling. Apparently the matter was not further pressed by the defense. It is now urged that the court below erred in not granting the motion to strike. We are of the view that by their cross-examination as to a possible $3,000 bribe of the witness, the defense opened the door to the redirect examination which resulted in the testimony of which complaint is now made. The general rule and the authorities on this proposition, referred to earlier in this opinion, need not here be repeated.

[26] Complaint is next made of the production in evidence, over objection, of a model bomb, the contention being that no proper foundation was laid therefor. The prosecution experts, who were amply qualified, testified at great length as to the kind and character of the fragments of the

bomb found at the scene of the explosion. From their examination and study of these fragments and from the nature of the destruction wrought in the Raymond garage they expressed their expert opinions as to the kind of bomb that had been employed. They then identified a model bomb which had been constructed by them or under their supervision and testified that while not necessarily identical it represented substantially and approximately the type of bomb which had been used in the Raymond bombing.

[27] In answer to defense counsels' objection, the trial court declared that the model "picturizes" what the expert then on the stand "has already described". The use of maps, models, diagrams, and photographs as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method. 3 Wigmore on Evidence, 3d Ed., 173, § 790; see, also, People v. Ferdinand, 194 Cal. 555, 564, 229 P. 341; People v. Glab, 15 Cal.App.2d 120, 123, 59 P.2d 195; People v. Phelan, 123 Cal. 551, 568, 56 P. 424.

[28] Nor do we find any error in the trial court's ruling admitting in evidence an exhibit containing pieces of wire. Contrary to the appellants' contention, the wires making up the exhibit were sufficiently identified by a prosecution expert as wires that had been picked up by him at the scene of the Raymond explosion or retrieved at the same place by other named persons engaged for a similar purpose.

[29] As intimated earlier in this opinion, Pinker, the police chemist, while searching the appellant Kynette's garage found certain wire which, as above stated, closely resembled fragments of wire found at the scene of the explosion and apparently used in the bomb. Shortly thereafter, Pinker showed the wire to the police captain who served as superintendent of the bureau of records and identification. A few days later it was turned over to certain other police superiors, the same wire ultimately reaching the hands of one of the prosecution experts for examination and study. It is now urged that the court below erred in its rulings on certain preliminary foundational questions and in excluding from evidence the rules and regulations of the police department, the theory being that such rules and regulations, if admitted, would have tended to show that Pinker had violated them in that he had not "booked" the wire with the property clerk. The impropriety, if any, was immaterial. The identification of the wire by Pinker was positive. The rules and regulations merely require a booking of property "without unnecessary delay". The temporary retention of the wire for examination and proper marking for identification purposes prior to its delivery to superior officers did not constitute a violation thereof.

[30] Appellants' next contention has to do with the action of the trial court in admitting in evidence a copy of "The Pacific Clipper", a newspaper published by a negro named Alexander who apparently had been making assaults upon the city administration. During his examination on the witness stand Kynette admitted that Alexander previously had been under investigation and surveillance by the intelligence unit of the police department. The newspaper was identified as a part of the files of the intelligence unit which had been procured by the prosecution by subpoena duces tecum. It was offered under the prosecution's theory that the real purpose of the intelligence unit was not the performance of legitimate police duty but the elimination of persons hostile or inimical to the then incumbent city administration. Such evidence would be relevant to the motive underlying the Raymond bombing. The court admitted it for a limited purpose, stating that "it is not to be considered by the jury that any of the contents of the newspaper are deemed to be true or otherwise but simply the knowledge of what was going on". We find no error in the admission of such exhibit.

[31] The next five assignments of the appellants have to do with the refusal of the trial court to give certain requested instructions. A brief discussion will be sufficient, for we have examined the entire charge to the jury and it adequately and fairly covers the issues. The first refused instruction concerned the presumption of innocence. This subject was adequately covered by the instruction given by the court, which followed the language of section 1096 of the Penal Code. Section 1096a of the same Code declares that no other instruction need be given on the subject. See People v. Cohen, 94 Cal.App. 4, 6, 270 P. 377; People v. Leddy, 95 Cal.App. 659, 678, 273 P. 110; People v. Ilderton, 14 Cal.

App.2d 647, 58 P.2d 986; People v. Magsaysay, 210 Cal. 301, 302, 291 P. 582. The subjects of the other refused instructions were likewise covered by other proper instructions given by the court.

[32, 33] It is next urged that the district attorney improperly illustrated his argument by reference to a well known New York trial wherein the prosecution kept witnesses in order to insure their protection. It is also contended that the district attorney otherwise improperly expressed opinions during his discussion of the witness Sakalis and the necessity for keeping him under guard and making payments to him. The details need not be narrated. Counsel may illuminate his argument by illustrations which may be as various as the resources of his talents. He may refer to matters of common knowledge, not special to the case, and to well known historical incidents. People v. Molina, 126 Cal. 505, 507, 59 P. 34; 8 Cal.Jur. 272, § 333. The trial court admonished the jury to regard as such any expression of opinion by the district attorney, and not to be prejudiced against the appellants by reason thereof. A portion of the argument complained of referred to certain matters touched upon by the evidence. They were matters that might properly be called to the jury's attention for whatever value it desired to attach to them. In People v. Cook, 148 Cal. 334, 83 P. 43, cited by the appellants, the district attorney gave a recital of purported facts having no support in the evidence. Each case must turn on its own peculiar facts. We cannot say that the argument of the district attorney resulted in any prejudice to the appellants' cause.

[34] As before stated, it was the theory of the prosecution throughout the trial that Raymond was under surveillance and bombed because he was believed to be hostile and inimical to the city administration. Inspection of Kynette's testimony, both on direct and cross-examination, definitely indicates that it was his purpose to establish that the surveillance of Raymond was undertaken in the ordinary course of legitimate police work and pursuant to orders from the then chief of police who assertedly stated to him that Raymond and others were connected with a conspiracy to obtain false affidavits concerning a member of the grand jury. Thereafter counsel for the defense offered in evidence certain indictments of Raymond and other supporting documents for the stated purpose of corroborating Kynette's testimony as to his asserted motive and intent in keeping Raymond under surveillance. We find no error in the ruling rejecting this evidence. Obviously, the truth or falsity of the information underlying the order of the chief of police to Kynette to place Raymond under surveillance would not tend to corroborate or establish the truth of Kynette's testimony that his surveillance of Raymond was based solely on the order. The material fact for the defense to establish was that the surveillance was prompted by the order of the chief of police. In other words, the question was whether Kynette did receive the information and act upon it, and not whether the information was true. The rejected evidence was not offered to prove that anything Kynette said he had done was actually done.

[35] The appellants quote many excerpts from the comment of the court to the jury at the close of the evidence, to support their charge that it was "argumentative and characteristically an act of advocacy". Specifically, they assert that the court gave undue prominence to certain evidence, that its comments were not a full and proper summing up of the evidence and that it invaded the province of the jury by failing to give a judicial and dispassionate discussion of the evidence. Our examination of the court's comment satisfies us that it does not exceed the bounds of propriety set forth in recent decisions of this court. See People v. De Moss, 4 Cal.2d 469, 476, 50 P.2d 1031; People v. Ottey, 5 Cal.2d 714, 722, 56 P.2d 193; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211; People v. Patubo, 9 Cal.2d 537, 541, 71 P.2d 270, 113 A.L.R. 1303. The remark of the court made in the absence of the jury and after it had returned its verdicts could not have prejudiced the appellants.

[36-38] We turn now to certain contentions peculiar to the Allen appeal alone. This appellant in three assignments of error asserts that the court below erred in ten separate instances in denying his motions to strike from the record certain conversations had or declarations made by Kynette in his absence. Generally, it is urged that these conversations and declarations occurred either prior to Allen's coming into the alleged conspiracy or after the conspiracy had terminated, and were inadmissible hearsay as to Allen. We find

no prejudicial error here. As a result of an amendment to the indictment to conform to proof several of the conversations or declarations became material to the conspiracy alleged. Nor do we find any impropriety in the trial court's allowance of such amendment. Under the provisions of section 1008 of the Penal Code a trial court may order an amendment of an indictment "for any defect or insufficiency, at any stage of the proceedings" provided it is not so amended "as to change the offense charged". The amendment here permitted was clearly within the purview of the statute and contrary to the appellant's contention it did not "change the offense charged". The conspiracy charged remained as originally alleged. The amendment merely permitted the specifying of a few overt acts in furtherance thereof in addition to the overt acts originally alleged, and as to all of which there was ample evidence in the record. As to the remaining conversations and declarations, it is well settled that the acts and declarations of one conspirator in furtherance of the conspiracy are admissible against his coconspirators. It was for the jury under all the evidence to determine when the alleged conspiracy had its inception and when it terminated. At the time of its admission and when Allen moved to strike the same, the evidence complained of had some relevancy to the alleged conspiracy. Moreover, inasmuch as all the defendants were thereafter acquitted on the conspiracy charge it is difficult to perceive wherein any of them could have been prejudiced by this evidence.

[39-41] This brings us to the contention of Kynette that the court below erred in instructing the jury that he could be convicted upon any and all of the offenses charged in the indictment. He urges that the verdicts finding him guilty on counts two and three are inconsistent with the verdict finding him guilty on count four. Relying on People v. Koehn, 207 Cal. 605, 279 P. 646, he argues that the intent to murder essential to each of the charges of attempted murder and assault with intent to murder, contained respectively in counts two and three, is inconsistent with the intent to injure alleged in count four in connection with the offense of malicious use of explosives therein charged. We find no merit in the contention. Prior to its repeal in 1939 and the inclusion of its counterpart in the Health and Safety Code as section 12354, St.1939, p. 785, section 601 of the Penal Code, under which the appellant was charged in count four, declared that any person who maliciously used explosives "with the intent to injure, intimidate, or terrify any human being, or by means of which any human being is injured or endangered, is guilty of a felony, and punishable by imprisonment in the state prison not less than one year". In the Koehn case, supra, the defendant was charged with and convicted of attempted murder and malicious use of explosives. Under the admitted and peculiar circumstances of that case this court vacated the judgment on the former charge and affirmed the judgment on the latter charge on the ground that the evidence indisputably disclosed that the explosives there had been used "with the expressed purpose of intimidating and terrifying" a judge into rendering a particular judgment in a cause then pending before him. The opinion in that case points out the inconsistency between the offense of attempted murder of the judge which, if successful, would have frustrated the effort to procure a favorable decision by the malicious use of explosives which admittedly were intended merely to terrify and intimidate the judge into rendering such favorable decision. The same inconsistency does not exist in our case, and under the provisions of section 954 of the Penal Code the prosecution was not required to elect. Here, the indictment charged an attempted murder, an assault with intent to murder and the malicious use of explosives "with the intent then and there to injure the said Harry Raymond". As already indicated, the evidence was such as to warrant a conviction on any or all of these charges. There is no repugnancy between an intent to kill the victim and an intent to injure him. There can be little doubt that if Kynette had intended by the use of a bomb to kill Harry Raymond, as found by the jury, he must also have intended to sufficiently injure Raymond by flying fragments of the exploded bomb as to cause his death. Under the evidence in this case, it is impossible to conceive how there could have been an intent to kill Raymond without at the same time entertaining an intent to injure him. Or, those responsible for planting the bomb could well have concluded, under the prosecution's theory, that the exploding of the bomb would either kill the victim or so maim him as to preclude or

deter him from making further attacks upon the city administration. To follow appellants' contention to its logical conclusion would lead to the absurd result of holding that proof of a defendant's intent to kill the victim would be a defense to a prosecution for the malicious use of explosives with intent to injure said victim. In short, we are of the view that an intent to injure is of necessity a part of an intent to kill, particularly when, as here, the latter intent is attempted to be effectuated by means of an explosive which necessarily must tear and maim the body of the victim. We find it unnecessary to discuss at length the case of People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168, cited by the appellant, for it too presented a distinguishable factual situation. The offenses there charged were solicitation to offer a bribe and attempted grand theft. As pointed out therein, the money could have been procured from the victim either for bribery purposes or because the defendants intended to divert it to their own use. But, as there indicated, only one of such intents could have existed.

[42, 43] While we are satisfied that no inconsistency exists in the several verdicts and judgments against Kynette and that he properly stands convicted of attempted murder, assault with intent to murder and the malicious use of explosives, we are not unmindful of the fact that all three offenses though involving variable elements are traceable to and are the direct result of the placing of a bomb in the automobile of the victim Raymond. In view of this, it would have been more in conformity with the legislative intent expressed in section 654 of the Penal Code to preclude more than one punishment for an act "punishable in different ways by different provisions of this code", if the court below had caused all three sentences to run concurrently rather than two of them, with the third running consecutively. The Attorney General appears to recognize the reasonableness of such a result, for in one of his briefs he states that "Under these circumstances, we submit that if the Court is of the opinion that this set of circumstances come within the provisions of section 654 of the Penal Code, that the simple remedy is * * * to decree that the defendant Kynette shall suffer the greatest penalty, namely, that provided by section 601 of the Penal Code." We are of the opinion that to give effect to the legislative intention expressed in section 654 all of the sentences should have been made to run concurrently and that this court may now so direct under the power conferred by section 1260 of the Penal Code to "reverse, affirm, or modify the judgment or order appealed from * * *". Pursuant to statutory authority an appellate court may now reduce the degree of a crime when appropriate, without ordering a new trial. People v. Kelley, 208 Cal. 387, 281 P. 609. See, also, People v. Wagner, 78 Cal.App. 503, 248 P. 946; People v. Ryan, 74 Cal.App. 125, 129, 239 P. 419. Where, as here, the several judgments and sentences should appropriately be made to run concurrently, this court may accordingly modify the same without in any manner interfering with the discretion normally vested in a trial court by section 669 of the Penal Code to determine whether two or more judgments should run concurrently or consecutively.

It follows that the several judgments and orders involved in the Allen and Kynette appeals must be, and each is, hereby affirmed with the exception of the judgment entered against Kynette upon his conviction under count four of the indictment charging malicious use of explosives, and that judgment is hereby modified so as to cause it and the sentence therein imposed to run concurrently with the remaining judgments and sentences against him.

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16 Cal.2d 46

CITY OF ALTURAS v. GLOSTER.

Sac. 5284.

Supreme Court of California.

Aug. 9, 1940.

1. Action 🔑6

A complaint, alleging that plaintiff city had entered into contract with defendant authorizing city to use soil from defendant's ranch for consideration of monthly payments to defendant, that city council had adopted resolution that rights under contract were no longer required by city, and, as a conclusion, that an actual controversy existed between city and defendant respecting their rights, and that defendant threatened to institute actions against city to recover compensation under contract, did not state a cause of action under statute concerning declaratory relief, where it was not alleged that contract was void or had been rescinded or modified. Code Civ.Proc. § 1060.

2. Action ⚿6

To state a cause of action for declaratory relief under statute concerning such relief, appropriate facts should be alleged from which the court may determine that an actual controversy relating to legal rights and duties of respective parties exists. Code Civ. Proc. § 1060.

3. Contracts ⚿313(1)

A valid contract cannot be abandoned or repudiated without cause, and, after due execution of a valid contract, each party is entitled to vested right of having it remain unaltered and its terms performed.

4. Contracts ⚿303(3, 4), 316(1)

Performance of a contract may be excused by express waiver or by acts of an adverse party preventing its fulfillment or by so-called acts of God over which parties have no control.

5. Appeal and error ⚿960(1)

Where trial court's action sustaining demurrer on ground that plaintiff had a speedy and adequate remedy other than by means of declaratory relief under statute was discretionary, Supreme Court was precluded from interfering with order sustaining demurrer, except for an abuse of discretion. Code Civ.Proc. §§ 1060, 1061.

◆

In Bank.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by the City of Alturas, a municipal corporation, against M. J. Gloster, for declaratory relief and incidental injunctive relief to prevent a multiplicity of suits. From an adverse judgment, plaintiff appeals.

Affirmed.

C. S. Baldwin, of Alturas, for appellant.

J. S. Henderson, of Alturas, for respondent.

THOMPSON, Justice pro tem.

The City of Alturas has appealed from a judgment which was rendered against it pursuant to an order sustaining a demurrer to an amended complaint for declaratory relief and for incidental injunctive relief to prevent a multiplicity of suits. The demurrer was sustained in effect on the grounds that the complaint fails to state a cause of action and that a construction of the contract involved in this suit, "is not necessary or proper at the time under all the circumstances", as provided by section 1061 of the Code of Civil Procedure.

The complaint alleges that the defendant owns a ranch adjacent to the easterly corporate limits of the City of Alturas; that the north fork of Pit river flows across the defendant's land and through the southerly portion of the city; that during times of flood water the river overflowed the lands of both the plaintiff and the defendant to the great damage of the city; that for many years past the defendant has maintained on his premises a diverting dam and levee to prevent the river from overflowing and damaging his land; that in February, 1930, the respective parties to this suit entered into a contract, which was approved by a duly adopted resolution of the city council, by the terms of which the city was authorized to use soil from defendant's ranch to repair and maintain the levee and to regulate the use of the diverting dam to prevent flooding and damaging of property within the limits of the city, for a consideration of monthly payments to the defendant of amounts equal to the water bills which he was required to pay the city, not exceeding the aggregate sum of $100 per year; that the terms of that contract were fulfilled by both parties for a period of seven years to January, 1937; that without previous notice on January 11, 1937, the city council adopted a resolution that "the rights and privileges * * * were no longer required for the use or benefit of said city and would no longer be used or exercised by said city, and that no further compensation would thereafter be allowed or paid"; that in April, 1937, the defendant recovered judgment in the justice's court of Alturas township for the sum of $10.70 as compensation under the contract, and in January, 1938, the defendant commenced suit in the same court for further compensation under the contract in the sum of $34.56, which action is now pending. The complaint further alleges that the defendant claims that the contract is a valid, continuing agreement entitling him to monthly payments of the stipulated consideration therefor. The city does not assert that the contract is void or that it was ever modified or rescinded, but merely alleges that its rights and privileges thereunder are no longer claimed or beneficial to the city. It is then stated that an actual controversy exists between the respective parties to the contract respecting their rights, and that the defendant threatens to institute other actions to recover his compensation unless he is restrained therefrom by injunction. The prayer asks for a determination of the rights of the respective parties under the contract, and that the defendant be enjoined from prosecuting further suits for compensation thereunder.

The demurrer alleges that the complaint fails to state facts sufficient to constitute a cause of action and that a determination of the rights of the parties is not necessary or proper under the circumstances since the plaintiff has plain, speedy and adequate remedies otherwise than by means of declaratory relief.

[1-4] We are of the opinion the demurrer was properly sustained for the reason that the complaint fails to allege facts sufficient to constitute a cause of action. No facts are alleged in the complaint from which the court may assume that an actual controversy exists between the parties regarding their legal rights under the contract. Merely a bare conclusion to that effect is alleged. It is not asserted the contract is void for any reason. In fact, the pleading asserts that after seven years of performance of the contract, the plaintiff, for no specified reason, elected to voluntarily abandon or repudiate the agreement merely because the privileges conferred by it are "no longer required for the use or benefit of said city". To state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure appropriate facts should be alleged from which the court may determine that an "actual controversy relating to the legal rights and duties of the respective parties" exists. Frasch v. London & Lancashire Fire Ins. Co., 213 Cal. 219, 225, 2 P.2d 147; Oldham v. Moodie, 94 Cal.App. 88, 270 P. 688; 5 Cal.Jur., Ten-Year Supp., p. 115, sec. 12; 3 Williston on Contracts, rev. ed., p. 1936, sec. 674; 16 Am.Jur. 333, sec. 64. In the present case the complaint clearly refutes the existence of an actual controversy regarding the legal rights of the respective parties. No circumstance or condition of the contract leading to such a controversy is pointed out or suggested. A valid, binding contract may not be abandoned or repudiated without cause. After the due execution of a valid contract each party is entitled to the vested right of having it remain unaltered and its terms performed. 6 Cal.Jur., p. 396, sec. 237. It is true that performance of a contract may be excused by express waiver or by acts of an adverse party preventing its fulfillment, or by so-called acts of God over which the parties have no control (6 Cal.Jur., p. 399, sec. 239), but no such acts or waiver are alleged in this case.

[5] The sustaining of the demurrer on the ground that the plaintiff has a speedy and adequate remedy other than by means of declaratory relief under section 1060 of the Code of Civil Procedure was discretionary on the part of the court under the circumstances alleged in the complaint, which precludes this court from interfering with that order, except for an abuse of discretion. Sec. 1061, Code Civ. Proc.; Cutting v. Bryan, 206 Cal. 254, 274 P. 326; Stenzel v. Kronick, 102 Cal.App. 507, 510, 283 P. 93; Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 53 P.2d 188; McCaughna v. Bilhorn, 10 Cal.App.2d 674, 682, 52 P.2d 1025; 87 A.L.R. 1212, note; 68 A.L.R. 116, note; 16 Am.Jur. 287, sec. 14. Section 1061 of the Code of Civil Procedure provides in that regard: "The court may *refuse to exercise the power* granted by this chapter *in any case where its declaration or determination is not necessary* or proper at the time under all the circumstances. (Italics ours.)

In the Cutting case, supra, this court said regarding the discretion of the trial court to refuse to entertain the suit for declaratory relief [206 Cal. 254, 274 P. 327]: "The order of the trial court in refusing to entertain this action, in so far as the declaratory relief sought therein is concerned, must therefore be held to have been made under the discretionary power invested in it by the foregoing provision, and hence must be held to be not reviewable upon this appeal, except for an abuse of discretion, which is not shown."

No abuse of discretion appears under the circumstances of this case.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; HOUSER, J.

WARD REDWOOD CO., Inc., v. FORTAIN et al.

Sac. 5362.

Supreme Court of California.
Aug. 9, 1940.

Rehearing Denied Sept. 6, 1940.

1. Waters and water courses 🔑98

Evidence sustained judgment for ejectment plaintiff, for possession of land which had developed from gradual accretion at end of a strip of land between river and slough, on ground that land to which disputed land was an accretion was within the calls of description found in patent through which the plaintiff deraigned title, and was not within boundaries of defendants' land. Civ.Code, § 1014.

2. Appeal and error 🔑891

Where trial court entered judgment for ejectment plaintiff for possession of land which had developed from gradual accretion at end of a strip of land between river and slough, photostatic copy of the United States Coast and Geodetic Survey map of 1874, which was admitted by Supreme Court as additional evidence, and tended to establish defendants' claim, was insufficient to require Supreme Court to make new findings, or to require reversal of judgment, under circumstances. Civ.Code, § 1014, Code Civ. Proc. § 956a.

3. Appeal and error 🔑1047(3)

Where witness who was county surveyor purported to outline on map, lands described in patent through which plaintiff deraigned title, and subsequently witness admitted he had no knowledge of conditions as they existed at time of grant of patent, trial court's refusal to strike testimony of witness was not prejudicial error, where cause was tried by the court sitting without a jury and there was nothing to indicate that the testimony influenced the trial court in determination of the issues.

4. Adverse possession 🔑85(1)

Where plaintiff in ejectment action established its title to disputed property, presumption existed that plaintiff was in possession thereof within time required by law and that any occupation thereof was in subordination to plaintiff's legal title, unless it appeared that the property was held and possessed adversely to the legal title for five years before commencement of the action. Code Civ.Proc. §§ 318, 321.

5. Adverse possession 🔑112

In ejectment action wherein defendants claimed title by adverse possession, defendants had burden to prove existence of all elements necessary to obtain title by adverse possession. Code Civ.Proc. §§ 318, 321, 325.

6. Adverse possession 🔑89

Defendants who claimed land by adverse possession were required to prove payment by defendants or their predecessors of all taxes which had been levied and assessed upon the land. Code Civ.Proc. § 325.

7. Adverse possession 🔑89

Defendants who failed to show that they or their predecessors paid taxes levied and assessed upon disputed land, legal title to which was in plaintiff, could not establish title to land by adverse possession. Code Civ. Proc. §§ 318, 321, 325.

8. Appeal and error 🔑891

Where defendants' application to take additional evidence in the Supreme Court was not resisted and the parties purported to stipulate to the facts concerning which defendants sought to introduce additional evidence, Supreme Court granted application and accepted stipulated facts. Code Civ. Proc. § 956a.

9. Taxation 🔑421(4)

Levy and assessment of taxes each year on land on which accretion was formed resulted in levy and assessment of taxes upon the accretion, even though the accretion was not specifically described by metes and bounds on the assessment roll. Civ.Code, § 1014.

10. Appeal and error 🔑891

Where defendants in opening brief contended that evidence failed to sustain judgment for plaintiff because of lack of evidence to show plaintiff's corporate existence or its right to do business in certain county, and subsequently plaintiff made application to take additional evidence in the Supreme Court, application was not resisted and parties entered into stipulation regarding the facts, Supreme Court granted the application and considered the stipulated facts which supplied the deficiency complained of in defendants' opening brief. Code Civ.Proc. § 956a.

11. Appeal and error 🔑709

Where record before Supreme Court failed to show entry of costs in any amount in judgment and failed to show any order of trial court with respect to defendants' motion to strike certain items from plaintiff's cost bill, or any appeal from such an order, the Supreme Court could not on appeal consider contention that the trial court erred with respect to the motion to strike the items.

◆

In Bank.

Appeal from Superior Court, Del Monte County; Warren V. Tryon, Judge.

Action in ejectment by the Ward Redwood Company, Inc., against Mrs. Jennie B. Fortain and others for possession of land. From a judgment for the plaintiff, defendants appeal. Applications were filed in the Supreme Court to take additional evidence.

Applications granted and judgment affirmed.

Arthur A. Jones, of Los Angeles, for appellants.

T. F. Peterson, of Eureka, for respondent.

SPENCE, Justice pro tem.

This is an appeal by defendants from a judgment in favor of plaintiff in an action in ejectment.

The controversy involves the plaintiff's claim of ownership and the right to possession of approximately 44 acres of land located in the shifting lowlands at the mouth of the Klamath river. Most of this land has been added to other land by accretion.

Plaintiff deraigns its title through a patent from the United States issued in the year 1898. It was stipulated upon the trial that the record title to the land described in said patent was in plaintiff and that said land was described as follows: "Commencing at a point five chains north of the southeast corner of lot numbered Two of section eight in Township Thirteen North of Range one East of Humboldt Meridian, thence West twenty chains, thence north to Klamath River, thence up said river to line between Lots numbered One and Two of said Section, thence south to the place of beginning." Defendants apparently deraign their title through a patent from the United States issued at approximately the same time but our attention has not been called to any evidence showing the description of the land as found in said patent. It appears to be conceded, however, that defendants were the owners of the land, including lot 1, in the vicinity of plaintiff's land and to the east of the line dividing lots one and two.

We shall endeavor to give a brief description of the so-called disputed land, and in doing so, we will describe the general situation in the vicinity as it existed at or about the time of the trial in 1939 and will thereafter return to the disputed claims concerning the situation as it existed in 1898 when the patent to plaintiff's land was issued.

The Klamath river runs in a general westerly direction as it empties into the Pacific ocean. There is a long sand spit near the mouth of the river, which sand spit extends southward from the mouth of the river to the mainland, being a distance of approximately two-thirds of a mile. This sand spit, which is several hundred feet in width, encloses an arm of the river or a bay which is comparable in length and width to the sand spit. The land in dispute lies along the easterly side of this bay and to the north of a slough, which slough runs in an easterly direction from a point on the easterly side of the bay approximately midway between the southerly end of the bay and the river. Said slough is approximately 92 feet wide and, as it runs easterly for about three-fourths of a mile from the bay to the head of the slough, its direction is substantially parallel to that of the river. From the head of the slough, it is about one-fourth of a mile in an easterly direction to the river. In other words, the land in dispute is at the westerly end of a strip of land approximately one mile in length, which strip lies between the river and the slough above mentioned and is connected with land at the easterly end by a strip approximately one-fourth of a mile wide.

There is but little difficulty encountered in describing some of the lot lines above mentioned with relation to the land above described. Lots one, two and three all have their southerly boundary along a line running in an easterly and westerly direction through a point slightly north of the southerly end of the bay and some distance south of the mouth of the slough. Lot three is the most westerly lot. It is adjoined on the east by lot two, which is in turn adjoined on the east by lot one. The line dividing lots three and two runs in a northerly and southerly direction along the sand spit while the line dividing lots two and one runs in a northerly and southerly direction through a point about 600 feet east of the mouth of the slough. It was therefore a simple matter for the trial court to locate the easterly, southerly and westerly lines of plaintiff's property but one of the main problems presented to the trial court was that of determining the location of the northerly line of said property which was described in the patent as commencing where the westerly line met the Klamath river and then running up said river to the line between lots one and two.

Some further description should be given of the general situation in these lowlands. From measurements taken at the time of the trial, it appears that all the land in immediate vicinity of the disputed land is very flat and of very low elevation. The elevations at various points were measured from low water in the slough and it was found that the highest points in the vicinity were two points, each 12.4 feet above such low water, which two points were located on the dividing line between lots one and two and about equidistant a few hundred feet to the north and south from the slough. The disputed land and much of the land in the vicinity is covered with several feet of water during the heavy seasonal flow of the river and no permanent structures have been built on such land. Some temporary structures have been placed thereon at times in order to cater to sportsmen who fish near the mouth of the river but any such structures which have been placed there in any year have been removed during the same year before the heavy flow. The action of this heavy flow each year, together with the action of the normal flow and of the tides, has resulted in changing the nature of the land in this vicinity. Some marked changes have developed in seasons of extremely heavy flow and other changes have developed more gradually. Prior to 1930, the mouth of the river was at its present location at the north end of the sand spit. Following 1930 and until 1935, the river appears to have emptied through the bay and at the south end of the sand spit. In 1935, a wing dam was placed across the north end of the bay and thereafter the mouth of the river was again located at the north end of the sand spit. The disputed land has developed from a gradual accretion at the west end of the strip between the river and the slough.

Plaintiff brought this action claiming ownership and the right of possession of "All of lot 2 except the south five (5) chains thereof in Section 8 Township 13 North, Range 1 East, Humboldt Meridian." It was apparently plaintiff's theory that the description in its patent covered all of the disputed land or at least the part of the land north of the slough and west of the line dividing between lots one and two to which the disputed land was an accretion. On the other hand, it was defendants' theory that the description in said patent covered none of the land north of said slough; that in 1898 all the land then existing north of the slough constituted an island completely surrounded by the river and the slough; that defendants and their predecessors owned all of said island and therefore defendants were owners of all accretions thereto. Evidence was presented by the parties in the trial court in support of their conflicting theories and the trial court found in favor of plaintiff and against defendants on the issues thus presented. The trial court also found in favor of plaintiff on the issue of the statute of limitations and entered its judgment accordingly.

Before considering the contentions of defendants on this appeal, it is appropriate to state that there have been filed in this court three applications to take additional evidence under section 956a of the Code of Civil Procedure, one application having been filed by plaintiff and two applications having been filed by defendants. Plaintiff's application sought to introduce evidence relating to the corporate existence of plaintiff and its right to do business in the county of Del Norte. Through an oversight, no evidence was presented on this issue in the trial court. Defendants' two applications sought to introduce (1) evidence consisting of a photostatic copy of a United States Coast and Geodetic Survey map of 1874 and (2) certain evidence on the question of the assessment or nonassessment of the disputed land for the purpose of taxation. At the hearing of the cause, a written stipulation was entered into by the parties purporting to dispose of all of these applications except defendants' application to introduce the map of 1874. That application was argued and submitted with the cause on the merits. We will discuss these matters further as the occasion may require.

Defendants' several contentions on the principal issues involved are but statements in different forms of the claim that the evidence was insufficient to sustain the findings on said principal issues. They cite and rely on Packer v. Bird, 71 Cal. 134, 11 P. 873; Fillmore v. Jennings, 78 Cal. 634, 21 P. 536, and other cases involving boundary lines and accretions. Their theory is that in 1898, the strip of land, to which the disputed land is an accretion, was an island, owned in its entirety by their predecessors in interest. The real question here is whether there was any substantial evidence presented to sustain the trial court's findings to the contrary.

[1] Several maps were introduced in evidence, including a United States government map referred to as the map of 1886, together with field notes made for the preparation of said map and the running of the southerly meander line along the river. Said United States government map of 1886 distinctly shows that the land north of the slough was not an island. The field notes so indicate and they further indicate that there was land north of the slough and west of the line dividing lots one and two. While defendants concede that the description in the patent under which plaintiff claims carried plaintiff's easterly and westerly lines in a northerly direction to the Klamath river as it existed in 1898 rather than to the meander line, the evidence shows that the meander line then established ran across the sand spit and bay in a direction slightly south of easterly to a point just south of the mouth of the slough and then turned sharply in a northeasterly direction and crossed the line between lots one and two at a point well to the north of the slough and then proceeded in a generally easterly direction along its irregular course. In our opinion the trial court could properly conclude from the above-mentioned evidence that the land acquired by defendants' predecessor in 1898 did not constitute an island but did constitute the major portion of a peninsula; that the westerly end of said peninsula was to the west of the line dividing lots one and two and within the calls of the description found in the patent through which plaintiff deraigned title; and that plaintiff was therefore the owner of the westerly end of said peninsula and of all accretions thereto. There was therefore no question of permitting plaintiff to "jump a slough", as stated by defendants, and of claiming accretions which were not contiguous to plaintiff's land. A reading of the record leads us to the conclusion that there was sufficient evidence to sustain the above-mentioned findings of the trial court on the principal issues.

[2] At this point we will consider defendants' application to this court to take additional evidence with respect to the said principal issues by admitting the map of 1874. A photostatic copy of said map was filed in support of the application. Without discussing plaintiff's objections to the admission of said map in evidence in this court, we have concluded to admit it in evidence and to consider it for whatever it may be worth. We do not believe, however, that it is in any way decisive of this appeal. Said map is one on file in the United States Coast and Geodetic Survey and is not one of the maps on file in the General Land Office of the Department of the Interior with respect to which patents are issued. While said map of 1874 indicates that the land north of the slough was an island in 1874, the field notes above referred to and the map of 1886, which was prepared therefrom and filed in the General Land Office, shows that it was not an island at that time. Furthermore, said map of 1874 shows no township, section or lot lines and there is therefore nothing contained on said map to indicate that, even at that time, there was no land north of the slough and west of the line dividing lots one and two. The relationship of anything found on the map of 1874 to the issues here involved is very remote and inconclusive. This is particularly true in the light of the admittedly changing nature throughout the years of the lands in and about the mouth of the river. It must be conceded that there was evidence to show that in earlier years rowboats could at times be rowed around the alleged island, at least when the water was high. It is admitted by all, however, that there has been no waterway of any description connecting the present head of the slough and the river on the east at any time during the past thirty years. Under the circumstances above set forth, it does not appear appropriate for this court to make other and different findings on the above-mentioned issues from those made by the trial court or to reverse the judgment with directions as requested by defendants.

[3] Before concluding the discussion relating to the principal issues, it should be stated that defendants make the further

contention that the court erred in denying their motion to strike certain testimony of Mr. Malpas, the county surveyor of Del Norte county. They state that the testimony referred to was "incompetent and unlawful testimony" as the witness gave his opinion that "all the accretion * * * belonging to respondent". We find no such testimony in the record. The witness had made certain maps showing the vicinity of the mouth of river in 1935 and in 1939. These maps were introduced in evidence without objection. The witness was asked to outline in red pencil on one of the maps the lands described in the patent through which plaintiff deraigned title. He purported to do so but thereafter admitted that he had no knowledge of the conditions as they existed in 1898. The trial court denied the motion to strike said portion of the witness' testimony reserving to defendants the right to argue the point later. We find no prejudicial error in the trial court's ruling. The cause was tried by the trial court sitting without a jury and there is nothing to indicate that the testimony to which the motion to strike was directed influenced the trial court in the determination of the issues before it.

In view of our conclusion that the trial court found upon sufficient evidence that plaintiff was the owner of the land to which the disputed land was an accretion and that plaintiff was therefore the owner of said accretion, we may now proceed to a consideration of defendants' contention that the trial court erred in finding against defendants on their plea of the statute of limitations. Code Civ.Proc. sec. 318. They state that they proved "by a preponderance of the evidence" that they were entitled to the disputed land by adverse possession but we must assume that defendants' real contention is that the evidence was insufficient to sustain the trial court's finding against them on this issue. We find no merit in this contention.

[4-6] As plaintiff had established its legal title to the disputed property, it is presumed that it was in possession thereof within the time required by law and that any occupation thereof was in subordination to the legal title unless it appeared that the property was held and possessed adversely to such legal title for five years before the commencement of the action. Code Civ.Proc. sec. 321. The elements and requisites of adverse possession are well understood (1 Cal.Jur. 522 et seq.), and the burden of proof was upon defendants to prove all of those elements and requisites. 1 Cal.Jur. 636. One of such elements was the payment by defendants or their predecessors of all the taxes which had been levied and assessed upon such land. Code Civ.Proc. sec. 325.

[7] The evidence is uncontradicted to the effect that defendants made some use of some of the disputed land during some of the period of approximately ten years prior to the commencement of this action. The disputed land was adjoined on the east by land of defendants and it does not appear that any fence was ever erected on the dividing line between lots one and two or at any other place on the disputed land. Some use of the disputed land was made by defendants and their tenants for pasturage during certain seasons. Some of said land was also used by them during certain seasons for the placing of temporary structures thereon for the purpose of catering to fishermen. Some use was also made by them of a few acres of the disputed land for the purpose of raising crops but this use was soon abandoned. It is further claimed by defendants that in 1931, they leased a portion of the disputed land to the county of Del Norte for use as an emergency landing field, but the testimony of the county surveyor shows that the land so leased was entirely in lot one and to the east of the disputed land. Disregarding for the moment the element of the payment of taxes, we may state that we doubt whether defendants' evidence relating to the other elements and requisites of adverse possession, even though uncontradicted, was such as to compel the trial court to find in their favor with respect to such elements and requisites. But in any event, there was no showing made by defendants in the trial court with respect to the payment of taxes and the trial court was therefore entirely justified in finding against defendants on their plea of the statute of limitations. Code Civ.Proc. sec. 325; In re Dixon, 120 Cal.App. 635, 8 P.2d 881; Redemeyer v. Cunningham, 61 Cal.App. 423, 215 P. 83.

[8] This brings us to defendants' second application to take additional evidence in this court. As above stated, this application relates to the question of the assessment or nonassessment of the disputed land for the purpose of taxation. Plaintiff has not resisted this application and the parties have purported to stipulate to the facts concerning which defendants sought to introduce additional evidence.

Under the circumstances we deem it appropriate to grant the application and to accept the stipulated facts for whatever value they may have. We do not believe, however, that these facts are sufficient to justify the making of findings by this court different from the findings made by the trial court or to justify the reversal of the judgment with directions as urged by defendants.

The stipulation recites that the accretion was never assessed "by its description"; that plaintiff contends as a matter of law that when it paid taxes on the lands described in its deed, it automatically paid taxes on the accretion; that defendants contend as a matter of law that to be considered as assessed for taxes said accretion "would of necessity be specifically described by metes and bounds" on the assessor's records; and that the question of the assessment or nonassessment of the accretion is "submitted on these facts as a matter of law for this court to decide".

[9] The parties have neither argued the question of law thus submitted nor presented any authorities with respect thereto. We are of the opinion, however, that defendants' contention cannot be sustained. We know of no requirement that any land must be specifically described by metes and bounds on the assessment roll so long as it is otherwise sufficiently described. Nor do we know of any requirement that any particular portion of an entire tract of land owned by one landowner should be assessed by "its" description. The peculiar difficulties which would be encountered by the imposition of such requirements are well exemplified here. The testimony here shows that the accretion has formed in the usual manner by "imperceptible degrees" Civ.Code sec. 1014, along the irregular, shifting bank of the river. We are of the view that as a matter of law, the levy and assessment of taxes each year upon the land upon which the accretion was formed should be held to result in the levy and assessment of taxes upon the accretion. Under this view, taxes were levied and assessed each year upon the accretion and, as defendants admittedly paid none of said taxes, they have failed to prove one of the essential elements of adverse possession. Code Civ.Proc., sec. 325.

[10] In defendants' opening brief they made the contention that the evidence was insufficient in that there was no evidence to show plaintiff's corporate existence or its right to do business in the county of Del Norte. Since the filing of said brief, plaintiff has made its above-mentioned application to take additional evidence in this court. Defendants did not resist said motion and the parties have entered into a stipulation regarding the facts. We deem it appropriate to grant said application and to consider the stipulated facts. These facts supply the deficiency in this regard in the evidence and it appears that defendants have now abandoned the contention previously made.

[11] The final contention of defendants is that the trial court erred with respect to their motion to strike certain items from plaintiff's cost bill. The aggregate of the items in dispute appears from defendants' reply brief to be $17. The record before us fails to show the entry of costs in any amount in the judgment. It further fails to show any order of the trial court with respect to defendants' motion or any appeal from such order, if any order was in fact made. It is therefore impossible for this court to consider this contention on this appeal.

As above indicated, the several applications to take additional evidence are granted and the additional evidence on file herein by stipulation or otherwise is admitted. For the reasons above stated, the judgment is affirmed.

We concur: GIBSON, C.J.; SHENK, J.; CURTIS, J.; CARTER, J.

FINLEY et al. v. STEINER et al.

Civ. 12237.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1940.

As Modified on Denial of Rehearing Aug. 30, 1940.

Hearing Denied Oct. 4, 1940.

1. Automobiles 🔑242(1)

In action for death of automobile guest who was fatally injured in collision with automobile driven by one of defendants, plaintiff had burden of proving facts constituting negligence on the part of defendants.

2. Appeal and error 🔑1010(1)

On appeal in death action arising out of automobile collision, District Court of Appeal was required to ascertain whether trial court's findings as to negligence were substantially supported by the evidence, and if evidentiary support was lacking, judgment was required to be reversed.

3. Automobiles 🔑244(35, 37)

In action for death of automobile guest who was fatally injured when automobile in which he was riding was struck at city intersection in daytime by automobile driven by one of defendants, testimony that defendant was traveling at speed of between 55 and 70 miles per hour and evidence as to length of skid marks on pavement and as to extent of damage to automobiles sustained finding that defendant was driving at an excessive and unreasonable speed and that such negligence, which concurred with negligence of driver of other automobile, was proximate cause of the collision and warranted recovery. Vehicle Code, § 510, St.1935, p. 176.

4. Appeal and error 🔑1010(1)

On appeal from judgment for plaintiff in death action arising out of automobile collision, District Court of Appeal could not substitute its opinion for that of trial court and could not disturb finding which was supported by substantial evidence that defendants were negligent and that their negligence was a proximate cause of collision.

5. Evidence 🔑595

Inferences deducible from evidence are not dispelled as a matter of law by contrary positive testimony where the evidence in opposition to the inferences is weakened by improbabilities.

6. Death 🔑95(3)

In widow's death action, recovery is limited to pecuniary loss, and such damages may be given as under all the circumstances of the case may be just. Code Civ.Proc. § 377.

7. Death 🔑79, 88

The pecuniary loss for which damages may be recovered in widow's death action includes the deprivation of the comfort, protection and society of deceased, and such loss is not compensable by merely nominal damages. Code Civ.Proc. § 377.

8. Appeal and error 🔑1004(1), 1013

In widow's death action, the pecuniary loss suffered from the deprivation of the comfort, protection and society of deceased is difficult to measure in mere dollars and cents and therefore must, with the whole question of damages, be left to the good sense and sound discretion of the trial judge or jury, to be exercised in the light of all the circumstances of the case. Code Civ.Proc. § 377.

9. Appeal and error 🔑1004(1), 1013

An appellate court may control the amount of damages awarded in widow's death action only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the trial court or jury making the award.

10. Death 🔑99(4)

$12,500 to widow for death of 57 year old husband who had a life expectancy of 16 years and who had operated a service station and lunch counter which returned monthly profits of $150 during winter months and $300 during summer months, and which widow was unable to operate alone and which she therefore sold for $450, was not excessive.

11. Death 🔑99(4)

In death action, $1,000 to deceased's daughter who was 34 years of age, married, and the mother of two small children, and who during the 16 years of her married life had received $100 each year from deceased who had a life expectancy at time of death of 16 years, was not excessive.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Grace Finley, Velda Baird, and others against Frank G. Steiner and another for the death of Robert W. Finley, who was the husband of plaintiff

Grace Finley and the father of plaintiff Velda Baird and who was fatally injured while riding as a guest in an automobile which collided with an automobile driven by defendant Frank G. Steiner. From judgment in favor of plaintiff Grace Finley for $12,500 general damages and $754 special damages and in favor of plaintiff Velda Baird for $1,000, defendants appeal.

Affirmed.

Chase, Barnes & Chase, Laurence A. Peters, and Thomas R. Suttner, all of Los Angeles, for appellants.

Howard B. Henshey and Charles E. R. Fulcher, both of Los Angeles, for respondents.

WHITE, Justice.

In this action plaintiffs Grace Finley and Velda Baird recovered a judgment against Frank G. Steiner, the driver of an automobile, and Dan Wray, his employer, for damages as the result of the death of Robert W. Finley, husband of Grace Finley and father of Velda Baird, he having died from injuries received while riding as a guest in the automobile of his father, Alexander K. Finley, when it collided with the automobile driven by the aforesaid Frank G. Steiner. The court found that the death of the decedent was occasioned by and through the concurrent negligence of the drivers of both automobiles and absolved the deceased of any contributory negligence. Judgment was accordingly rendered against defendants in favor of Grace Finley, the widow, for $12,500 general damages; $754 special damages, and in favor of the daughter, Velda Baird, in the sum of $1,000.

As to the other named plaintiffs, they are the surviving heirs of Isabel Finley, who was the wife of Alexander K. Finley. Mrs. Finley also was fatally injured in the same collision. As to her heirs, however, judgment went for the defendants on the ground that the contributory negligence of her husband, Alexander K. Finley, driver of one of the involved automobiles, was imputed to her. From the last-named judgment no appeal was taken, and we are therefore concerned only with the appeal from the judgment rendered in favor of the wife and daughter of Robert W. Finley.

The accident occurred at 1:30 on the afternoon of December 13, 1937, at the intersection of Nordhoff street and Van Nuys boulevard in the San Fernando valley section of the city of Los Angeles. The day was clear and the pavement dry. Both streets were paved and each was approximately 40 feet wide. Boulevard stop signs, requiring traffic on Nordhoff street to stop before crossing Van Nuys boulevard, had been authoritatively erected at the intersection pursuant to resolution of the city council, thereby establishing Van Nuys boulevard as a "through highway". Vehicle Code, sec. 82.5, as added by St.1937, p. 413, and section 471, St.1935, p. 168. The vehicle operated by defendant Steiner was moving north on Van Nuys boulevard when it struck the right side of the eastbound car driven by Alexander Finley as the latter crossed the intersection on Nordhoff street. The court found that the Finley car did not stop before entering the intersection.

Frank G. Steiner, driver of defendant Wray's car, called by plaintiffs under section 2055 of the Code of Civil Procedure, testified that as he approached the intersection he was driving 25 to 30 miles per hour; that after coming almost to a stop at a railroad crossing six-tenths of a mile south of the intersection he accelerated to 25 or 30 miles per hour, and did not exceed that speed at any time; that he first saw the Finley car when he was about 35 feet from the south line of Nordhoff street, at which time the Finley car was approximately 20 or 25 feet from the west line of Van Nuys boulevard on the south or right side of Nordhoff and traveling 20 to 25 miles per hour; that thereupon Finley accelerated his car and Steiner applied his brakes and skidded—moving straight ahead—until the impact, which occurred in the intersection 2 or 3 feet north of the south line of Nordhoff. According to the witness, his car stopped almost instantly after the impact and the front end slid to the right so that it came to rest pointing northeast, while the Finley car went on past the Steiner car, turned to the left into some shrubbery, then turned sharply to the right and overturned on its left side at the northeast corner of the intersection. Steiner suffered only a slight abrasion on his forehead.

Frank Jones testified that he was driving with Mrs. Jones north on Van Nuys boulevard immediately before the accident happened; that as he crossed the railroad track six-tenths of a mile south of the intersection, a car passed him going north; that no other car passed him up to the time he reached the intersection. He further testified that after slowing down for the crossing he accelerated to about 45 miles per hour; that he first observed there had been a collision when he had traveled two-thirds of the distance from the railroad crossing to the intersection. The witness' wife estimated the speed of the car that passed them as between 55 and 70 miles per hour as it moved ahead.

Alexander K. Finley testified that he brought the Finley car to a stop about 3 feet west of the west line of Van Nuys boulevard, from which point he could see about 276 feet south on Van Nuys; that he did not see the other car until he had started up and had reached the middle of the street, when, he supposed, the other car was 33 feet away; he did not remember whether he looked down Van Nuys boulevard again after starting up; that his estimate of defendants' speed as 80 miles per hour was based on "what they told me of the accident * * *"; and admitted that at the taking of his deposition he testified, "I hadn't time to form any" (estimate of speed) "because it was done all at once." It also appeared that his testimony as to where he stopped before crossing Van Nuys boulevard was founded on measurements taken by him after the accident based on his recollection of the distance he could see down Van Nuys boulevard when he allegedly stopped.

A police officer testified that he and his partner were driving behind the Finley car and were about 150 feet away when the collision took place; that the Finley car did not stop but was going about 15 miles per hour as it reached the intersection and then increased speed slightly; that he formed no estimate of the speed of the other car; that before the cars were moved he and his fellow officer measured the skid marks of the defendants' car and found them to be 35 feet long and "practically straight" except the last 2 feet at the north end, where they curved to the east. The other officer testified that they saw the accident from about 75 yards from the intersection and that they measured the marks after the cars had been moved away. The defendant Steiner testified that he was going about 10 miles per hour at the moment of impact, and that the skid marks were measured from the front of his car and that they were between 24 and 25 feet. Walter Finley, a brother of decedent, testified that he "stepped off" the skid marks the day after the accident; that they were "approximately between" 60 and 75 feet long. A garageman called on behalf of plaintiffs testified that he examined the Finley car after the accident and found that the right side of the frame was "bent in approximately five inches"; that the crossmembers of the frame also "were bent to a certain extent".

Appellants' chief contention is that the findings are not supported by the evidence; that "the undisputed evidence shows that the defendants were not guilty of any negligence whatsoever"; that the findings that defendant Steiner was negligent and that his negligence was a proximate cause of the accident "are not supported by the evidence or any inference that may properly be drawn from the evidence"; and further, that "the sole proximate cause of the accident was the negligence of Alexander K. Finley. Any negligence on the part of the defendant Steiner, even if shown, was not a proximate or legal cause of the collision, and the court erred in so finding."

[1, 2] It is true, as contended by appellants, that the burden rested upon the plaintiffs at the trial to prove the facts constituting negligence on the part of defendants. Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38; Tower v. Humboldt Transit Co., 176 Cal. 602, 169 P. 227; Wood v. Los Angeles Ry. Corp., 172 Cal. 15, 155 P. 68. Under the law, therefore, it devolves upon us to ascertain whether the findings as to negligence are substantially supported by the evidence, and if such evidentiary support is lacking we must reverse the judgment. Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377, 14 L.R.A.,N.S., 913, 14 Ann.Cas. 1159; Wynne v. Wynne, 20 Cal.App.2d 131, 66 P.2d 467.

Defendant Steiner testified that as he crossed a railroad track six-tenths of a mile removed from the scene of the accident he came "almost to a stop"; that he then "went back to a speed of about 25 or 30 miles per hour up until directly before the accident". He further testified that he first observed the Finley vehicle when about 35 feet from the point of impact, and that the latter was then traveling about 20 to 25 miles per hour, but its speed was accelerated, whereupon, according to Mr. Steiner, he applied his brakes. In contradiction of defendant Steiner's testimony that he practically stopped at the railroad crossing six-tenths of a mile from the accident, we find the testimony of the witness Frank Jones, who with his wife was in an automobile traveling in the same direction as defendant Steiner. This witness testified that before he reached the railroad crossing his automobile was going about 45 miles per hour; that he slowed down for the crossing and then increased his speed again to about 45 miles per hour. Mr. Jones further testified that at the time defendant Steiner's automobile passed him at the crossing it was traveling at a rate one-third faster than the Jones car. Mrs. Jones, who was riding with her husband, estimated the speed of the Steiner automobile as it passed them at the railroad crossing as between 55 and 70 miles per hour. Although there was a conflict in the evidence as to the length of the skid marks made by the defendant Steiner's automobile, there is in the record evidence that these skid marks were in a straight line and were from 60 to 75 feet in length. The record also reflects evidence that the defendant Steiner's automobile struck the Finley vehicle on the right side with such force that the right side of the frame was bent in 5 inches; the right rear door, composed of steel, was bent in 6 inches, while the edge of the steel floor on the right side was pushed up approximately 6 inches. The trial judge was not compelled to accept defendant Steiner's estimate of his speed, but was entitled to infer from the length of the skid marks and the force of the impact, as well as the testimony of Mr. and Mrs. Jones, that his actual speed was greatly in excess of that to which he testified. In determining the credibility of the witness Steiner, the trial court was authorized to consider all of the facts and circumstances of the transaction and to believe the testimony of Mr. and Mrs. Jones in contradiction of that given by Steiner as to his speed when he was crossing and after he had crossed the railroad tracks a short distance from the scene of the accident. The court was authorized to disbelieve the testimony of defendant Steiner as to his speed at the time he crossed the intersection if the court believed his testimony was false as to the speed at which he claimed he was traveling when he passed the automobile of Mr. Jones at the railroad crossing.

[3, 4] Under all of the foregoing facts, we cannot say that the trial court erred in holding that defendant Steiner was unmindful of his duty to anticipate that he might meet vehicles at any point on the highway and particularly at intersections thereof, and that he failed to keep his machine under such control as would enable him to avoid a collision under the conditions here present. In other words, it was a question for consideration by the trial court as a matter of fact to determine whether, under all the circumstances here present, including the physical facts, defendant Steiner was driving his automobile in conformity with the requirements of section 510 of the Vehicle Code, St.1935, p. 176. The testimony herein narrated presents substantial evidence to warrant the trial court in concluding as it did that defendant Steiner was not driving his car at a careful and prudent speed, not greater than was reasonable and proper, and at such speed as not to endanger the life, limb or property of any person. Therefore we cannot disturb the finding that such negligence on the part of defendant Steiner, concurring with the negligence of Alexander K. Finley, driver of the automobile in which decedent was riding, was the proximate cause of the collision. To do so would mean a substitution of the opinion of this court on the facts of the case for the opinion of the trial court with reference thereto, which, as we understand the rule applicable in the premises, is not in accord with the recognized functions of an appellate tribunal.

[5] Appellants' contention that inferences deducible from the evidence herein are dispelled as a matter of law by the positive testimony of defendant Steiner concerning the speed at which he was traveling, must fall before the rule which declares that inferences are not dispelled as a matter of law when the evidence in opposition to such inferences is weakened by improbabilities. Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059.

No complaint is made by appellants of the award for funeral and burial expenses, and the main attack is centered upon the award of $12,500 to the widow of the deceased. In this connection the record discloses that Grace Finley was happily married to decedent for more than 34 years. He was 57 years of age at the time of his death and was in robust health. The husband was industrious and hard-working. At the time of his death he and his wife had been operating a service station and lunch counter on a mountain highway near Coeur d'Alene, Idaho, from which they were realizing $150 per month during the winter and $300 per month during the summer season, or, as testified, the profits ran as high as $300 per month for four or five months of the year and $150 for the remaining period of each year. Decedent had a life expectancy of 16 years. The widow testified that she assisted her husband in the operation of the service station business; that she served lunches, helped pump gasoline, and waited upon the customers. She further testified that after her husband's death she found herself unable to operate the business alone and sold the same for $450.

[6-9] In actions of this type the recovery is limited to pecuniary loss and "such damages may be given as under all the circumstances of the case, may be just". (Code Civ.Proc., sec. 377.) While damages recoverable are only for the pecuniary loss suffered, that loss includes the deprivation of the comfort, protection and society of the deceased (Clark v. Tulare Lake Dredging Co., 14 Cal.App. 414, 112 P. 564); and loss of comfort, protection and society not only is a proper element of damages, but is by no means to be classed as compensable by merely nominal damages. Johnson v. So. Pac. R. R. Co., 154 Cal. 285, 97 P. 520. It is true that the pecuniary loss suffered from the last-named cause is difficult to measure in mere dollars and cents, and therefore must, with the whole question of damages, be left to the good sense and sound discretion of the trial judge or jury, to be exercised in the light of all the circumstances of the case. The power of an appellate court to control the amount of damages awarded arises only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the trial court or jury making the award. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 203 P. 768; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83; Webster v. Harris, 119 Cal.App. 46, 6 P.2d 88.

[10, 11] With reference to the award of $1,000 to the decedent's daughter, the record shows that she was 34 years of age, married, and the mother of two small children. Her husband was working part time. During the 16 years of her married life she was the recipient of $100 each year from the decedent, which money was sent her to assist in the purchase of clothing and other necessities of life. With decedent's life expectancy of 16 years, an award of $1,000 cannot be regarded as excessive. After a review of the decisions of appellate courts of this state in similar cases, we cannot hold that the damages awarded in this case were excessive, nor can we say, under all the facts and circumstances here present, that the damages are so outrageously excessive as to suggest at first blush passion, prejudice or corruption. Therefore they cannot be set aside on appeal. Connor v. Henderson, 108 Cal.App. 237, 242, 291 P. 641.

For the foregoing reasons, that part of the judgment from which this appeal is taken must be, and it is, affirmed.

We concur: YORK, P. J.; DORAN, J.

LYNCH et al. v. BENCINI et al. *

Civ. 2372.

District Court of Appeal, Fourth District.
California.
Aug. 1, 1940.

As Amended Aug. 13, 1940.

Hearing Granted Sept. 30, 1940.

1. Appeal and error ⇨347(1)

A judgment entered after default does not relate back to the time when default was entered so as to cut off the right of appeal where entry of judgment is delayed until time for appeal has expired.

2. Appeal and error ⇨347(1)

A judgment, reciting that it was entered upon application of the plaintiff who at the time judgment was entered was dead and at time when statute imposed duty on the court to dismiss the action, which judgment included large amount of interest accruing between entry of default and date that judgment was entered, did not relate back to the time when default was entered so as to defeat right of appeal. Code Civ.Proc. § 581a.

3. Judgment ⇨126(1), 131

Under statute authorizing clerk to enter default judgment in an action arising upon contract for the recovery of money or damages only, clerk has power to enter default judgment only where the proper amount appears from terms of contract as alleged in complaint or follows therefrom by mere mathematical computation, and he has no power to enter such judgment where exercise of discretion and taking of evidence is necessary to determine amount of damages. Code Civ.Proc. § 585, subds. 1, 2.

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* Subsequent opinion 110 P.2d 662.

4. Judgment 🔑131

In action to recover price of certain stock which defendants under contract agreed to buy from plaintiff, whether clerk was authorized to enter a default judgment against one of the defendants was not dependent on whether the complaint stated a cause of action but whether the complaint stated a cause of action within statute authorizing the clerk to enter default judgment in an action arising upon contract for the recovery of money or damages only. Code Civ. Proc. § 585, subd. 1.

5. Judgment 🔑131

Where creditor agreed to take stock of corporation in payment of debt as soon as the permit was issued by corporation commissioner and directors agreed to buy certain part of stock at a future time on certain contingencies and it was agreed that dividends were to be applied on purchase price and there was no stipulation as to amount of damages in event of breach, in creditor's action to recover from directors purchase price of the stock agreed to be purchased, clerk was not authorized to enter default judgment since taking of evidence was necessary to determine amount of damages. Code Civ.Proc. § 585, subd. 1.

6. Judgment 🔑131

In determining whether an action is one arising upon contract for the recovery of money or damages only so as to authorize the clerk to enter default judgment, allegations of the complaint and the terms of the contract are to be considered notwithstanding that the prayer is for a certain amount. Code Civ.Proc. § 585, subd. 1.

7. Dismissal and nonsuit 🔑65

Under statute providing that all actions must be dismissed by the court in which the same are pending on court's own motion if summons has been served and no answer has been filed and plaintiff fails to have judgment entered within three years after service of summons, duty is imposed on court to dismiss action if plaintiff fails to perform duty imposed upon him, and, where defendant has not taken steps for his own protection, court's error in failing to perform duty is one which may be corrected on appeal if taken within statutory time. Code Civ.Proc. § 581a.

8. Appeal and error 🔑127

Where clerk after death of plaintiff entered default judgment against a defendant more than three years after he was served with summons in action arising out of contract for the purchase of certain stock and defendant made timely motion after judgment to dismiss the action and court did not perform duty imposed by statute providing for dismissal of action if plaintiff fails to have judgment entered within three years after service of summons, default judgment was not immune from direct attack on appeal. Code Civ.Proc. §§ 579, 581a, 585.

9. Appeal and error 🔑934(1)

There is no presumption in favor of a judgment entered by clerk. Code Civ.Proc. § 585, subd. 1.

Appeal from Superior Court, San Diego County; E. J. Kelly, Judge.

Action by Frank Lynch against C. H. Bencini and others for the price of certain stock which defendants under a contract agreed to buy from plaintiff, wherein Georgia A. Lynch and F. C. Lynch, as executrix and executor respectively of the last will and testament of Frank Lynch, deceased, were substituted as plaintiffs on death of Frank Lynch. From a default judgment entered by the clerk and from order denying motion to vacate the judgment and to dismiss the action, Leroy A. Wright appeals.

Judgment and order reversed with directions.

J. A. Donnelley and C. M. Monroe, both of San Diego, for appellant.

Dempster McKee, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a default judgment entered by the clerk, and from orders denying motions to vacate the judgment and to dismiss the action.

On August 23, 1929, a written agreement was prepared which purports to be between Frank Lynch on the one hand and six named persons on the other hand. However, only five of the latter signed the agreement. The agreement provides that whereas a named corporation is indebted to Lynch in the sum of $275,000, Lynch agrees to cancel this debt and accept in lieu thereof enough shares of stock in said corporation which at ⅘ths of their par value would amount to $275,000, the same to be delivered as soon as a permit was issued by the corporation commissioner. It further provides that in consideration of this cancellation of the debt the other six persons, as directors of the corporation, jointly and severally agree to purchase from Lynch within seven months after delivery of the stock to him, so much of said stock as at ⅘ths of its par value would represent $175,000. Lynch then agrees to sell to the others "any portion or all of said stock" at a named price if all or any part of said stock is purchased within thirty days after he acquires the stock, and at slightly increasing prices if said stock is purchased in succeeding months up to the seventh. The contract then provides: "Should dividends be paid on the above stock during the life of this contract, such dividends are to be credited on the purchase price hereinbefore set forth."

In this action, which was filed on February 8, 1934, by Frank Lynch, only four of the other parties who signed the contract were named as defendants. The contract of August 23, 1929, was attached to the complaint and made a part thereof. The complaint alleges that on September 29, 1929, the plaintiff canceled the note for $275,000 and as consideration therefor accepted 13,750 shares of the stock of this corporation which were issued to him on that day; that the plaintiff has duly done and performed all things which were to be done by him under the terms of said contract; that the defendants have not, nor has any one of them, purchased from the plaintiff the said stock or any part thereof which they agreed to purchase under the terms of the contract; that the whole of the purchase price, to wit, $190,312.50, together with interest from April 29, 1930, is due and unpaid from the defendants and from each of them; and that demand has been made. The prayer is for judgment against each of the defendants for $190,312.50, with interest at 7 per cent from April 29, 1930.

Two of the four defendants were never served, so far as the record shows. The defendant Wright was not served until January 10, 1936, and the return of this service was not filed until August 4, 1936, on which date his default was entered. The defendant Gray filed a demurrer on July 30, 1936, and filed an answer on September 15, 1936, with an amended answer on February 5, 1937. He alleged that he had signed the agreement on the express condition that it was not to be effective as to him until the signature of the sixth other party had been obtained, and that this had not been done. Nothing further was done until June 29, 1939, when the clerk entered a default judgment against the defendant Wright for $312,429.64, being the full amount prayed for in the complaint with interest at 7 per cent from April 29, 1930, to June 29, 1939. On April 22, 1939, and before this judgment was entered, Frank Lynch died, and the present plaintiffs were appointed executrix and executor of his will on May 12, 1939. On July 11, 1939, they applied for and obtained an order of court substituting them as plaintiffs in this action. On July 21, 1939, there was filed a dismissal of the action with prejudice, as to the defendant Gray only, the dismissal being dated June 3, 1937.

On July 12, 1939, the defendant Wright served and filed notice of motion for an order vacating this judgment and dismissing the action, which motion was later made and denied. Subsequently, a motion to reopen and reconsider was made and denied. Within the statutory time, the defendant Wright appealed from the judgment and from the orders denying his motions.

The questions presented involve the powers of the clerk under section 585 of the Code of Civil Procedure and the effect of sections 579 and 581a of that code under the circumstances here appearing. The respondent contends that these other sections have no application here since under section 585 it was the duty of the clerk to enter judgment immediately upon entering the appellant's default and that, in contemplation of law, it must be deemed that this judgment was entered on August 4, 1936, within three years after the summons were served, and that no discretion remained to be exercised by the court.

[1, 2] While it has been stated in some cases, as sufficient under the circumstances and for the purposes therein, that the judgment entered by the clerk might be regarded as relating back to the time when default was entered this is not necessarily always true and would not be true where a timely appeal from the judgment is taken. If an appeal otherwise possesses merit, it could hardly be held that this legal fiction

applied and cut off the right of appeal. See De Leonis v. Walsh, 140 Cal. 175, 73 P. 813. If this were true, the plaintiff could prevent an appeal from a default judgment by having the clerk, after entering the default, delay the entry of judgment until the time for appeal has expired. Moreover, the judgment here entered by the clerk discloses on its face reasons why it should not be considered as having been entered at the date of the default. The judgment recites that it is "hereby" entered "upon application of said plaintiff". Not only was this judgment entered at a time when the plaintiff was dead, and at a time when the statute made it the duty of the court to dismiss the action, but it is for an amount which includes more than $38,000 interest accruing between the entry of the default and the date judgment was entered.

The first question that should be considered is whether this action is one of the kind in which a clerk has power to enter judgment. In other words, whether this is "an action arising upon contract for the recovery of money or damages only", within the meaning of that provision in subdivision 1 of section 585.

[3] It has been held in a number of cases that a clerk has the power to enter judgment only where the proper amount appears from the terms of the contract as alleged in the complaint or follows therefrom by mere mathematical computation. For this reason it has been held that in an action involving any sort of accounting the clerk cannot enter a judgment. Crossman v. Vivienda Water Co., 136 Cal. 571, 69 P. 220. It is clear that the clerk has no such power where the taking of any evidence is necessary and it has been held that he has no such power where the reasonable value of services or goods must be determined. In Landwehr v. Gillette, 174 Cal. 654, 163 P. 1018, 1019, the meaning of this provision of section 585 is given more thorough consideration than in any other case to which our attention has been called. The court there said: "While it is true that the language used in subdivision 1 of the section is quite broad and authorizes the clerk after default to enter up judgment in all actions 'arising upon contract for the recovery of money or damages only,' still what is meant by that language is that the contract to warrant the exercise of such authority by the clerk alone in entering judgment must by its terms as set forth in the complaint call for the payment of some fixed and definite sum in money or damages. In the nature of things this provision of the Code must be construed to apply to contracts which provide for some definite fixed amount of damages ascertainable from the contract sued on or from the terms of which a certain computation or calculation may be made by the clerk. As the duty of the clerk is purely ministerial, his power could only be exercised and properly apply in the case of such a contract, and must be limited thereto. If the contract declared on is indefinite and uncertain in the amount of damages which plaintiff is entitled to recover on it, and in the nature of things must be ascertained and fixed, the matter then is necessarily one for judicial determination by the court, and not for ministerial action by the clerk. Hence it must appear from the contract sued on, either from its terms as set forth in the complaint or from the allegations in the latter respecting it, that a definite or liquidated sum of money is to be paid as damages; an amount which is definitely fixed by the contract sued on or which from the allegations of the complaint may be ascertained by mere computation or mathematical computation of the clerk."

The court then pointed out that under any other circumstances the default of the defendant merely admits that something is due but does not admit that the amount prayed for constitutes that amount.

We think this interpretation of this statutory provision is eminently correct and should not be departed from. The language used in section 585 indicates an intention to provide, in subdivision 1, for the entry of judgment by the clerk where no evidence is necessary to disclose the correct amount, and by subdivision 2 for judgment by the court when the taking of evidence or the exercise of discretion is necessary. Evidence is as necessary in order to fix the amount of damages for breach of contract as it is in tort actions, unless this is fixed by the agreement. Subdivision 1 of section 585 seems to refer more to actions based upon contract than to those based upon a breach of contract, although it would include an action for breach of contract in which the amount of the damages had also been agreed upon. But, as pointed out in Landwehr v. Gillette, supra, it must appear from the terms of the contract that a definite sum was thereby fixed, to be paid as damages.

[4] The respondents mainly contend, with respect to this question, that their complaint stated a cause of action. The question, however, is not whether the complaint states a cause of action but whether it states one that falls within subdivision 1 of section 585. The respondents rely on Christerson v. French, 180 Cal. 523, 182 P. 27, 28, in which the plaintiff was allowed to recover under a default judgment for the breach of a contract. Very few facts are given in the opinion, although the court does say that the action is "based on contract for the recovery of damages." It may be that the contract there in question fixed the amount of damages for the breach in question. However that may be, it does appear that the court gave little consideration to the point now before us. Apparently the court assumed that the action was one coming within the provisions of subdivision 1 of section 585 since that question was not raised, and since the defendant was relying upon the contentions that the filing of a demurrer and motion to strike raised questions which must be decided by the court and that the complaint failed to state a cause of action. If it be assumed that this case in any way conflicts with the views expressed in Landwehr v. Gillette, supra, we prefer to follow the latter case.

In the instant case it is difficult to tell upon what the plaintiff based his demand. The contract did not provide for a present sale of the stock. In fact, the plaintiff did not then have the stock and it was not known whether or not the commissioner of corporations would ever permit the stock to be sold and delivered to him. The other parties merely agreed to buy the stock at a future time, contingent upon certain other things. The plaintiff affirmatively alleges that the defendants have not, nor has any one of them, purchased from the plaintiff said stock or any part thereof. It could hardly be an action for the purchase price of stock which was never purchased and, if it was, there are no allegations showing a delivery or tender of the stock or of facts which would justify a judgment for the full purchase price while leaving the plaintiff in full possession of stock which was supposedly worth $190,000. Moreover, the contract specifically provides that if any dividends are paid on the stock such amounts are to be credited on the named purchase price. It is not alleged that no dividends were ever received, although the plaintiff held the stock for ten years, and there is no allegation that it is or ever was worthless. While the plaintiff alleges that he had done everything to be performed on his part under the terms of the contract this would still be true if he had received very substantial dividends on the stock.

[5, 6] It seems quite clear that this is an action for damages for breach of the contract to purchase the stock and the contract makes no provision, definite or otherwise, for the amount of damages in case of its breach. The complaint contains no allegations even purporting to show the amount of damage sustained, or as to the value of the stock or what has become of it. As a matter of common justice, if the stock has a value, the plaintiff should not be allowed to keep it and also recover the full purchase price. If it has some value but less than the amount the others agreed to pay he might be entitled to damages in some amount but no attempt was made to allege anything as to this, definitely or otherwise. While the prayer is for a certain amount, the allegations of the complaint and the terms of the contract are to be considered in determining whether or not the action is one coming within the provisions of subdivision 1 of section 585, under the authorities above cited. The allegations of the complaint are so indefinite, incomplete and uncertain as to fairly and clearly require, in any court of justice, that evidence should be taken to determine the amount to which the plaintiff was entitled. If we assume that the complaint is sufficient in the sense that, in the absence of a demurrer, it will permit a recovery in some amount, this is not sufficient for the purposes now under consideration. The amount to which the plaintiff was entitled under the allegations of the complaint is not ascertainable from any mere ministerial computation that could be made by the clerk. The allegations of the complaint are such as, at best, called for the taking of evidence and the exercise of judicial action.

The respondents contend that objections based upon the absence from the complaint of allegations as to the delivery of this stock, the passing of title, the value of the stock and like matters, are completely answered by the case of Mason v. Lievre, 145 Cal. 514, 78 P. 1040, 1043, from which they quote: "The intention to sell and the intention to buy are both clear and unmistakable from the written expressions of the parties, and whatever significance might attach to the acts of payment and delivery would be in the nature of evidence, and not as of the essence of the contract."

In that case the sale was complete, and the language quoted has no application here, although the latter part thereof is suggestive. The very fact that such things are evidentiary matters emphasizes their absence and indicates the impropriety of allowing a clerk to enter a judgment before they have been presented and considered by a court.

The next question suggested is as to whether, assuming that the clerk otherwise had power under section 585 to enter this judgment, he had such power in view of section 579, which provides that in an action against several defendants the court may, in its discretion, render judgment against one and leave the action to proceed against the others whenever a several judgment is proper. To the extent that that section requires a court to exercise judicial discretion and decide whether a several judgment is proper before entering judgment against one defendant and allowing the action to proceed against others, that section seems to conflict with subdivision 1 of section 585, which seems to permit the clerk to enter a judgment against one of several defendants without regard to whether or not a several judgment is proper. This would seem to give the clerk more power in such a case than has the court and by exercising it the clerk would seem to be depriving the court of the opportunity of exercising the discretion imposed upon it by section 579. This case is an illustration of the good reasons that might exist for not depriving the court of the discretion mentioned in section 579. While all of the signers of this contract were severally liable they were also equally liable one with another. At the time the appellant defaulted, the defendant Gray had appeared and the action was still pending against him in what is, in a very real sense, the same obligation. It was, in fact, a case in which the matter should have been held in abeyance until it was also decided against Gray, although the judgment, when finally determined upon, would be equally applicable against both of these defendants. The injustice of the action taken particularly appears in view of the fact that a dismissal with prejudice was later, and before judgment was entered against the appellant, given to the defendant Gray. If, as is probable, something was paid by Gray for this great benefit, whatever he paid should have been applied as a reduction of the judgment against the appellant.

In this connection the appellant relies upon the case of Trans-Pacific T. Co. v. Patsy F. & R. Co., 189 Cal. 509, 209 P. 357, 359. The respondent contends that this case has no bearing here because the 1933 amendment to section 585 struck out the reference therein to section 414 of the Code of Civil Procedure, it being argued that this amendment was adopted for the purpose of nullifying the effect of the opinion in the case cited. That case has no direct bearing here as it involved a situation where all of the defendants had been served. The 1933 amendment to section 585 does not affect our present problem for since then, as well as before, section 585 purports to permit the clerk to enter a judgment when some but not all of the defendants are served. However, in the case last cited, the court did say: "The liability of the defendants and appellant as stockholders being several (Brown v. Merrill, 107 Cal. 446, 40 P. 557, 48 Am.St.Rep. 145), the case falls under section 579 of the Code of Civil Procedure, which provides: 'In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.' Under this section the discretion vested is a judicial one, to be exercised by the court, and not the clerk. The court erred in refusing to exercise this discretion and vacate the judgment entered by the clerk against appellant."

While this is suggestive here and while the apparent conflict between these sections raises an interesting question, it is not necessary to further consider the same under the view we take upon the other points raised.

If it be assumed that the clerk had power to enter judgment in this case under section 585 and irrespective of section 579, the next question is whether a judgment thus entered is not only good upon its face but conclusive and immune from a direct attack on appeal. This question involves the effect of the last paragraph of section 581a, which was added by amendment in 1933. This paragraph reads: "All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons."

The precise question seems never to have been determined. The respondents rely on certain cases as controlling on this point, but we do not so regard them. In Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357, a judgment had not been entered and the effect of section 581a under an appeal from the judgment was not considered. While there is some dicta in the opinion the holding is merely that prohibition will not lie against the performance of a ministerial act. In Merner Lumber Co. v. Silvey, 29 Cal.App.2d 426, 84 P.2d 1062, a motion was made more than a year and a half after the judgment was entered, and after it had become final, to set it aside and dismiss the action. It was there held that the court had jurisdiction in spite of section 581a, so the judgment was not void upon its face. However, the clerk, in entering a default judgment, is acting for the court and to hold that a court has jurisdiction in such a case is far from holding that such an act, if taken in disregard of another statute, is free from error and that a judgment so entered may not be directly attacked on appeal. Gonsalves v. Bank of America, Cal.App., 94 P.2d 61, is also relied upon. This case has no application here. Not only was the court talking about different portions of section 581a but the language relied upon was eliminated upon a rehearing when a different result was reached. See Golsalves v. Bank of America, Cal.App., 96 P.2d 391. The respondents also rely upon several other cases, including Christerson v. French, supra. These cases were all decided long before the last paragraph was added to section 581a and at a time when no further duty rested upon the plaintiff. In several of these cases it is stated that the failure of the clerk to do his duty cannot prejudice the rights of the plaintiff or confer any rights upon the defendant whose default has been entered. While this may have been true at that time, a statute can impose a duty upon a plaintiff with a resulting benefit to a defendant, and this has been done by the last paragraph of section 581a where a specific penalty is provided when the plaintiff fails to perform a further duty which is imposed upon him.

The respondents contend that the word "must" in section 581a does not indicate any curtailment of jurisdiction to enter judgment under subdivision 1 of section 585. While this may be true, the last paragraph of section 581a, taken as a whole, imposes a duty upon the plaintiff and imposes a duty on the court to dismiss the action if the plaintiff fails to perform that duty. While formerly the only duty in such a case was one resting upon the clerk, with no penalty for his delay, it is now made the duty of the plaintiff to "have judgment entered" within the prescribed time, in other words to take affirmative steps to that end.

[7, 8] When the plaintiff fails to perform that duty his rights are affected and a benefit is conferred upon the defendant by the provision that the court must dismiss the action. The duty thus imposed on the court, however, is not confined to where such action is requested by the defendant but is one which the court is required to exercise "on its own motion". This statutory provision is clearly intended to apply to cases where the defendant is not yet taking any steps for his own protection. Clearly, under the statute, it is error for the court to fail to perform this duty directly imposed upon it. While a judgment so entered may not be void for lack of jurisdiction the court's error in failing to perform that duty is one which may be corrected on appeal from the judgment, if taken within the statutory time. The duties and rights of the parties are still affected by the last paragraph of section 581a and the judgment itself is still subject to review on a direct and timely appeal. Assuming that the clerk had here a duty to perform in his ministerial capacity, and that he had no power to pass upon the effect of the last paragraph of section 581a, the court had both the power and the duty to do so, the matter was directly presented to it on timely motions after judgment, and the matter is now properly here for review. Under such circumstances the error may be corrected and the judgment, entered and allowed to stand in disregard of the provisions of section 581a, should be reversed.

The provision of section 581a which we have been considering would be largely meaningless if, where such a judgment is applied for in the absence of the defendant, the judgment is to be taken as conclusive and immune from direct attack. To so construe this provision would be not only to disregard that part thereof which provides that the action must be dismissed by the court "on its own motion", but would be to write in a provision that the amendment was to apply only when the defendant objected at the time the judgment was applied for. No such provision was included by the legislature and should not be added by judicial decision to the plain language of the statute. This statutory provision was plainly intended to apply in just such a case as this, where the defendant did not appear. The direct requirement of the statute would be rendered nugatory if the disregard thereof may not be corrected on a timely appeal.

A further consideration is that at the time this judgment was entered the plaintiff was dead. No substitution of parties had been made and there was no party plaintiff before the court. Under somewhat similar circumstances the entry of a judgment has been held improper. Maxon v. Avery, 32 Cal.App.2d 300, 89 P.2d 684; Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317; Scoville v. Keglor, 27 Cal.App.2d 17, 80 P.2d 162, 167. In the last named case, where it was contended that a judgment could be entered nunc pro tunc as of a date before the death of the plaintiff, this court said: "We are unable, in view of the Supreme Court's language in De Leonis v. Walsh [supra] to avoid the conclusion that the trial court erred in undertaking to file its findings of fact and conclusions of law and to enter its judgment before making an order of substitution of the administratrix of the estate of J. M. Scoville for that plaintiff. In so far as the interest of the decedent was concerned there was at the date when the findings of fact and conclusions of law were actually filed and the judgment entered no plaintiff before the court. To be sure, after the findings of fact and conclusions of law should be properly filed and the judgment properly entered they would be treated by the law for the purpose of avoiding the lapsing of the cause of action as having been made as of the date to which it was provided that, nunc pro tunc, they should relate. But if when they were respectively filed and entered in fact there was as to the decedent's interest no plaintiff before the court the defect would appear to us to go to the jurisdiction to file and enter them."

[9] It is well settled that there are no presumptions in favor of a judgment entered by a clerk. It is peculiarly appropriate that we are required to indulge in no presumptions in favor of this judgment. The strange and unusual facts, including the many and long delays on the part of the plaintiff, the singling out of certain persons as against others, the dismissal as to the only one who appeared and the entry of judgment against this appellant alone, the ignoring of all such matters as the value of the stock still retained and whether or not dividends had been received thereon, and the taking of judgment by other parties shortly after the death of the plaintiff, all suggest that the true facts and actual situation are not disclosed by the record here. While these matters are not, in themselves, controlling, they illustrate the wisdom of the statutes and rules we have held applicable, and strongly indicate that their application here will result in no injustice.

The judgment and orders are reversed with directions to the trial court to dismiss the action as to the appellant.

We concur: MARKS, J; GRIFFIN, J.

40 Cal.App.2d 235

WARWICK v. MANEELY et al.

Civ. 2544.

District Court of Appeal, Fourth District, California.

July 23, 1940.

Hearing Denied Sept. 19, 1940.

1. Trial 🔑121(1)

The statement of plaintiff's counsel in presence of jury and while defendant's daughter was on stand, that defendant's daughter had been listening during testimony at door of courtroom after court had instructed daughter to remain outside courtroom, was improper. Code Civ.Proc. § 2055.

2. Automobiles 🔑246(58)

In automobile accident case, instruction on last clear chance doctrine, given at request of plaintiff, was error, where at best no more than a possible chance to avoid accident existed.

3. Appeal and error 🔑1066
Trial 🔑253(4)

In motorist's action against owner and driver of approaching truck and driver of automobile following the truck, for damages sustained when motorist and automobile collided in center lane of three-lane highway, instruction to find for motorist and against owner and driver of truck and driver of automobile if motorist was not negligent, and if truck driver was contributorily negligent, was prejudicial error for omission of negligence of driver of automobile.

4. Appeal and error 🔑1066
Trial 🔑253(4)

In motorist's action against owner and driver of approaching truck and driver of automobile following the truck, for damages sustained when motorist and automobile collided in center lane of three-lane highway, instruction to find for motorist if owner and driver of truck and driver of automobile failed to establish defense of contributory negligence of motorist was prejudicial error, for omission of negligence of owner and driver of truck and driver of automobile.

5. Trial 🔑296(7)

A formula instruction should contain all elements essential to recovery, and absence of any one element may not be compensated for nor cured by reference thereto in other instructions correctly and fully stating the law.

6. Appeal and error 🔑1066

Whether failure of formula instruction to contain all elements essential to recovery is prejudicial depends on whether jury is misled by instruction.

7. Negligence 🔑138(2)

An instruction that all men are presumed to be ordinarily careful in the matter of protecting themselves against possible injury to their persons should not be given where the party is alive and the facts are fully developed in the evidence.

8. Automobiles 🔑246(60)

In automobile accident case, instruction, given at plaintiff's request, that all men are presumed to be ordinarily careful in the matter of protecting themselves against possible injury to their persons, and that such presumption was to be considered as evidence which might be determinative upon question of plaintiff's negligence, was error, where plaintiff was alive and the facts were fully developed in the evidence.

9. Automobiles 🔑244(10)

In motorist's action against owner and driver of approaching truck for damages sustained in motorist's collision with automobile following truck, when both motorist and automobile were using center lane of three-lane highway at the same time, evidence was insufficient to show that truck driver was negligent in driving too close to center lane or in not pulling over to side of highway.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by George Warwick against Lawrence Maneely, Arthur E. Harrah, and Stewart & Nuss, Inc., for damages sustained in an automobile collision. Lawrence Maneely filed a cross-complaint against the plaintiff. The jury returned a verdict against Lawrence Maneely on his cross-complaint and in favor of the plaintiff as against all defendants, and thereafter a judgment notwithstanding the verdict was entered in favor of Arthur E. Harrah and Stewart & Nuss, Inc., and the plaintiff and Lawrence Maneely both appeal.

Judgment in favor of plaintiff reversed, and judgment notwithstanding verdict in favor of Arthur E. Harrah and Stewart & Nuss, Inc., affirmed.

Laurence B. Martin, of Los Angeles, and Dearing & Jertberg and Kenneth G.

Avery, all of Fresno (Geo. L. Beckwith, of Los Angeles, of counsel), for appellant and respondent Warwick.

Rae B. Carter and John D. Chinello, both of Fresno, for appellant Maneely.

Ray W. Hays, of Fresno, for respondents Harrah and Stewart & Nuss, Inc.

BARNARD, Presiding Justice.

This is an action for damages arising from an automobile collision in which were involved a car driven by the plaintiff, one driven by the defendant Maneely, and a truck loaded with seven tons of gravel owned by the defendant corporation and driven by the defendant Harrah. The collision occurred about 4:30 p. m. on August 2, 1937, on Highway 99, about six miles north of Fresno. This highway consists of three lanes, each ten feet wide and with broad shoulders on either side. The highway is straight and level for some miles on both sides of the point in question. The plaintiff was traveling north in the east lane following another car and the truck was coming south in the west lane, while Maneely was following the truck. The accident occurred when the plaintiff and Maneely, in attempting to pass the respective vehicles ahead of them, each entered and tried to use the middle lane about the same time. Maneely had gotten slightly ahead of the truck and his car was moving slightly at an angle, into the west lane when his car and the plaintiff's car collided. After this impact Maneely's car continued or was forced farther into the west lane and into the path of the truck, which struck its westerly side and, as plaintiff contends, threw the Maneely car again against the plaintiff's car.

This action was brought against Maneely and against the driver and owner of the truck, and Maneely filed a cross-complaint against the plaintiff. A jury returned a verdict against Maneely on his cross-complaint and in favor of the plaintiff as against all defendants. Thereafter, a judgment notwithstanding the verdict was entered in favor of the driver and owner of the truck. The plaintiff has appealed from the latter judgment and Maneely has appealed from the judgment against him. The last-mentioned appeal will be first considered.

It is first contended on behalf of Maneely that the evidence is insufficient to establish negligence on his part which was a proximate cause of the accident, and that the evidence discloses that the plaintiff was guilty of contributory negligence as a matter of law. There is a sharp conflict between the testimony of these two parties as to which first entered the middle or passing lane and as to which car struck the other. The plaintiff, who gave his age as 70 years, testified that the car ahead of him was going 25 miles per hour; that after observing that the middle lane was clear and seeing the truck in the west lane about 500 or 600 feet north of him he sounded his horn, increased his speed to 30 or 35 miles an hour, moved into the middle lane and attempted to pass the car in front of him; that he traveled 200 feet in the center lane in a straight line, and when his car was about opposite the car he was passing the truck was 250 feet farther north; that he then observed the Maneely car about 25 feet north of the truck and in the west lane; that in "not very many seconds" the Maneely car swerved out from behind the truck and into the center lane; that the Maneely car "bore down on him"; that "there was only one thing I could do; it was too late for me to get out of the center lane"; that he immediately applied his brakes and stopped within 12 feet; that when he applied his brakes the Maneely car was about abreast of the truck and less than 100 feet away and his own car was about opposite the car he was passing; that he saw that he could not get by the moment he saw the Maneely car come from behind the truck; that just after Maneely had passed the truck "he attempted to get ahead of the truck, and in doing so he struck my car slightly on the bias"; that at that time Maneely's car was "cutting at an angle back into the west lane"; that there was no contact between the Maneely car and the truck until after the Maneely car hit his car; and that Maneely's car stopped within a few feet after the collision.

Maneely testified that he was traveling south behind the truck; that he first saw the plaintiff's car and the one in front of it when they were from 150 to 175 feet away; that the plaintiff's car was about 50 or 75 feet from him when he started to pass the truck; that as he was passing the truck there was nothing to give him any concern; that before he knew whether or not he was sufficiently clear of the truck to permit him to return to the west lane, and as he had just started to ease his car over to the right, he saw the plaintiff's car cutting across the center lane; that the plaintiff's car suddenly shot out toward him; that the front of plaintiff's car hit the left front side of his car and pushed his car "right into the path of the gravel truck"; and that later there was a contact between his car and the truck.

Harrah testified that his truck was traveling south in the middle of the west lane; that Maneely's car was practically alongside him when he first saw it; that he then noticed the two cars coming north, the first car being about 100 feet away and the plaintiff's car about 150 feet; that he then slackened his speed slightly and turned a little to the right; that just as he noticed the two cars coming from the south the plaintiff's car turned into the center lane; that this made him think there was going to be an accident; that the plaintiff's car hit Maneely's car as that car was pulling back into the west lane; that he would say the Maneely car was 30 feet ahead of his truck when the crash occurred; that plaintiff's car came straight across the center lane at an angle; that after the plaintiff's car hit Maneely's car the front and rear tires of his truck struck the fenders of the Maneely car; that he pulled off the pavement to the right and stopped in 75 feet; and that, regardless of the exact distances or the respective speeds of the other two cars, they were so close together when the plaintiff pulled into the center lane that he thought neither one of them could be turned quickly enough to avoid a crash.

It is apparent that each of these drivers attempted to use the center lane as a passing lane at about the same time. While each driver claims to have been the first to enter that lane it is equally apparent that neither of them had any clear or accurate idea of the speeds and distances which might have a bearing on the accident in so far as their cars are concerned. All parties are agreed that the gravel truck was traveling at 25 miles per hour, but the plaintiff and Maneely each charge the other with a speed much greater than his own. Each made conflicting statements as to the respective distances and the relative position of certain cars at various stages of their testimony. For example, the plaintiff at different times stated that the front of his car at the farthest point got a few feet ahead of the car he was passing, that it got just even with the front end of that car, and that it got only to the middle of that car. Each gave estimates of speed and distances which are impossible. For instance, if the plaintiff's testimony were to be accepted at face value the Maneely car was 150 feet beyond the point of impact at the time the collision occurred. A similar result is obtained by taking Maneely's testimony in these respects. Obviously, the testimony of each with regard to respective distances between the several cars at critical times just prior to the accident is unreliable and amounts to little more than guesses or conjectures.

Under such circumstances, certain physical facts sometimes assume great importance. Keyes v. Hawley, 100 Cal.App. 53, 279 P. 674; Waizman v. Black, 101 Cal.App. 610, 281 P. 1087; Tracy v. Guibbini, 20 Cal.App.2d 216, 66 P.2d 675. Photographs which were taken of these cars and of the highway, before the cars were moved, were introduced in evidence. From these photographs, as well as from the testimony, it appears that the damage to the plaintiff's car covered the entire front thereof while the damage to the Maneely car is mainly on its left front side, extending from the front door forward. The front and rear fenders on the right side of the Maneely car were also bent in toward the car, apparently as a result of the collision between that car and the truck. While the condition in which these cars were left is not conclusive as to which driver was at fault, for reasons which have frequently been pointed out in other cases, it is quite suggestive in this instance. The photographs, as well as the testimony. disclose that after the collision the plaintiff's car was standing across the highway, facing west, covering most of the center lane but with its front wheels on the west lane. The Maneely car was almost in front of it but a few feet south, headed in a southwesterly direction, with its rear end on the pavement and its front end on the shoulder to the west of the pavement.

An engineer, who went to the scene about an hour after the accident, made a map of this portion of the highway showing certain skid marks which he observed on the pavement, which map was introduced in evidence. He testified that he observed skid marks 52.8 feet in length, running along the westerly part of the east lane and then at an angle across the middle lane to a point near the west edge of that lane, from which point there were a number of other marks on the pavement extending toward the southwest. A state traffic officer, who arrived at the scene fifteen minutes after the accident and before the cars had been moved, testified that he then observed skid marks extending from the east lane toward the west and into the center lane of the highway, and oil spots and marks which were around the point of impact. He testified that these were skid marks made by the car which had been going north and that, as he remembered it, these marks were approximately 15 feet long. He remembered seeing no marks showing the application of brakes on cars that were going south. With respect to a conversation he had with the plaintiff at the scene of the accident, this officer testified that the plaintiff told him that he saw the other car coming from the opposite direction but thought he had time to get by.

One or two hundred feet is a short space on a highway when two cars are approaching each other at fair rates of speed. It is obvious that this whole incident occurred within one or two seconds. While there is a conflict in the testimony of these parties as to which first entered the passing lane, their estimates of distances, speeds and the relative positions of the various cars are obviously unreliable, which is rather natural under the circumstances. Not only is the plaintiff's testimony unsatisfactory for this reason and because he frequently changed it in important particulars, but it cannot be reconciled with the tire marks left on the pavement by his car, which began in the east lane and ran at an angle across the middle lane to the point of impact. The evidence of the existence of these marks immediately after the accident stands without contradiction. Whatever the length of those marks, the officer and the engineer agreed that they came from the east lane and crossed the middle lane. It was impossible for the plaintiff to have been traveling within the center lane, and opposite the car he said he was passing, when these marks were made. This undisputed physical fact comes close to demonstrating that the plaintiff's expressed conclusion that he entered the middle lane first was "merely an erroneous guess". Waizman v. Black, supra [101 Cal.App. 610, 281 P. 1088]. Moreover, the plaintiff told the officer that he saw the other car coming but thought he "had time to get back in".

If we assume that portions of the plaintiff's evidence are sufficient to raise a conflict on the issue as to his contributory negligence it cannot be questioned that, in so far as it is disclosed by the written record, the evidence largely preponderates in favor of the defendant. It hardly seems possible that the jury could have found for the plaintiff unless it was prejudiced in some manner or was misled by the instructions. Under such circumstances, the other matters raised become very important.

[1] The defendant Maneely contends that one of plaintiff's counsel was guilty of misconduct which must have had a prejudicial effect upon the jury. While this counsel was examining Maneely under section 2055, Code of Civil Procedure, he suspended his interrogation and called Maneely's daughter to the stand. He first asked her if she had heard the court's instruction to leave the court room and remain outside. He then started a question "Isn't it a fact Miss Maneely * * *" when the court interrupted to say that he wanted any such matter taken up outside of the hearing of the jury. In spite of this and several attempts of the court to prevent him from then going into the matter counsel persisted and stated in the presence of the jury "I have certain evidence indicative of the fact that Miss Maneely was listening at the door during the testimony yesterday afternoon," and "I intend to show precisely what took place." The court had excluded the witnesses, but Miss Maneely was never called as a witness.

This conduct of counsel was unjustified and improper. There can be little question that he was sufficiently intelligent and experienced to know how to correct the situation he claimed to have existed, if any correction was necessary. The fact that he brought the matter up in the way he did and at the time he did indicates that he had a wrongful purpose in mind. Whether or not this be true, the circumstance was one well calculated to prejudice the jury against this defendant. It is rather significant that in this connection it is argued in plaintiff's brief that "it is also very much in point to observe that as a matter of fact, Miss Maneely was listening at the door and that there was absolutely no showing or indication to disprove this as an admitted fact". When a trained legal mind considers this fact very much in point, and as justifying certain inferences, it is hardly reasonable to suppose that the improper disclosure of that matter to the jurors did not have a similar effect upon them. Deibler v. Wright, 119 Cal.App. 277, 6 P.2d 344; Keena v. United Railroads, 197 Cal. 148, 239 P. 1061. Whether or not this circumstance was sufficient, in itself, to require a reversal it was entirely inexcusable and adds a further unsatisfactory element to the record in this case.

[2] Complaint is also made of the giving of certain instructions. It is first contended that the court erred in giving, at the request of the plaintiff, an instruction on the doctrine of last clear chance in which, after enumerating six conditions, the jury was told that if it found that these conditions existed it must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable despite any negligence on the part of the plaintiff. We think this instruction should not have been given under the circumstances shown by the evidence. The skid marks of the appellant's car, running from the east lane across the middle lane to the point of impact, constitute the strongest evidence in the case and indicate that Maneely had no chance whatever to avoid the collision. The uncontradicted evidence is that at the time of the collision the Maneely car was angling into the west lane. Even the plaintiff testified to that fact. The vehicles were so close together that before Maneely could get out of the way the gravel truck struck his car. Moreover, if for present purposes we accept the testimony given on behalf of plaintiff, Maneely suddenly swung out from behind the truck when he was so close that the plaintiff could not do anything except try to stop his car. He said that Maneely's car was so close when it first appeared from behind the truck that it was impossible for him to drop behind the car which was preceding him in the east lane, although he finally settled down to and firmly insisted upon the claim that when Maneely's car appeared the front end of his car was opposite the middle of the car he was passing. The car ahead of him was going almost as fast as he was, and if he was unable to drop back some six feet the time was very short and the Maneely car was very close. It further appears that as soon as Maneely saw that the plaintiff's car was in the center lane he pulled over and tried to get into the west lane, and his car was hit by the truck even then. There is no satisfactory evidence to show that Maneely should have seen the plaintiff's car earlier than he did, but if such a fact be conceded it is all the more certain that he would have been hit by the truck if he had turned into its path at an earlier instant. Both the plaintiff and Maneely asked for sudden peril instructions worded in favor of each, respectively, and both were given. This is one of those situations from which, when it is once brought about, neither party has much of a chance to escape. The language used in Bagwill v. Pacific Elec. R. Co., 90 Cal.App. 114, 265 P. 517, 519, is applicable here: "Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. * * * We are not to tear down the facts of a case and rebuild the same so that, by a trimming-down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last clear chance, not possible chance."

[3, 4] At the request of the plaintiff the court gave two other instructions, which are erroneous. In the first of these the jurors were told that in the event they found the plaintiff was not negligent, if they found that the negligence, if any, of Harrah contributed in any degree, no matter how slight, to plaintiff's injury their verdict "should be for the plaintiff and against the defendants". While thus authorizing a verdict against all defendants under these conditions the matter of negligence on the part of Maneely was entirely omitted from the instruction. This instruction was immediately followed by another instruction, which reads: "You are instructed that the defense of contributory negligence is a defense to be affirmatively established by the defendants by a fair preponderance of all the evidence in the case, unless such negligence is shown or can be inferred from the evidence adduced in support of the plaintiff's case, and in the event defendants do not so establish the defense of contributory negligence, your verdict should be for the plaintiff."

Again, this instruction entirely omits the matter of negligence on the part of the defendants, although it purports to state and clearly states the conditions under which a verdict should be returned for the plaintiff.

[5] The general rule in this regard is thus set forth in Douglas v. Southern Pac. Co., 203 Cal. 390, 264 P. 237, 238: "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. This principle is well stated in Beyerle v. Clift, 59 Cal.App. 7, 9, 209 P. 1015, 1016, wherein it is held that: 'If an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced. "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state." * * * The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions.'"

That rule is reaffirmed in Mecchi v. Lyon Van & Storage Co., Cal.Sup., 104 P.2d 26. The giving of such an instruction was held prejudicial in Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, and La Rue v. Powell, 5 Cal.App. 2d 439, 42 P.2d 1063.

[6] It is true that this rule has not been strictly applied in some cases where the instruction in question did not purport to be a complete statement of the law upon which a recovery could be based or where it appeared from the context that the jury could not have been misled. See, Douglas v. Southern Pacific Co., supra. In fact, the basic question in such a case is whether or not the jury may have been misled by the instruction. A large number of instructions were here given, some of which are very lengthy. The one in question is short and concise and one which might easily attract the attention of, and be remembered by, the jury. Without qualification, the jurors were told that unless the defendants affirmatively established their defense of contributory negligence the verdict should be for the plaintiff. The instruction was express and not general, and a verdict for the plaintiff was directed upon one condition. The omission of the element of negligence on the part of the defendant may well have misled the jury in such a case as this, where the evidence preponderates in favor of the defendant and where, so far as the record is concerned, it is difficult to see how the jury could reasonably have found for the plaintiff under the evidence. Under such circumstances, it cannot be held that the omission was not prejudicial and we are far from convinced that a miscarriage of justice has not occurred.

At the request of the plaintiff, the court further instructed the jury as follows: "I instruct you that the presumption is that all men are ordinarily careful in the matter of protecting themselves against possible injury to their persons. Such presumption, of course, may be overcome by the evidence, but in the absence of evidence to the contrary, you are entitled to consider said presumption along with all of the other evidence in the case in determining whether or not the plaintiff conducted himself as a man of ordinary prudence, under the same or similar circumstances."

[7, 8] It has frequently been held that this instruction should not be given where the party is alive and the facts are fully developed in the evidence. In a number of cases, however, it has been held not sufficiently prejudicial, under the circumstances, to justify a reversal. It was so held in Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. In that case the instruction merely stated the presumption and the court pointed out that the evidence in behalf of the plaintiff was beyond question and said it could not be assumed that the jury placed any great reliance on any such presumption even though told that they might do so. In Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128, such an instruction was held not prejudicial although there was a dissenting opinion. In that case the facts were practically uncontradicted and the court pointed out that in the instruction there given the jury was not told that this presumption might stand as evidence unless contradicted, and that no instructions were given with respect to the force or effect of such a presumption. In Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709, 714, a case in which contributory negligence was not a

defence, such an instruction was given which included the statement that this presumption should be considered as evidence unless it was rebutted by other evidence. While it was held that the instruction was improper but not prejudicial, the court said: "Had this been a case where the contributory negligence of the plaintiff would have defeated his claim for damages, the consequences following the giving of that instruction might have been most serious, and possibly might have required a reversal of the judgment." The instruction here in question went farther than any of the instructions in the cases referred to and the jury was told that this presumption was to be considered as evidence and was, in effect, told that it might even be determinative upon the question of the plaintiff's negligence. Under the circumstances of this case its effect upon the jury may have been considerable. Whether or not it would be sufficient, standing alone, to justify a reversal, this instruction furnishes an added reason why the judgment against this defendant should be reversed.

The appeal taken by the plaintiff from the judgment notwithstanding the verdict entered in favor of the defendants Harrah and Stewart & Nuss, Inc., deserves little consideration. The general facts heretofore set forth and a part of what has already been said is also applicable to this appeal. It appears without contradiction that the truck owned and driven by these defendants was proceeding southerly on the west lane of this highway at a speed of 25 miles an hour. The accident happened as a result of the actions of one or both of the drivers of the other two cars, who were both attempting to use the passing lane at the same time.

It appears from the uncontradicted evidence that the collision between the other two cars had occurred before the truck in any way came in contact with the right side of the Maneely car. The plaintiff contends, however, that after that crash occurred a second one followed in which the truck struck the Maneely car, which had turned into the path of the truck, throwing that car again against the plaintiff's car, causing additional damage.

[9] Negligence is ascribed to these defendants in only one or two particulars. The plaintiff, his wife and daughter, all testified that they saw the truck when they were 500 or 600 feet away, that it was proceeding south in the west lane but that its left rear tires were close to or upon or straddling the white line which separated the west lane from the middle or passing lane, and that the course of the truck was not changed prior to the collision. It is contended that to drive the truck near the inner edge of the west lane was negligence and, further, that negligence appears because Harrah testified that he saw that a collision between the other two cars was inevitable, it being argued that although he saw this he did not turn to his right and off the pavement as soon as he should have done. In this connection, in addition to his testimony previously referred to, Harrah testified that he thought prior to the crash that a collision was inevitable, that the sudden turning of the plaintiff's car from the east lane out into the center lane was what made him think there would be a crash, that this occurred just as the Maneely car was passing his left front wheel, and that at the moment he thought there would be an accident he immediately pulled his car to the right, going off the pavement and off the shoulder and stopping 75 feet beyond the point of impact. There is ample evidence that the truck was not running close to the white line. However, if we assume that it was and that this was a negligent act there is nothing whatever to show that such act had any causal connection with the accident or was a proximate cause thereof. The middle lane was 10 feet wide and all parties agree that the Maneely car had completely passed the truck before the accident occurred and that the truck did not touch the Maneely car until that car had turned or been knocked over into the west lane into the path of the truck. The evidence shows that the rear wheels of the truck constituted the widest part of the truck, that is the truck body did not overhang the wheels. Even when the Maneely car turned partially into the west lane in the path of the truck the truck was over far enough so that it only dented the fenders on the right side of the Maneely car. The truck was proceeding south in the west lane and there is evidence that near the scene of the accident a sign had been erected warning truck drivers to stay on the pavement. The truck driver had no reason to anticipate that the drivers of the other two cars would attempt to use the passing lane at the same time and the evidence shows that as soon as he realized

the situation he attempted to turn to his right and that he almost avoided contact with the Maneely car, although that car moved or was pushed into the west lane and into the path of the truck. After reading the evidence we are unable to see how a judgment against these defendants could be upheld and the action of the trial court in ordering a judgment notwithstanding the verdict, as far as they are concerned, was proper.

For the reasons given, the judgment in favor of the plaintiff is reversed and the judgment notwithstanding the verdict in favor of the defendants Harrah and Stewart & Nuss, Inc., is affirmed.

We concur: MARKS J.; GRIFFIN, J.

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40 Cal.App.2d 813

Helen L. WARWICK, Plaintiff, Cross-Defendant, Appellant and Respondent, v. Lawrence MANEELY, Defendant, Cross-Complainant and Appellant; Arthur E. Harrah and Stewart & Nuss, Inc., Defendants and Respondents.

Civ. 2543.

District Court of Appeal, Fourth District, California.

July 23, 1940.

Hearing Denied Sept. 19, 1940.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Laurence B. Martin, of Los Angeles, and Dearing & Jertberg and Kenneth G. Avery, all of Fresno (Geo. L. Beckwith, of Los Angeles, of counsel), for appellant and respondent Warwick.

Rae B. Carter and John D. Chinello, both of Fresno, for appellant Maneely.

Ray W. Hays, of Fresno, for respondents Harrah and Stewart & Nuss, Inc.

BARNARD, Presiding Justice.

This is a companion case to 104 P.2d 831, the decision in which has this day been filed. The plaintiff herein is the daughter of the plaintiff in the other action and she was injured in the same accident. The actions were tried together but separate appeals were taken which have been presented upon separate clerk's transcripts and on the same reporter's transcript. The questions involved and all material matters are identical in the two actions.

For the reasons given in the opinion referred to, the judgment in favor of the plaintiff is reversed and the judgment notwithstanding the verdict in favor of the defendants Harrah and Stewart & Nuss, Inc., is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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40 Cal.App.2d 812

Nina C. WARWICK, Plaintiff, Cross-Defendant, Appellant and Respondent, v. Lawrence MANEELY, Defendant, Cross-Complainant and Appellant; Arthur E. Harrah and Stewart & Nuss, Inc., Defendants and Respondents.

Civ. 2545.

District Court of Appeal, Fourth District, California.

July 23, 1940.

Hearing Denied Sept. 19, 1940.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Laurence B. Martin, of Los Angeles, and Dearing & Jertberg and Kenneth G. Avery, all of Fresno (Geo. L. Beckwith, of Los Angeles, of counsel), for appellant and respondent Warwick.

Rae B. Carter and John D. Chinello, both of Fresno, for appellant Maneely.

Ray W. Hays, of Fresno, for respondents Harrah and Stewart & Nuss, Inc.

BARNARD, Presiding Justice.

This is a companion case to 104 P.2d 831, the decision in which has this day been filed. The plaintiff herein is the wife of the plaintiff in the other action and she was injured in the same accident. The actions were tried together but separate appeals were taken which have been presented upon separate clerk's transcripts and on the same reporter's transcript. The questions involved and all material matters are identical in the two actions.

For the reasons given in the opinion referred to the judgment in favor of the plaintiff is reversed and the judgment notwithstanding the verdict in favor of the defendants Harrah and Stewart & Nuss, Inc., is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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40 Cal.App.2d 266

RICKARDS et al. v. NOONAN et al.

Civ. 2390.

District Court of Appeal, Fourth District, California.

July 31, 1940.

Hearing Denied Sept. 25, 1940.

1. Death 🔑105

A single lump-sum finding on damages suffered by heirs from wrongful death and a single lump-sum judgment is the only proper method of assessing damages, and whether it is divided among them after recovery, or how it is divided, are matters of no concern to defendants.

2. Appeal and error 🔑717

Generally, the written opinion of the trial court is no part of the record on appeal and will not be considered by the District Court of Appeal for purpose of predicating error on rulings of the trial court or in determining whether findings of fact are supported by evidence.

3. Appeal and error 🔑854(1)

Judgment would be sustained if it was right upon any applicable theory of law regardless of considerations moving trial court to its conclusion.

4. Divorce 🔑156

The law enforcing a year's delay between interlocutory and final decrees of divorce contemplates that facts arising subsequent to entry of interlocutory decree should have influence in determining right to a final decree, and the courts inherently possess the power to recognize condonations and reconciliations and to do justice as may be demanded by such events as have arisen subsequent to interlocutory decree and before expiration of the fixed period of one year.

5. Death 🔑77

Evidence of frequent meetings and friendly companionship between husband and wife after entry of interlocutory decree of divorce, of their decision to reunite, their indulgence in sexual intercourse, their desire to move together as soon as their financial condition would permit, and testimony that they had become reconciled, sustained conclusion that reconciliation had taken place as basis for measuring damages to which wife was entitled for wrongful death of husband. Code Civ.Proc. § 377.

6. Trial 🔑375

In action by wife and father of deceased accident victim to recover damages for wrongful death, where evidence did not disclose age of father as basis for calculating damages, the trier of facts was entitled to approximate his age and life expectancy.

7. Death 🔑99(4, 5)

In action by wife and father of deceased accident victim to recover damages for wrongful death, evidence sustained award of $3,438.64. Code Civ.Proc. § 377.

8. Trial 🔑47(2)

Where objections to certain testimony were sustained, but objection to introduction of portion of deposition by witness was later withdrawn and this portion of the deposition was received in evidence, and court gave counsel permission to offer further evidence on the matter but no further request or offer of proof was made, error could not be predicated upon court's previous ruling.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Charles P. Rickards and another against Mildred Noonan and another to recover damages for the wrongful death of Stewart Rickards, deceased. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Stickney & Stickney and Edward Strop, all of San Diego, for appellants.

Hervey & Holt, of San Diego, and Henry F. Walker, of Los Angeles, for respondents.

GRIFFIN, Justice.

This is an appeal by defendants and appellants from a judgment awarding plaintiffs and respondents, as the sole surviving heirs at law of Stewart Rickards, deceased, damages for his wrongful death.

Appellants raise no question concerning their negligence or liability to respond in damages. They contend (1) that the damage awarded is excessive; and (2) that the trial court erred in ruling upon the admissibility of certain evidence.

Respondent Doris Rickards was decedent's wife and respondent Charles P. Rickards was decedent's father. Trial was had before the court without a jury. It found that the respondents jointly had been damaged in the sum of $3,438.64, of which $146.50 was for funeral expenses.

One night about October 30, 1938, the deceased was riding with a Beleta Myers and certain other persons in a hay wagon used for hay ride excursions on a paved highway near El Cajon. A car owned by Mildred Noonan and being driven with her consent by Hale Whitaker ran into the rear of the hay wagon, resulting in the immediate death of Stewart Rickards.

Respondent Doris Rickards was married to decedent on April 16, 1933, about three years after her graduation from high school. They lived together as man and wife (except for a period of about three weeks) until May 9, 1938, a period of five years. They became separated on this latter date and on August 10, 1938, she procured an interlocutory decree of divorce. No provision was made in that decree for alimony or support.

From the evidence it appears that the divorce proceedings were instituted by respondent Doris Rickards for the apparent purpose of reforming decedent; that intermittently throughout their married life, decedent had gambled considerably; that respondent had attempted to break him of the habit; that she sought the divorce to teach him a lesson; that she still loved him and he still loved her and she brought the divorce proceedings as a last resort; that soon after the granting of the interlocutory decree the parties started to reconcile their marital difficulties and sometime prior to his death they began to see each other "every other day or so"; that during the two weeks preceding his death they frequently met and had various engagements for lunches, dancing, playing games, and riding together. He frequently telephoned her. They discussed "going back together again". Sexual relations between them were had on the two nights preceding his death. Plaintiff testified that "subsequent to the granting of the interlocutory decree between us, there was a reconciliation between us", and although they had become reconciled, they had not as yet moved together again because decedent, who was living with his father, had many bills to pay and he "wanted to get on his feet first" so that their resumed married life would not again fail. On the last evening when Doris Rickards was in the company of the deceased, he borrowed $50 from her and gave her his note for $56. This note was in addition to a prior note for $500 which she testified he gave her for money loaned to him by her prior to their marriage, and decedent had agreed to pay a community debt (grocery bill), a portion of which he had paid, the balance of which was $172. Respondent Doris Rickards had been employed during her married life and was self-supporting. Her husband, during the two summers preceding his death, had a seasonal job with a salary of $41 per week. At the time of his death he was employed in a steady position at a salary of $36 per week.

As to the respondent, the father, the evidence shows that he was partially dependent upon the deceased for his support during the married life of his son; that for several years previous to their separation, decedent and his wife had resided about one block from the father's home. In May of 1938, decedent moved into his father's home where he was staying at the time of his death. Charles P. Rickards testified that decedent "was paying me $12.50 a week to support me" and that such contribution started when decedent moved to the father's residence; that in addition to the foregoing contributions the decedent gave him other amounts which over a period of several months averaged $10 a month; that although he could not tell the average thereof prior to the five months preceding decedent's death, he testified that similar contributions had been made for several years previous thereto.

Respondent Doris Rickards testified that her husband had given his father sums varying from $10 to $20 and on two or three occasions had "helped his father out with large sums of money".

The trial court in its formal findings of fact and conclusions of law found that plaintiff Doris Rickards was the wife of deceased at the time of his death, and that although she had procured an interlocutory decree of divorce, she was not divorced from decedent. It was further found that by his death she had been deprived of the comfort, society, support and consortium of the decedent to her damage, which, combined with that suffered by her coplaintiff, amounted to $3,292.14.

Appellants on this appeal contend that respondent Doris Rickards suffered no substantial damage and, if entitled to anything, she was entitled only to nominal damages. It is conceded by appellants that she is a proper party plaintiff herein, that is, she is an heir at law within the meaning of the provisions of section 377 of the Code of Civil Procedure, but that as such heir she is entitled to only nominal damages under the evidence.

In support of the first contention appellants argue that the evidence would not justify a finding or conclusion that the parties had effected a reconciliation and that therefore the respondent Doris Rickards had no legally enforceable right to support from the deceased, Stewart Rickards, and cite McClure v. McClure, 4 Cal. 2d 356, 49 P.2d 584, 100 A.L.R. 1257, which in effect holds that where the interlocutory decree of divorce neither awards alimony to the wife nor reserves a right thereafter to make an allowance for her support, the husband is relieved of the obligation to pay alimony or support the wife. The case of Powers v. Sutherland Auto Stage Co., 190 Cal. 487, 213 P. 494, 495, is also cited, wherein it is said: "The amount awarded is solely attributable, therefore, to the loss by the death of the husband of the legally enforceable right of support against him." It is therefore maintained that when Doris Rickards procured the interlocutory decree of divorce against her husband she freed him from any legally enforceable obligation for support, and placed herself in the category of a collateral heir for the purposes of this action, and that the result of this action on her part is that she now has the burden of proving actual pecuniary loss, citing Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A.L.R. 509; London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 466, 184 P. 864; Estate of Walker, 176 Cal. 402, 413, 168 P. 689; Zeller v. Reid, 26 Cal.App.2d 421, 79 P.2d 449; Dickinson v. Southern Pacific Co., 172 Cal. 727, 158 P. 183, and Piland v. Yakima Motor Coach Co., 162 Wash. 456, 298 P. 419.

Respondents, in meeting this contention, assert that damages in a wrongful death action are based on the valuation of the benefits which the heirs probably would have received from the decedent had his life not been taken, and that in cases of this character, the damages sustained are largely of a prospective nature, citing Valente v. Sierra Ry. Co., 158 Cal. 412, 419, 111 P. 95.

In Taylor v. Albion Lumber Co., 176 Cal. 347, 351, 352, 168 P. 348, 350, L.R.A. 1918B, 185, it was held that: "The action given by section 377, Code of Civil Procedure, is one for the benefit of 'heirs' * * * and lies, regardless of their condition as to dependency, for any pecuniary loss they may suffer by reason of the death. * * * As said in Sneed v. Marysville, etc., Co., 149 Cal. [704] 710, 87 P. [376] 379: 'This pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only.' "

In Williams v. McDowell, 32 Cal.App. 2d 49, 89 P.2d 155, 157, it was held that "While recovery is limited to pecuniary loss this may be either a loss arising from the deprivation of something to which the heir would have been legally entitled, such as support, or it may arise from a loss of benefits which under the circumstances could reasonably be expected to have accrued to the heir even though the obligation resting upon the deceased to bestow such benefits may have been a moral obligation only." The case of Morgan v. Southern Pacific Co., 95 Cal. 510, 521, 30 P. 603, 17 L.R.A. 71, 29 Am.St.Rep. 143, is also cited.

[1] Appellants throughout their brief quote and rely upon certain statements made by the trial court in his oral opinion. They have predicated much of their argument thereon and thereunder have attempted to divide the lump-sum judgment into two distinct portions, one of which they attempt to allocate to the respondent widow and the other to the respondent father. The formal findings and judgment make no such division. A single lump sum finding on damages suffered by the heirs

and a single lump-sum judgment is the only proper method of assessing damages and whether it is divided among them after recovery or not, or how it is divided, are matters of no concern to the appellants. Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 194 P. 39.

[2] The general rule is that the written opinion of the trial court is no part of the record on appeal and will not be considered by this court for the purpose of predicating error in the rulings of the trial court or in determining whether the findings of fact are supported by the evidence. Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 704, 74 P. 307; DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444; Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 89 P.2d 732; Toby v. Hubbard, 125 Cal.App. 261, 13 P.2d 869; Heinfelt v. Arth, 4 Cal.App.2d 381, 41 P.2d 191: Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213; El Centro Grain Co. v. Bank of Italy, etc., 123 Cal.App. 564, 11 P.2d 650.

However, there is another line of decisions which hold that the opinion of the trial judge may be considered for the purpose of considering the process by which he arrived at his conclusions, or when the opinion furnishes the basis of the court's decision of the case. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273. The trial judge, in discussing the question of damages, made certain remarks which were not basically well chosen concerning the probabilities of the claimed reconciliation being of a permanent character, or relating to the possibilities of a complete reconciliation. The remarks were: "I think I am entitled to consider what are the reasonable probabilities of reconciliation during the one year that there was not a divorce, but simply an interlocutory decree, and from all the evidence in the case it would be my guess that there is about one chance out of four of there actually being a reconciliation which would stand. * * * It is my belief that he would eventually have paid the grocery bill. * * * As far as the notes are concerned, it is my belief that if there was never a reconciliation and he got around to it and had a lot of money that he didn't have any use for somewhere else, and did not gamble, he would have paid them. If he became reconciled, he never would. * * * Again, I think she had about one chance out of four of ever recovering on those notes. * * * I think that it would be fair to allow her about one-fourth as much as I would if there had been no interlocutory decree and they had been living together. * * * I would feel probably that his comfort and protection and society, etc., measured in dollars and cents, was about the same to her as it was to his own father, * * * I think I will allow her $1,500 for that."

The item of $146.50 for the funeral bill was indicated as an additional item to be added to the father's share and an additional amount of $192 was likewise suggested as an item of allowance to the wife. The court then held that the judgment of the plaintiffs on the death case would be $3,338.50.

Before denying the motion for new trial the court reconsidered the remarks above made and stated:

"Defendants' construction of the remarks made by the court in deciding this case, while perhaps logical, does not set forth the real intention of the court. It was my feeling at the time, and is my present feeling, that the evidence strongly preponderates to the effect that a reconciliation would have been accomplished. The probability of a reconciliation was and is established in my mind by clear, satisfactory, and convincing evidence. However, I felt that even though the probability was clearly established yet it might not work out in more than one out of four cases. What was said by the Court was, of course, not a finding of fact but a discussion from the bench, trying to explain to counsel the operations of the Court's mind as to how it arrived in dollars and cents at the value of the intangible elements which are compensable under the death statute.

"The final result and ultimate facts determined were and are that the plaintiff Doris Rickards was damaged by the death of her husband and that for that damage plaintiffs are entitled to a judgment in the amount set forth in the judgment. The court is of the opinion that the plaintiffs are entitled to recover judgment as a matter of fact and law, all as set forth in the findings and judgment, and that the evidence bearing thereon was established in favor of plaintiffs by a clear preponderance and by clear, satisfactory and convincing evidence."

[3] In view of the determination made on the motion for new trial, we feel bound

by the general rule first above mentioned. If the judgment or order in question is right upon any theory of law applicable to the case it must be sustained, regardless of the considerations which may have moved the trial court to its conclusion. It is judicial action and not judicial reasoning which is the subject of review. Luman v. Golden Ancient Channel M. Co., supra; 2 Cal.Jur. 476.

In the instant case there are several theories upon which the judgment of the trial court may have been predicated: (1) that the plaintiff wife suffered all of the damages awarded upon the theory that a reconciliation with reasonable certainty would have been accomplished and she was deprived of future benefits which would have accrued to her; (2) that a reconciliation had taken place and she was damaged by the deprivation of future benefits and rights; (3) that the plaintiff father suffered all of the general damages awarded; and (4) that the plaintiffs each suffered substantial damages which combined amounted to the award made.

[4,5] One of the great purposes of the law enforcing a year's delay between the interlocutory and final decrees of divorce is to provide a period during which the parties may become reconciled and thus avoid the unhappy consequence of a final decree of divorce. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110. It is within the contemplation of the law that facts arising subsequent to the entry of the interlocutory decree should have their influence in determining the right to a final decree, and the courts inherently possess under the present statute and without express authorization, the power to recognize condonations and reconciliations and to do justice as may be demanded by such events as have arisen subsequent to the interlocutory decree and before the expiration of the fixed period of one year. It has been declared that one of the important purposes of the law is to give the spouses a chance to effect a reconciliation, which the law always favors. Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A.L.R. 1589. Reconciliation is to a great extent dependent upon the intention of the parties. The existence of such intention in the instant case is supported by evidence. Their frequent meetings and friendly companionship, their decision to reunite, their indulgence in sexual intercourse, their desire to move together as soon as their financial condition would permit, and the testimony that they had become reconciled, could result in a conclusion that a reconciliation had taken place. Gregg v. Manufacturers Bldg. Corp., 134 Cal.App. 147, 25 P.2d 1014; Estate of Walker, 176 Cal. 402, 413, 168 P. 689.

[6] Although the evidence does not disclose the age of the father, the trial court remarked, after seeing the witness on the stand, that in this regard he used his own judgment and considered his personal experience and to him he appeared to be a little older than 53 years. It has been held, under such circumstances, that a trier of facts may approximate the witness's age and life expectancy. Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; Hill v. New York Life Ins. Co., Cal.App., 101 P.2d 752; Duehren v. Stewart, Cal.App., 102 P.2d 784.

[7] Applying the rules applicable in reference to pecuniary loss under section 377 of the Code of Civil Procedure (8 Cal. Jur., secs. 51-2-3, pp. 1003-1007), and for the reasons expressed, we are unable to hold that the award was unreasonable and not supported by the evidence.

[8] The sole remaining contention made by appellants relates to the rulings made on the admissibility of certain evidence. All of this evidence related to one subject, i. e., an attempt by appellants to introduce testimony through Miss Beleta Myers of conversations had between her and the decedent respecting marriage. Miss Myers testified that she was not engaged to the decedent. On cross-examination Doris Rickards testified that decedent had never told her that he and Miss Myers were engaged to be married. An unsuccessful attempt was made by appellants on two different occasions to introduce purported conversations between Miss Myers and the decedent on that subject. Regardless of the correctness of the court's ruling, appellants are in no position to urge error in regard to any of the foregoing. Respondents, toward the close of the trial, withdrew their objections to the introduction in evidence of certain testimony set forth in a deposition wherein Miss Myers stated that there had been a conversation in reference to their marital intentions, and this portion of the deposition was received in evidence. The court thereafter remarked to appellants' counsel: "If you want to get further evidence from

her on that, I will permit you. . . . By Mr. Stickney: If I desire to, I will request Your Honor. I don't know that I will." No further request or offer of proof was thereafter made. Error cannot be predicated upon the court's previous ruling. McDonald v. Morley, Cal.Sup., 101 P.2d 690.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

40 Cal.App.2d 327

PEOPLE v. LESTERJETTE et al.

Cr. 3339.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1940.

1. Criminal law 🔑980(2)

In robbery prosecution, where information did not allege that any of the defendants were armed with a deadly weapon and defendants pleaded guilty, trial court could not include finding that defendants were armed with deadly weapon in judgments of conviction, and such finding must be stricken out. Pen.Code, §§ 969c, 1168, subd. 2(e).

2. Indictment and information 🔑113

In order to put in issue the question whether a defendant is armed with a deadly weapon, such allegation must be pleaded in the complaint, information or indictment.

3. Criminal law 🔑1206(3)

The statutes providing for increased penalties when defendant is armed with a deadly weapon are highly penal and should be strictly construed. Pen.Code, §§ 969c, 1168, subd. 2(e).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Prosecution against Douglas Lesterjette and others, wherein Al H. Thompson and John R. Thompson were convicted of robbery, and they appeal.

Modified, and as modified, affirmed.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information containing nine counts of robbery, the appellants herein, Al H. Thompson and John R. Thompson, were jointly charged in each count of the information with the other defendants with the crime of robbery. Following the original entry of pleas of not guilty, appellants thereafter, by consent of the court, withdrew such pleas as to counts 4 and 9 and thereupon entered pleas of guilty. Appellants were permitted to file an application for probation, so that all the facts might be brought to the attention of the court, and by stipulation it was agreed that from the facts contained in the transcript of the preliminary examination, coupled with the facts narrated in the report of the probation officer, the court might fix the degree of the respective crimes. The remaining counts of the information were dismissed. Upon consideration, the trial court found that the robberies to which each of the appellants herein had entered a plea of guilty were of the first degree, and further found that each of the appellants was armed with a deadly weapon at the time of the commission of the offenses to which they and each of them had pleaded guilty. This appeal is from the judgment entered.

[1, 2] The single point urged on appeal is that the judgment should be modified by striking therefrom the finding of the court that appellants were armed with a deadly weapon at the time of the commission of the offenses. In support of their contention appellants assert, and the attorney-general admits, that the information contained no allegation whatsoever that appellants, or any of the other defendants, were armed with deadly weapons, by reason of which, it is argued, the trial court was without authority to make a finding thereon or to include in the judgments any such finding. In this claim appellants must be upheld. Section 969c of the Penal Code provides that whenever a defendant is armed with a deadly weapon "the fact that the defendant was so armed shall be charged in the indictment or information or complaint". This section further provides that "the nature of the weapon must be set forth * * *". It is further pro-

vided in said section that where, as in the instant case, "the defendant pleads guilty to the offense charged the question whether or not he was armed as alleged must be determined by the court before pronouncing judgment". Manifestly, in order to put in issue the question of whether a defendant is armed with a deadly weapon such allegation must be pleaded in the complaint, information or indictment. Unless the question of whether a defendant was so armed is raised by the pleadings, there is no issue to "be determined" by the court following a plea of guilty. Undoubtedly for that reason the legislature ordained in the aforesaid section that "this charge shall be added to and be a part * * * of the indictment or information or complaint which charge the offense * * *".

In the case now before us it appears that when one of defendants' counsel indicated his desire to be heard upon the question of whether defendants were armed with a deadly weapon in contemplation of law, the court said, "There is no such allegation in the information", and a careful reading by us of the reporter's transcript gives no indication that any evidence whatsoever was received by the court on the issue of whether the defendants were armed with a deadly weapon. Nevertheless, the court determined and incorporated in the judgment a finding that each appellant was "armed with a deadly weapon at the time of the commission of the offense". Undoubtedly, if the district attorney had been prepared to prove that appellants were so armed he would have included in the information an appropriate allegation thereof. Not having pleaded that appellants or any of their codefendants were armed with a deadly weapon at the time of the commission of the offense, and no evidence having been offered in support of such issue, the court's finding thereon is without legal justification and must be eliminated from the judgment. Moreover, subdivision 2 (e) of section 1168 of the Penal Code, commonly known as the indeterminate sentence law, provides that minimum penalties therein provided for in cases where a defendant is armed with a deadly weapon at the time he commits an offense shall apply "only when such possession of a deadly weapon * * * has been charged and * * * found to be true in the manner provided by law". When, therefore, the finding appears in the judgment, the board of prison terms and paroles is thereby authorized to assume, in fixing the added penalty therefor, that the fact that the prisoner was armed with a deadly weapon at the time of the commission of his offense was properly pleaded and competently proved.

[3] In Cavassa v. Off, 206 Cal. 307, 313, 274 P. 523, 525, our Supreme Court says: "It is well established in this state, where a prior conviction is relied upon for the purpose of empowering a court to inflict an increased penalty upon a defendant, that the indictment or complaint must allege the prior conviction, and upon the trial, unless admitted, such prior conviction must be proven by competent evidence. People v. Delany, 49 Cal. 394, People v. Coleman, 145 Cal. 609, 612, 79 P. 283. In the Coleman Case this court said: 'The former conviction is a fact, and a very important one, which constitutes or goes to make up this aggravated offense, and being a material fact in the case, necessarily it must be pleaded, and if issue be joined in reference thereto, * * * must be proven as any other material fact in the trial of the cause.'" Inasmuch as the provisions governing allegation and proof of prior convictions are interwoven with and part and parcel of sections 969c and 1168 of the Penal Code, the former of which provides in like manner for alleging and proving the fact that a defendant was armed with a deadly weapon at the time of the commission of the offense with which he is charged, we hold that in the instant case the court had no power to declare in the judgment that appellants were armed with a deadly weapon at the time they committed the offenses to which they pleaded guilty. This by reason of the fact that concededly such fact was neither alleged nor proven. The provisions of sections 969c and 1168 of the Penal Code, providing for increased penalties when a defendant is armed with a deadly weapon in the commission of an offense, are highly penal in their nature, and should therefore receive a strict construction.

For the foregoing reasons, it is ordered that the judgment entered herein be modified by striking therefrom the words, "and the court having found that defendant was armed with a deadly weapon at the time of the commission of the offense". As so modified, the judgments are affirmed.

We concur: YORK, P. J.; DORAN, J.

40 Cal.App.2d 324

PEOPLE v. TAYLOR.

Cr. 3365.

District Court of Appeal, Second District,
Division 1, California.
Aug. 6, 1940.

1. Gaming 🔑98(1)

Evidence sustained conviction of violation of statute declaring it a crime to receive, hold or forward any money or thing of value staked, pledged, bet or wagered upon the result of any trial or contest of skill, speed or power of endurance of man or beast. Pen.Code, § 337a, subd. 3.

2. Criminal law 🔑409, 535(2)

Proof beyond a reasonable doubt of corpus delicti is not required in order to receive evidence of admissions or confessions, all that is necessary being a prima facie showing.

3. Criminal law 🔑409

In prosecution for receiving money for horse race bets, evidence that accused received money from several persons on the street, that accused looked at a "Scratch Sheet" and went immediately to a telephone booth and phoned horse race bets, made a prima facie showing of corpus delicti to authorize admission of testimony concerning conversation had between police officers and accused. Pen.Code, § 337a, subd. 3.

4. Criminal law 🔑1159(2)

Before a verdict can be set aside, it must clearly appear that upon no hypothesis whatever is there in the record substantial evidence to support the judgment.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Floyd Taylor was convicted of violating the statute which declares it a crime to receive, hold or forward any money or thing of value staked, pledged, bet or wagered upon the result of any trial or contest of skill, speed or power of endurance of man or beast, and he appeals.

Affirmed.

Leland E. Zeman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was convicted of a violation of subdivision 3 of section 337a of the Penal Code, which declares it a crime to receive, hold or forward, "in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered * * * upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever".

Trial by jury was waived and the cause submitted for decision upon the evidence adduced at the preliminary hearing, which consisted of the testimony of one of the arresting officers to the effect that he observed the defendant on the street for about ten minutes; saw him on three or four different occasions speak to men on the street; that "money would change hands and the defendant would go to a telephone in this wine store"; that he did not hear any of the conversation between the defendant and the men on the street; that before defendant left the two men they had looked at a National Scratch Sheet; that "when the money had changed hands the defendant started for the wine store. I went around the corner and entered the wine store. The defendant was dialing a number. I stood approximately two or three feet behind him and heard the defendant say '784, one to win, B.K. 786, one to win, A.R.' He just hung up the receiver when an unidentified man stepped up to him and said, 'I want one to win on 784.' The defendant said, 'O. K.' He dialed a number and as he was finishing dialing he turned around and saw me, hung the phone up and started to walk away, when I placed him under arrest." The officer further testified that a National Scratch Sheet of that date, containing notations and prices of previous races that day, was found on the defendant's person, together with $97, mostly in one-dollar bills, and several dollars in silver; that the number 784 appeared on the scratch sheet opposite the name of the horse Electrose running that day; that the number 786 referred to a horse named Canibal, running in the same race; that after his arrest the defendant said that he took bets only on the street and did not go in any place of business; and that "during the conversation in the car with officers Gunn, Allen, myself and the defendant, we asked him who he was making a book for. He said that was Lollie's corner, and he used to make a book for him, and he was still making a book for him and no one else was on the corner. I asked—Officer Allen asked him how he made his bets. He said he laid off all his bets over the telephone as soon as he received them."

[1-4] We are satisfied that the evidence is sufficient to sustain the conviction. There is no merit in defendant's claim that the corpus delicti was not established and that the trial court erred in admitting testimony concerning the conversation had between the police officers and defendant. Proof beyond a reasonable doubt of the corpus delicti is not required in order to receive evidence of admissions or confessions. All that is necessary is a prima facie showing. People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571; People v. Black, 111 Cal.App. 90, 295 P. 87; People v. Harris, Cal.App., 104 P.2d 529. Manifestly, such a showing was made in the instant case. Appellant received money from several persons on the street. The officer testified that appellant was looking at a scratch sheet with two men, received money from them and went immediately to a telephone booth and phoned two bets. The inference is clear that appellant was phoning a bet for each of these two men. This is the inference the court drew and was justified in drawing. Add to the foregoing appellant's admissions made to the arresting officers and the inference of guilt drawn therefrom by the trial court certainly does no violence to reason. We cannot, therefore, substitute any finding of ours as to such ultimate fact for that reached by the jury, or as here, reached by the trial judge without a jury. People v. Yant, 26 Cal.App.2d 725, 733, 80 P.2d 506; People v. Latona, 2 Cal.2d 714, 725, 43 P.2d 260; People v. Kneiling, 127 Cal. App. 151, 153, 15 P.2d 561. Before a verdict can be set aside it must clearly appear that upon no hypothesis whatever is there in the record substantial evidence to support the judgment. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467. Moreover, appellant in the case before us did not take the witness stand, nor did he present any evidence in his own defense, nor deny the inculpatory admissions made by him. The case of People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707, so earnestly relied upon by appellant, is not applicable here. In the case just cited defendant made no incriminatory admissions, stoutly maintained his innocence, took the witness stand, and offered a defense. In the instant case, oral proof tending to establish the corpus delicti being of a substantial character, the proof of guilt beyond a reasonable doubt was not only corroborated and strengthened by the admissions of appellant to the police officers, but was thereby actually supplied.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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40 Cal.App.2d 280

IRVINE v. STATE BOARD OF EQUALIZATION.

Civ. 12565.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1940.

1. Constitutional law 🔑287

There is no inherent right in a citizen to sell intoxicating liquors, and a license to do so is not a "contract," nor a "proprietary right" within meaning of due process clause of the Constitution, but is a "permit" to do what would otherwise be unlawful. Gen.Laws 1937, Act 3796, §§ 40, 41; Const. art. 1, § 13; art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract", "Permit" and "Proprietary Right".

2. Intoxicating liquors 🔑108(9)

One should not be deprived of a permit to engage in a legitimate business such as the liquor business, without a fair and impartial hearing, and without an opportunity to present competent evidence for consideration by the licensing authority in opposition to proposed revocation of his permit. Gen.

Laws 1937, Act 3796, §§ 40, 41; Const. art. 20, § 22.

3. Intoxicating liquors ⚷=45

The Alcoholic Beverage Control Act providing for notice of hearing of complaint made against a liquor licensee, and a hearing, is not in conflict with constitutional provision conferring plenary jurisdiction upon the Board of Equalization to license and regulate the sale of intoxicating liquor, and the act merely regulates procedure and does not impair constitutional power of Board of Equalization, nor attempt to regulate or define what jurisdiction the board shall possess. Gen.Laws 1937, Act 3796, §§ 40, 41; Const. art. 20, § 22.

4. Intoxicating liquors ⚷=45

The Legislature may prescribe the procedure by which jurisdiction of the Board of Equalization is to be exercised in suspending or revoking license of liquor licensee against whom a complaint has been made. Gen.Laws 1937, Act 3796, §§ 40, 41; Const. art. 20, § 22.

5. Intoxicating liquors ⚷=45

When legislative action prescribing mode in which the Board of Equalization shall exercise its jurisdiction does not circumscribe the board's powers as derived from the Constitution, the action does no violence to jurisdiction of the board and does not interfere with the broad discretion lodged in the board to control issuance and cancellation of liquor licenses, and it is only where the legislative action impairs the powers granted by the Constitution or defeats exercise of such powers that it is without force. Gen. Laws 1937, Act 3796, §§ 40, 41; Const. art. 20, § 22.

6. Intoxicating liquors ⚷=108(2)

Amendment to Alcoholic Beverage Control Act which authorized suspension or revocation of liquor license if continuance of license would be contrary to public welfare or morals, and provided that proceedings for suspension or revocation upon such grounds should not be deemed a limitation upon the authority of the Board of Equalization to proceed pursuant to constitutional authorization, was not indicative of purpose to recognize right of board to revoke a license summarily and without notice when acting on board's own motion, and the amendment merely gave to any person the right to initiate a proceeding for revocation or suspension upon ground previously reserved to the board. Gen.Laws 1937, Act 3796, §§ 40, 41; Const. art. 20, § 22.

7. Intoxicating liquors ⚷=108(2, 9)

The Board of Equalization was not authorized to revoke liquor license without giving notice to the licensee of a hearing and without conducting a hearing, even though the board acted independently and not upon verified complaint. Gen.Laws 1937, Act 3796, §§ 40, 41; Const. art. 20, § 22.

DORAN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Mandamus proceeding by Frank Irvine, doing business as Paradise Club Cafe, against the State Board of Equalization of the state of California to require defendant to reinstate a liquor license previously revoked by defendant. From an adverse judgment, the defendant appeals.

Affirmed.

Earl Warren, Atty. Gen. and Burdette J. Daniels, Deputy Atty. Gen., for appellant.

Robert W. Kenny and Morris E. Cohn, both of Los Angeles, for respondent.

WHITE, Justice.

In October, 1939, petitioner, respondent herein, filed in the superior court of Los Angeles county a petition for a writ of mandate directed against the State Board of Equalization of the State of California, appellant herein. Subsequently an amended petition was filed wherein it was alleged that prior to August 10, 1939, the State Board of Equalization issued to petitioner a license authorizing him to sell alcoholic beverages at a cafe and restaurant owned and operated by him in the city of Los Angeles; that said license was issued to petitioner under the provisions of the act commonly known as the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, as amended by Stats. 1937, pp. 1934, 2126, Gen.Laws 1937, Act 3796). The amended petition further averred that on August 16, 1939, the State Board of Equalization notified petitioner in writing that his said license was revoked and canceled. The notice of revocation recited that the cancellation of petitioner's license was made "under authority of Article XX, Section 22 of the Constitution of the State of California". It was further alleged in the amended petition that petitioner was at no time notified of any hearing in connection with said revocation of his license and that the same was revoked without his knowledge. Then follows the allegation that petitioner had complied with all the laws pertaining to the handling of alcoholic beverages in accordance with the provisions of the Alcoholic Beverage Control Act and had complied with the rules and regulations of the Board of Equalization; that at the time the board revoked said liquor license it made no findings of fact, and that no evidence was introduced or presented at said hearing; that the revocation of said liquor license was "without cause", and thereby constituted an abuse of discretion by said Board of Equalization. Petitioner further alleged that he had operated a restaurant in the city of Los Angeles for many years and had developed an extensive and valuable patronage, and that unless permitted to resume the sale of alcoholic beverages in his said restaurant he would suffer great and irreparable injury.

In its answer the State Board of Equalization admitted that petitioner's license was revoked without any notice to him or knowledge upon his part and without any hearing at which petitioner was present, but alleged that the board made an investigation prior to August 10, 1939, in order to determine whether or not petitioner's alcoholic beverage license should be revoked, and that from the facts found as a result of said investigation the board concluded and determined that the continuance of said alcoholic beverage license would be objectionable and contrary to public welfare and morals.

With the issues thus framed, the cause proceeded to trial, following which the court in substance found that there was "no substantial or sufficient evidence before respondent board to warrant the revocation of petitioner's liquor license", and further, "that petitioner was at no time notified of any hearing in connection with said alleged revocation of said license, and was at no time notified of any charges or alleged charges against him. That * * * said license was revoked by respondent board without petitioner's knowledge and without any trial or hearing whatsoever"; and accordingly, the court ordered a peremptory writ of mandate to issue commanding the Board of Equalization to "forthwith reinstate the liquor license authorizing petitioner herein to sell alcoholic beverages" at his cafe and restaurant. From such judgment the State Board of Equalization prosecutes this appeal. Hereafter in this opinion petitioner will be referred to as the respondent and the Board of Equalization designated as the appellant.

As a first ground of appeal appellant claims that the discretion conferred upon it by section 22 of article XX of the State Constitution cannot be controlled by mandamus except to prevent an abuse thereof. The cited constitutional provision reads in part as follows: "* * * The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. * * *"

The State Liquor Control Act (secs. 40 and 41, Stats. 1935, ch. 330, p. 1123; Stats. 1937, pp. 2161, 2162; Deering's Gen. Laws, 1937, Act 3796) provides generally with reference to complaints made against a licensee, that:

"§ 40. Complaints may be made to the board by any person against any licensee. Complaints must be in writing and must state a violation of section 38e or one or more grounds which would authorize the board to suspend or revoke the license or licenses of the licensee against whom the complaint is made. * * *

"§ 41. The board shall cause written notice of the time and place of hearing the * * * complaint * * * to be given to the * * * licensee * * *.

"The hearing shall be set for a date not more than fifteen days nor less than five days subsequent to the mailing of the notice and shall be held in the county seat of the county in which the premises of the * * * licensee are located.

"Inclosed with a copy of the notice of the time and place of hearing sent to the * * * licensee shall be a copy of the * * * complaint as filed with the board."

[1, 2] The position of appellant board may be thus summarized: That because the constitutional provision (Art. XX,

sec. 22) does not provide for any notice and hearing as a prerequisite to revocation of a license, that when the Board of Equalization acts independently and not upon any verified complaint filed by "any person", no notice of such hearing is required, and the license may be revoked without notice to the licensee and without affording him an opportunity to be heard. We cannot agree with this contention. We are not unmindful of the rule that there is no inherent right in a citizen to sell intoxicants; that a license so to do is not a proprietary right within the meaning of the due process clause of the Constitution (Const., art. I, sec. 13); that such license is not a contract, but as characterized in State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 377, 42 P.2d 1076, 1077, is "but a permit to do what would otherwise be unlawful". Nevertheless, we cannot forget that the law contemplates justice, whether the license is granted as a privilege or recognized as a vested right; that under the American system of justice it is the policy of our law that a person should not be deprived even of a "permit" to engage in a legitimate business without a fair and impartial hearing and without an opportunity to present competent evidence for consideration by the licensing authority in opposition to the proposed revocation of his permit. Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843; Smith v. Foster, D.C., 15 F.2d 115.

[3-5] We find no conflict between the provisions of the Alcoholic Beverage Control Act, supra, providing for notice and a hearing, and the constitutional provision conferring plenary jurisdiction upon the Board of Equalization to license and regulate the sale of intoxicants. The statutory provisions of the Alcoholic Beverage Control Act adopted by the Legislature merely prescribe the procedure by which the board's jurisdiction is to be exercised. The sections of the Alcoholic Beverage Control Act involved herein merely regulate procedure and are not designed to, nor do they in any way, impair the constitutional power of the Board of Equalization, nor do they even remotely attempt to regulate or define what jurisdiction the board shall possess. That the Legislature may prescribe the procedure by which jurisdiction is to be exercised has long been recognized. Wood v. Pendola, 1 Cal.2d 435, 35 P.2d 526, and cases therein cited. When legislative action prescribing a mode in which the board shall exercise its jurisdiction does not circumscribe the latter's powers as derived from the Constitution, such procedural legislation does no violence to the jurisdiction of the board nor does it interfere with the broad discretion lodged in the board to control the issuance and cancellation of liquor licenses. It is only where the legislative action impairs the powers granted by the Constitution, or defeats the exercise of such powers, that it is without force or effect.

[6] Appellant points out that when the Legislature of 1937 amended subdivision 1 of section 40 of the Alcoholic Beverage Control Act by adding as ground for suspension or revocation of a liquor license "when the continuance of such license would be contrary to public welfare or morals * * *", which is the identical language used in the constitutional amendment, the Legislature at the same time inserted the following: "* * * but proceedings under section 40 upon this ground shall not be deemed a limitation upon the board's authority to proceed under Article XX, section 22 of the Constitution of this State." Such legislative action, argues appellant, indicates that the law-making body intended to recognize the right of the board to revoke a license summarily and without notice or hearing when acting on its own motion. We do not so construe the legislative intent. We regard the inclusion of the last-mentioned quotation as an indication of the fact that the Legislature did not intend the amendment as indicative of a purpose to impinge upon the right of the board to institute upon its own motion proceedings for the revocation of licenses, the continuance of which appeared to the board to contravene public welfare or morals, provided the procedural requirements contained in the statutory provisions were adhered to. The amendment merely gave to any person the right to initiate a proceeding for revocation or suspension of a license upon a ground theretofore reserved to the board. Surely it cannot be contended that there is one brand of justice for the licensee complained against by an individdual and another for him whose right to a license is challenged by the board itself upon identical charges. The mere statement of such an anomalous situation would seem to answer the query. In the

case of State Board of Equalization v. Superior Court, supra, relied upon by appellant, the question of legislative right to regulate merely procedure without diminishing the constitutional jurisdiction conferred upon the board, or attempting to regulate what jurisdiction it shall possess, was neither raised, considered, nor decided.

[7] Appellant having admitted by its answer that it revoked respondent's license without either notice to him or a hearing, and therefore in violation of the statutes, the demurrer to the answer should have been sustained and the writ granted upon the pleadings.

By reason of the foregoing, other questions raised do not require discussion or consideration.

The judgment is affirmed.

I concur: YORK, P. J.

I dissent: DORAN, J.

40 Cal.App.2d 374

ALLEN et al. v. CALIFORNIA MUT. BUILDING & LOAN ASS'N et al.

EDWARDS v. SAME.

Civ. 11239.

District Court of Appeal, First District, Division 2, California.

Aug. 12, 1940.

Rehearing Denied Sept. 11, 1940.

Hearing Denied Oct. 10, 1940.

1. New trial 🔑38

An order granting motion for nonsuit, whether the motion is based on opening statement or after close of evidence, may be reviewed on motion for new trial. Code Civ. Proc. § 657, subd. 7.

2. New trial 🔑17, 18

An order ruling on a motion may not be reviewed on motion for new trial. Code Civ.Proc. § 657, subd. 7.

3. New trial 🔑18

A motion for judgment on the pleadings, not accompanied or associated with other rulings made at the time of trial, may not be reviewed on motion for new trial. Code Civ.Proc. § 657, subd. 7.

4. New trial 🔑38

Where trial court sustained defendants' objection to introduction of any evidence by plaintiffs on ground that plaintiffs' complaint failed to state cause of action, and ordered judgment on pleadings in favor of defendants, the proceedings were in effect the granting of a nonsuit and were reviewable by motion for new trial, notwithstanding that judgment recited that it was based on the pleadings. Code Civ.Proc. § 657, subd. 7.

5. Building and loan associations 🔑42(16)

In action based on alleged fraud of agents of building and loan association who induced plaintiffs to exchange their investments in association for shares of stock in another company, complaint was not insufficient for failure to allege that plaintiffs' claims were presented to commissioner who was in control of association for purpose of liquidation, in view of allegations that company whose stock plaintiffs accepted was agent of association, and that exchange was made without consideration and that association still held the securities which plaintiffs delivered to it, which in effect constituted allegation that exchange transaction was a mere change in form of accounts between plaintiffs and association, in which case plaintiffs would remain "investors" in association and would not be bound to present their claims to the commissioner. Gen. Laws 1937, Act 986, § 13.16.

See Words and Phrases, Permanent Edition, for all other definitions of "Investors".

6. Pleading 🔑350(3)

Defendants' motions for judgment on the pleadings admitted the truth of allegations contained in the complaint.

7. Judgment 🔑251(1)

Where defendants filed answer to plaintiffs' complaint, plaintiffs might be awarded any relief that would come within the issues. Code Civ.Proc. § 580.

8. Building and loan associations 🔑42(17)

The word "hereafter" as used in statute providing that any investor in building and loan association, without presenting a claim, shall be entitled, as to any dividends "hereafter" declared, to share in such dividends in certain manner, was a misprint for the word "thereafter" and under the statute, investors who delay in presenting their claims lose their rights to participate in dividends theretofore declared and paid but after the claims have been presented they are entitled to rights provided in the statute. Gen.Laws 1937, Act 986, § 13.16.

SPENCE, J., dissenting.

◆

Appeal from Superior Court, Santa Clara County; Stanley Murray, Judge.

Action by Mrs. W. A. Allen and others against the California Mutual Building and Loan Association and another for alleged fraud of the named defendant's agents in inducing plaintiffs to exchange their investments in the named defendant for shares of stock in another company, wherein T. J. Edwards intervened. Judgment in favor of the defendants on the pleadings was ordered, and the plaintiffs moved for new trial. From an order granting motion for new trial, defendants appeal.

Affirmed.

Walter Carrington, of Oakland, and Fry & Jenkins and D. T. Jenkins, all of San Jose, for appellants.

F. W. Sawyer, of Los Angeles, for respondents.

Gillis & Edwards, of Oakland, for plaintiff in intervention and respondent.

STURTEVANT, Justice.

The defendant, California Building and Loan Association, was organized in 1889. It continued to do business down to the 23d day of January, 1933, when it went into liquidation and the defendant Justus Craemer, the then building and loan commissioner, took control. Prior to the date of liquidation each of the plaintiffs had become an investor. In 1929 the State Capital Company was organized. It was organized as an agency of, and for the purpose of assisting the California Mutual Building and Loan Association in the transaction of its business. During the period 1929 to 1931 the agents of the California Mutual Building and Loan Association induced the plaintiffs to exchange their investments in it for shares of stock in State Capital Company. In doing so the plaintiffs claim they were defrauded. On February 26, 1936, they filed a complaint pleading such facts and sought to recover a judgment in damages. They did not allege in their complaint that at any time they presented their claims to the building and loan commissioner. On November 17, 1938, the plaintiffs filed a second amended complaint. It likewise contained no allegation regarding the presentation of claims. T. J. Edwards, claiming to be the owner of a passbook and to have superior rights to the assets of California Mutual Building and Loan Association, filed a complaint in intervention. The second amended complaint and the complaint in intervention were answered and the cause was set down for trial on the 5th day of June, 1939. The plaintiffs called George S. Walker, the then building and loan commissioner, as a witness. Before he had given any testimony the defendants interposed an objection to the taking of any evidence on the ground that the plaintiffs' second amended complaint did not state a cause of action. Later that objection was sustained. Still later, on motion of the defendants, the trial court ordered a judgment in their favor on the pleadings in the case. The plaintiffs duly moved for a new trial. That motion was granted. From that order the defendants have appealed.

[1-4] In their opening brief the defendants contended that the presentation of claims as provided in section 13.16, Act 986, volume I, Deering's General Laws 1937, as amended in 1935, was a condition precedent to the maintenance by the plaintiffs of this action. In the plaintiffs' brief they controverted that contention. In the reply brief the defendants for the first time presented the point that no motion for a new trial was proper under the facts hereinabove set forth. Continuing, they claimed that therefore the order granting a new trial should be reversed. Hotel Park Cent. v. Security-First Nat. Bank, 15 Cal.App.2d 293, 59 P.2d 606; Abbey Land, etc., Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408, Ann.Cas.1915C, 804. The plaintiffs stress the fact that the trial court sustained an objection to the introduction of evidence. Thereupon they assert they had a right to make a motion for a new trial for the purpose of having reviewed an "error in law, occurring at the trial and excepted to by the party making the application". Code Civ.Proc., sec. 657, subd. 7. They then claim that because the court thereafter granted a motion for judgment on the pleadings they were not deprived of their right to make a motion for a new trial. They cite and rely on Moore v. Bates, 46 Cal. 29; Green v. Duvergey, 146

Cal. 379, 385, 80 P. 234; Stow v. Superior Court, 178 Cal. 140, 142-145, 172 P. 598; People v. Garcia, 98 Cal.App. 702, 705, 277 P. 747; Johnson v. Superior Court, 121 Cal. App. 288, 292, 8 P.2d 1047. We think the defendants are in error and that the contention of the plaintiffs must be sustained. The difference between the two lines of cases is not broad, but nevertheless it is clear. It is settled law and has been for many years, that an order granting a motion for a nonsuit, whether the motion is based on the opening statement or after the close of the evidence, may be reviewed on a motion for a new trial. Carton Corporation v. Superior Court, 76 Cal. App. 434, 436, 244 P. 932, and cases there cited. It is also settled law that an order ruling on a motion may not be reviewed on a motion for a new trial. 20 Cal.Jur. 19, New Trial, § 7. In accord with that rule a motion for judgment on the pleadings, not accompanied or associated with other rulings made at the time of the trial, falls within the rule last stated. Abbey Land, etc., Co. v. San Mateo County, supra. But when on an examination of the entire record it appears the trial court sustained on objection of the defendants to the introduction of any evidence by the plaintiff on the ground the plaintiffs' complaint failed to state a cause of action, and continuing it ordered judgment on the pleadings in favor of the defendants, such proceedings are, in effect, the granting of a nonsuit and the same may be reviewed by a motion for a new trial. Stow v. Superior Court, 178 Cal. 140, 142–145, 172 P. 598. And the fact that the judgment recites it was based on the pleadings is not controlling. Stow v. Superior Court, supra. The case entitled Hotel Park Cent. v. Security-First Nat. Bank, supra [15 Cal.App.2d 293, 59 P.2d 607], refers to an "attempted motion for new trial", and contains some language at variance with what we have said. But, if it was meant to hold that under the facts of that case a new trial did not lie, the case was not supported by the Abbey case in which the facts were different and it was in conflict with the Stow case in which the facts were similar. All we have said finds support, arguendo at least, in City of Pasadena v. Superior Court, 212 Cal. 309, 298 P. 968, and Carton Corporation v. Superior Court, supra. In the latter case the authorities are carefully reviewed and we have but followed that court's conclusions. See, also, vol. 1, Hayne on New Trial and Appeal, Rev.Ed., p. 9, § 1. For the foregoing reasons we think it may not be said that the plaintiffs were not entitled to move for a new trial.

[5, 6] The defendants contend that the plaintiffs' complaint was insufficient because the plaintiffs wholly omitted to plead that they presented their claims to the commissioner as required by the provisions of section 13.16, supra. The plaintiffs reply that they were and are "investors" within the terms of said statute and were not bound to present their claims. To that reply the defendants assert it is true the plaintiffs alleged in paragraph III of their pleadings that they were investors, but that in paragraph X they specifically alleged that in 1929–1931 they exchanged their interests for shares of the capital stock in State Capital Company and that such allegation is controlling. Little v. Union Oil Co., 73 Cal.App. 612, 619, 238 P. 1066. If there were no other facts involved that assertion would be quite persuasive. But there are many other allegations. The plaintiffs alleged that by the fraudulent misrepresentations of the defendant corporation they were induced to exchange securities, issued by the defendant corporation, for securities of State Capital Company, an agent of said defendant; that such exchange was not based on any consideration moving from plaintiffs to defendant; that the defendant corporation still holds the securities which the plaintiffs delivered to it; and that all of said facts appear on the books and records of said defendant. In other words they alleged in effect that there was merely an exchange in form but not in fact, and that the transaction was a mere change in the form of accounts between the plaintiffs and the corporate defendant. Manifestly if these allegations are true, and the defendants' motions admitted the truth thereof, it is clear the plaintiffs are and at all times have been *"investors"* in the defendant corporation. We are unable to say, therefore, that the plaintiffs' complaint did not state facts sufficient to constitute a cause of action.

Stating our views in a different form, these propositions are clearly presented by the record. The plaintiffs claim to be investors and entitled to recover as such. They were entitled to plead an action to quiet title. That they have done and more too. In the supposed action to quiet title the defendants would have been entitled to plead the alleged exchange. As by replication the plaintiffs would have been entitled to prove the alleged fraud. Under such pleadings and proof they would have been entitled to relief. Moore v. Copp, 119 Cal. 429, 51 P. 630; Wetzstein v. Thomasson, 34 Cal.App.2d 554, 557, 93 P. 2d 1028. We may not say they should be precluded because they have pleaded too much.

[7] It may be said the plaintiffs sued to recover damages. True, but their complaint was answered and they may be awarded such relief as comes within the issues. Sec. 580, Code Civ.Proc. If they establish their claim as alleged, the trial court may find they are still the owners of their original certificates and, if so, they will then be entitled to present them to the defendant commissioner and share in subsequent dividends as provided in Act 986, supra. Section 13.16, paragraph 3, contains this sentence: "Any investor, without presenting a claim, shall be entitled, as to any dividends *hereafter* declared, to share in such dividends to the extent, and in the proper relative order of priority, of any claim shown by the books of the association to exist in his favor against the association." (Italics ours.)

[8] As the action must go back to the trial court for further proceedings, it should be stated that we notice the use of the word "hereafter" in the statute we have just quoted. It is evidently a misprint for "thereafter". Any other construction would lead to absurd results. To illustrate, let us assume that since September 1, 1935, dividends have been declared and paid as provided in Act 986, supra. The sentence we have quoted took effect on the date last mentioned. According to the meaning of said sentence as it is written, all sums so paid would have to be recalled, reapportioned, and these plaintiffs included. As stated above that would be an absurdity. Construing the word as *thereafter* instead of *hereafter,* the sentence has a reasonable meaning. Those who delay in presenting their claims lose their rights to participate in dividends theretofore declared and paid, but after their claims have been presented, as in said sentence provided, they are then entitled to the rights provided therein.

The order appealed from is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice (dissenting).

I dissent. The specific allegations contained in the pleadings were controlling. Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1068; Aitken v. Stewart, 129 Cal. App. 38, 18 P.2d 988. I believe that the specific allegations contained in the pleadings of both plaintiffs and the plaintiff in intervention showed that said parties had ceased to be "investors" in the association, within the meaning of section 13.16 of the Building and Loan Act, long before the take-over of the association by the commissioner in 1933. Under said section 13.16 they were required to present their claims within the time prescribed by said section or their causes of action, if any, were barred. This action for damages was not commenced until 1936. It was not alleged in any of the pleadings that any of these claimants had ever presented any claim. The parties stood upon their pleadings and stated that they did not intend to prove the presentation of any claim as provided in said section 13.16. I am therefore of the opinion that the trial court properly entered judgment on the pleadings in favor of the defendants; that it erred in granting a new trial; and that the order granting a new trial should be reversed.

40 Cal.App.2d 310

BROOKS et al. v. BAILEY et al.

Civ. 2363.

District Court of Appeal, Fourth District, California.

Aug. 5, 1940.

1. Appeal and error 🔑1011(1)

In action for damages and injuries resulting when plaintiffs' truck rammed into rear end of timbers projecting beyond defendants' trailer and truck traveling in the same direction at night, the number of lights on defendants' truck and trailer and whether they were lighted at time of accident were for trial court under conflicting evidence. Vehicle Code, §§ 621(d), 626(a), St.1935, pp. 202, 205

2. Automobiles ⚿244(18, 36)

In action for damages and injuries resulting when plaintiffs' truck rammed into rear end of timbers projecting beyond defendants' trailer and truck traveling in the same direction at night, evidence supported trial court's finding that defendants were negligent and that their negligence was the proximate cause of the accident and injuries.

3. Automobiles ⚿180

Defendants who were operating their truck and trailer on a public highway at night with timbers projecting beyond end of trailer had a plain duty sufficiently to guard against causing injury to others. Vehicle Code, §§ 621(d), 626(a), St.1935, pp. 202, 205.

4. Appeal and error ⚿1008(1)

Contributory negligence of driver of truck which rammed into rear end of timbers projecting beyond defendants' trailer and truck traveling in the same direction at night was for the trial court sitting without a jury.

5. Appeal and error ⚿1071(6)

A judgment in an action for negligence will not be reversed for failure to find on the issue of contributory negligence, if the omitted finding would have been adverse to the appellant.

6. Appeal and error ⚿1071(6)

Where the trial court found in truck collision case that driver of plaintiffs' truck was "carefully and lawfully driving" truck, and it did not appear from the evidence that plaintiffs were contributorily negligent as a matter of law, a judgment for plaintiffs would not be reversed merely for the purpose of having the trial court make the finding on the issue of contributory negligence more specific.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by E. J. Brooks and another against J. H. Bailey, doing business under the fictitious name and style of Brawley Transfer & Storage, and others for damages and personal injuries arising out of a collision between two trucks. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Luce, Forward & Swing, Phil D. Swing, and Fred Kunzel, all of San Diego, for appellants.

Raymond Thompson, of Fullerton, and George R. Kirk, of El Centro, for respondents.

GRIFFIN, Justice.

This is an action arising out of a collision between two trucks on a public highway, both traveling in the same direction. The truck and semi-trailer owned by respondent E. J. Brooks ran into the rear end of appellant J. H. Bailey's trailer and truck, resulting in damage to respondent Brook's truck and personal injury to plaintiff and respondent Dan Zickler, the driver of that truck.

Respondents brought suit against Bailey, the owner of the other truck, and Zambrano, the driver of Bailey's truck, contending that their negligence in failing to have their truck and trailer properly equipped with lights was the proximate cause of the accident.

Appellant's answer denied this and in turn affirmatively charged that the accident was due to respondents' failure to use ordinary care to avoid a collision with the truck and trailer and that the proximate cause of the collision was respondents' contributory negligence.

The case was tried without a jury. Judgment was entered for respondents in the sum of $660.51 for E. J. Brooks for damages to his truck and $500 to Dan Zickler for personal injuries and for costs. A motion for new trial was made and denied. This appeal is taken from the judgment.

On the evening of December 5, 1938, at 9:15 p. m., appellant Zambrano was driving the truck and trailer loaded with timbers on public highway number 99, about 23 miles west of Westmoreland, in Imperial valley. The timbers were 12x12's, 40 feet long and overhung 9 feet 5 inches beyond the last part or support of the trailer. He was traveling at a speed of between 20 and 25 miles per hour. At the same time and on the same highway respondent Zickler was driving a truck with a semi-trailer which was unloaded. He was traveling at a speed of 35 miles per hour. Zickler testified that at all times and particularly immediately prior to the time of the collision, he was watching the road in front of him. The accident happened when respondents' truck overtook and rammed into the rear end of the timbers projecting beyond appellants' trailer. The timbers came through the windshield of respondent's truck. It was a clear, bright moonlight night and the moon was practically full. The highway at the point of the accident was an open road through the desert country and at the place in question was straight for a distance of approximately two miles. The surface of the road was dry and both trucks were traveling upgrade. The highway was a two-lane, thirty-foot macadamized road with additional oiled shoulders. There was moderate traffic going in both directions. At the moment of the collision a car coming from the opposite direction passed respondents' car but impaired Zickler's vision only to a small extent, as the driver of the oncoming car had dimmed its lights before passing. At the time of the accident appellants' trailer was not equipped with reflectors, as required by section 621, subdivision (d) of the Vehicle Code, St. 1935, p. 202, and was not equipped with two taillights.

Respondent Zickler testified that he did not see any taillight whatever burning and visible at the time of the accident; that the overhanging load was not equipped with two red lights as required by section 626, subdivision (a) of the Vehicle Code, St. 1935, p. 205; that the rear of the trailer and its load were devoid of any bright surface such as glass, shiny metal, freshly painted surface, or anything else which would efficiently reflect light and increase their capacity for visibility; that immediately before the collision he saw something that had the appearance of a shadow or a resurfaced place in the road, the same as several other resurfaced places he had passed; that a split second later, and as the timbers were just about into or through the windshield, he for the first time was able to discern that what first appeared to be a shadow or resurfaced place in the road was an unlighted trailer loaded with overhanging moving timbers; that he made an effort at the brake, but was not sure that he ever got it applied.

Appellants concede that their truck and trailer was not lighted in every particular as required by the Vehicle Code, but contend that there was ample lighting to enable any driver using ordinary care and prudence to avoid the collision; that there were lights enough to enable other vehicles to pass safely and that therefore respondent Zickler should have seen them.

Zambrano testified that when he got to Whitewater just before dark, he checked his lights and took the trailer light off his trailer and extended it back and up to the end of the timbers; that he put it on the left-hand inside timber; that it was a red taillight; that he fastened it on there with a nail; that when he fastened on the taillight he checked the other lights; that he had four clearance lights and a taillight on his truck, and four clearance lights and a taillight on his trailer; that on the trailer two green clearance lights were on the front corners and two on the rear corners; that there was nothing obstructing those clearance lights in back; that he checked the lights when he started off from Truckhaven and they were burning.

Riding with Zambrano as guests on the Bailey truck were a Mr. and Mrs. Goodwin. Mr. Goodwin testified that he saw Zambrano check the lights on the truck at Whitewater just before dark; that there were two running lights on the side of the trailer, "either two or one"; that the taillight also was lit; that as far as he could remember it was up on one of the timbers on the left-hand side; that he actually saw it burning. Mrs. Goodwin testified to the same effect.

Appellants now contend that as a result of the above-mentioned testimony that appellants' lights had been examined and found burning only a short distance from the place of the accident and that this testimony was uncontradicted and that in view of impeaching statements made by Zickler, his testimony in reference to the lights to the effect that they were not burning was "so weak and uncertain as to be no denial at all", citing Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, and argue that even if it were true that appellants' taillights and even clearance lights were not burning at the moment of collision, as contended by Zickler, still they had been examined and found burning a distance of ten miles from the place of the accident, and the fact that Zambrano had used care and caution in checking and examining the lights to see that they were in proper order and that they were then burning would excuse him from a charge of negligence in the event of their subsequently having gone out, citing Butcher v. Thornhill, 14 Cal. App.2d 149, 58 P.2d 179; Nelson v. Signal Oil & Gas Co., 10 Cal.App.2d 448, 51 P.2d 885; Yates v. Brazelton, 108 Cal.App. 533, 291 P. 695, and Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675.

From an examination of the record there is an apparent conflict in reference to the number of lights and whether or not they were lighted at the time of the accident.

[1-3] Zickler testified that after the accident both he and Zambrano looked at the end of the Bailey trailer and there were "no lights on it and no reflectors, and we made an inspection of the wire and he had no wire leading from the truck to the trailer"; and that on the timbers there were no lights. He further testified that Zambrano then stated to him that "the trailer had been out of use for some length of time and that he was sent up to San Pedro to get this load of house-moving equipment and he was supposed to be back before dark and they sent the truck out without lighting equipment which should have been on it, that the state requires for them to carry, and he thought he would be back in before dark that evening".

Although there is in evidence a statement claimed to have been made by Zickler to the effect that "after the accident I found a light in my truck which had come off the other outfit. The driver of the other outfit said it was a light which he had taken off the rear of the trailer and had put on the extending timbers" Zickler, at the trial, testified that "I had told the man I didn't know whether it came off the extended timber or whether it was off the refuse of my truck". A traffic officer appeared on the scene shortly after the accident and checked the lights on the trailer of appellants and "none of them were lighted" and "there were no reflectors or taillights on the rear of the trailer". Zambrano told the officer that he had taken the taillight off from over the license plate and put it on the timber. The officer testified that he was unable to find any wire leading from the license plate to the end of the timber which would indicate that a light had been there, although he did find a nail in the end of the timber. He further testified that the Goodwins told him that "they saw the lights on the truck, but, however, they did not go around to the rear of the trailer". We must therefore conclude that there was a substantial conflict in the evidence and that the trial court was justified in deciding that conflict in favor of respondents. We see no reason to disturb the finding of negligence on the part of appellants and that such negligence was the proximate cause of the accident and injury. The rule applied in Nelson v. Signal Oil & Gas Co., supra, and cases cited, do not prevent a recovery in the instant case. In view of the testimony of the officer, it is doubtful if Zambrano ever had a light burning at the end of the timbers, one of which protruded considerably beyond the others. A particularly dangerous condition existed in reference to the overhanging and projecting timbers. A plain duty rested upon appellants to sufficiently guard against causing injury to others by virtue of the hazard described. Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510.

The next contention is that the evidence, without substantial conflict, proves that respondents' contributory negligence was the proximate cause of the injuries complained of; that under the state of facts as testified to by Zickler himself, if true, it was entirely possible for him to have avoided the accident; that all he would have had to do after he saw appellants' truck was to have applied the brakes as required by law to stop in an emergency; that this would have reduced his speed to that of appellants' truck in time to have avoided a collision.

In this connection appellants have minutely diagramed a scale in reference to the number of feet within which a vehicle must be able to stop and have endeavored to demonstrate by a mathematical calculation that had respondent Zickler braked his truck as required by law at the time he said he first saw appellants' truck and trailer in front of him, he would have reduced his speed to 20 miles per hour within a distance of 76 feet and could have avoided the accident, and that his failure so to do was contributory negligence barring a recovery. In this connection it is also argued that if Zickler were using ordinary care, he should have seen appellants' truck due to the surrounding conditions in reference to the light of the moon and the lights on approaching cars, citing Jones v. Southern Pacific Co., 34 Cal.App. 629, 168 P. 586; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; Berlin v. Violett, 129 Cal. App. 337, 18 P.2d 737; and Commonwealth Insurance Co. v. Cement Co., 69 Cal.App. 165, 230 P. 995.

[4-6] The further argument is used that because drivers of other cars traveling in the same direction had no difficulty in seeing appellants' truck and trailer as they overtook it and passed it on the highway, respondent should therefore have seen it. We are thoroughly convinced that the question of contributory negligence was thoroughly presented and argued to the trial court be-

fore judgment and on the motion for new trial. From the conclusion there reached, it becomes apparent that this issue was decided in favor of respondents and against appellants. Under the evidence, this conclusion cannot be disturbed. In this respect, appellants have presented another point worthy of consideration. They have alleged an affirmative defense of contributory negligence on the part of respondents. In this connection, instead of finding directly and severally on that issue, the court has found "That it is true that on or about the 5th day of December, 1938, at the hour of approximately 9:15 p. m., plaintiff Dan Zickler was carefully and lawfully driving * * * a * * * truck and trailer * * * on Imperial Road, * * * that while plaintiff Dan Zickler was so driving said truck and trailer * * * the defendant Feto Zambrano ran and operated a certain Mack truck and trailer * * * in such a careless, negligent, wrongful and unlawful manner as to cause, and did cause, said trucks to collide, thereby causing damage * * *."

Appellants now contend that since there was abundant evidence in the record to have supported a finding, if one had been made, that plaintiffs were guilty of contributory negligence, the omission of the court to find on this issue was reversible error, citing Due v. Swartz, 22 Cal.App.2d 217, 70 P.2d 716; Hall v. Kaufman, 30 Cal.App.2d 283, 86 P.2d 151, and Hubbard v. San Diego Electric Ry. Co., 201 Cal. 53, 255 P. 508. From the evidence it does not appear that respondents were guilty of contributory negligence as a matter of law, and while there was no separate and distinct finding on the question of contributory negligence, in view of the holding in Arrelano v. Jorgensen, 52 Cal.App. 622, 199 P. 855, 856, to the effect that a finding in an action for negligence that the plaintiff was in the exercise of "due care and circumspection" was a sufficient finding that he was not guilty of contributory negligence and that a judgment will not be reversed for failure to find upon the issue, if the omitted finding would have been adverse to the appellant, and in Menefee v. Raisch Imp. Co., 78 Cal.App. 785, 248 P. 1031, where it was held that a finding that plaintiff was "driving in a careful and prudent manner" was a sufficient finding on the issue of contributory negligence, we do not feel, under the facts of the instant case, justified in ordering a reversal merely for the purpose of having the trial court make the finding on that issue more specific.

Judgment affirmed.

I concur: BARNARD, P. J.

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40 Cal.App.2d 456

SWANSON v. McAULIFF.

Civ. 2561.

District Court of Appeal, Fourth District, California.

Aug. 19, 1940.

Hearing Denied Oct. 17, 1940.

Master and servant 🔑68

An instrument which provided that owner of mine agreed to sell named individuals mining claims for certain amount, and that they were to have possession and right to remove ore in return for turning over 10 per cent. of gross receipts to the owner, and that if named individuals failed to comply with agreement, it should be void, and which was signed only by owner, was a mere "option to purchase," and hence owner was not liable to caretaker for services under contract conditioned on sale of mine.

See Words and Phrases, Permanent Edition, for all other definitions of "Option to Purchase".

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Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Charles Swanson against P. W. McAuliff, also known as P. W. McAuliffe, to recover for services alleged to have been performed by the plaintiff as a caretaker of mining property. From a judgment, and from a modified judgment, in favor of the plaintiff, the defendant appeals.

Judgments reversed.

Claflin, Dorsey & Campbell, of Bakersfield, for appellant.

Wagy & Hulsy, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for services alleged to have been performed, as a caretaker at a mining property, under a memorandum dated March 9, 1936, reading:

"Myself P. W. McAuliff, owner of the White Mine, this day has made arrangements with Mr. Swanson to be at the mine & in event the mine is sold I am to pay Shorty $3.00 per day & if the mine aint sold he is to receive no pay.

"Chas. Swanson."

The court found that the mine had been sold, findings being filed on January 15, 1940, followed by a judgment on January 22, 1940. A minute entry shows that a motion for a new trial was denied on February 20, 1940. Notice of appeal from that judgment was filed on March 2, 1940. Amended findings and a modified judgment were filed on March 6, 1940. An appeal from this judgment was filed on March 16, 1940. The two appeals have been consolidated and presented upon one set of briefs.

The entire controversy is as to whether this mine was "sold" within the meaning of the memorandum agreement under which the services were performed. The appellant contends that this agreement should be interpreted as providing that the services were not to be paid for unless and until a completed sale of the mine was consummated. The respondent contends that nothing more than a "contract of sale" or "agreement of sale" was required, and that upon the execution of an "agreement of sale, and delivery of possession of the mine to the buyers, the mine was 'sold', within the meaning of the contracting parties". The respondent relies on the case of Eaton v. Richeri, 83 Cal. 185, 23 P. 286, where services were not to be paid for until mining property was sold or until a sum sufficient to pay for the services was realized from the mine. After the services were performed the defendant entered into a contract to sell the mine and received a partial payment which was more than sufficient to pay the claim of the plaintiff. The court sustained a judgment for the plaintiff saying that the time for payment arrived when the contract to sell was entered into and the partial payment was received. That case is not very helpful here unless the agreement now before us should be interpreted as providing for payment only out of funds arising from a sale of the mine. While the language used would lend considerable support to such an interpretation it is not necessary to pass upon the question thus suggested.

In view of the record before us, it is also unnecessary to decide whether this employment agreement should be interpreted as referring to a completed sale of the mine or to the entering into of an agreement to sell the same. If it be conceded that the latter interpretation is in accordance with the intention of the parties and should prevail, it is still true that an "agreement" to sell was required, in any event. Even under that interpretation it can not reasonably be supposed that the parties had in mind and referred to anything other than the usual mutual agreement whereby one person agrees to sell certain property and another person agrees to buy the same, that is to say, a valid subsisting agreement for the sale and purchase of the property.

In this connection the court found in its original findings that the "defendant entered into a written agreement with Arthur O. Borks and Nick Lippolis, whereby defendant agreed to sell said mining claim to said Borks and Lippolis, who agreed to buy said claims from defendant". In its amended findings this was stricken out and in lieu thereof the court found that the appellant entered into a written agreement with these parties whereby he "agreed to sell said mining claims to Borks and Lippolis" and that, thereupon, he "did sell and deliver possession of said mining claims to said Borks and Lippolis". We think neither of these findings, in so far as a sale which was within the meaning of the employment agreement is concerned, is supported by the evidence.

The only evidence which could have any tendency to support these findings consists of an instrument signed by the appellant under date of April 24, 1937, which was introduced into evidence. This instrument is entitled "Bond-Lease". It provides that the appellant is bound unto Arthur O. Borks and Nick Lippolis in the penal sum of $50,000 on the conditions named. It recites that the first party has agreed to sell to the second parties the mining claims here in question for $50,000, which is to be paid in certain future instalments, that the second parties are to be given possession of said mining property and the right to remove ore therefrom, and that they are to turn over to the appellant 10 per cent of the gross receipts and do certain other things which are set forth. It is then provided that the obligation is such that if the second parties fail to comply with any of the terms of the agreement, time being of the essence, the obligation shall be null and void. This instrument was not signed by Borks or Lippolis or by anyone except the appellant, and there is no evidence that Borks or Lippolis or anyone else ever agreed to be bound by the terms of this instrument or ever agreed to purchase the mining property in any way.

This instrument is nothing more than a unilateral agreement, at best, and in legal effect it constituted merely an option to purchase the property which the other parties referred to were free to exercise or not, as they chose. There is no evidence that they ever exercised this option or paid anything to the appellant. While there is evidence that they entered into possession of the property and later gave it up, this is entirely consistent with their rights under the option and is in no way sufficient to show that they agreed to purchase the property or became bound to pay for it. It is well known that mining options are frequently given with the right of entry for the very purpose of enabling the optionee to make tests and take other steps in order to determine whether or not he desires to exercise the option.

Some claim is made that the fact that the appellant at one time handed the respondent $54 indicates that the appellant recognized that a sale had been made, and that he was presently obligated to the respondent for the full amount claimed. While the respondent testified that the appellant handed him $54, he did not state that this was on account of the services here in question and the transcript indicates that this was paid in September, 1936, some months before this agreement was made. The appellant testified that he had never sold this mine, that he still owned it, that he was still trying to sell it, and that he intended to pay the respondent as soon as he succeeded in selling it. There is no evidence to the contrary except the instrument of April 24, 1937, to which we have referred. The evidence is insufficient to establish a sale of this mining property within the meaning of the employment agreement of March 9, 1936.

A further point raised by the appellant to the effect that the court had lost jurisdiction to enter the modified judgment need not be considered. Both judgments relate to the same obligation and what we have said applies to either or both, and neither should be allowed to stand, under the evidence now appearing, since a burden would thus be placed upon the appellant which he did not assume through his agreement with the respondent.

The judgments appealed from are reversed.

I concur: GRIFFIN, J.

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40 Cal.App.2d 348

NORAL v. HEARST PUBLICATIONS, Inc.

Civ. 12554.

District Court of Appeal, Second District, Division 2, California.

Aug. 9, 1940.

1. Libel and slander 🔑82

A complaint, alleging that plaintiff was an official of the Workers Alliance of California, that defendant, with intent to impute to plaintiff the crime of embezzlement or larceny, published in defendant's newspaper false statements charging that Workers Alliance members and their officials diverted membership dues to further Communist agitation, and that such statements were understood by readers of newspapers to be about plaintiff, did not state a cause of action for libel where Alliance had at least 162 officials, since publication did not defame any ascertainable person.

2. Libel and slander 🔑82

In action for alleged libel, plaintiff could not, by use of colloquium, make language which was applicable to a large group of persons specifically applicable to plaintiff.

3. Libel and slander 🔑21

An accusation against a large group of individuals cannot have the quality of a libel unless there is certainty as to individuals accused, and, where group is very large and nothing that is said applies in particular to plaintiff, plaintiff cannot recover in action for libel as result of accusation.

4. Libel and slander 🔑48(1)

Charges of libel against a publication which has reported or commented upon matters involving public policy should be viewed with caution, since in such matters freedom of press is of paramount concern.

5. Libel and slander ⚷=82

Under statute providing that in an action for libel it is sufficient to state generally that libel was published or spoken concerning plaintiff, it was intention of Legislature to establish a rule of pleading and not to assert a principle of substantive law, and Legislature did not intend to declare what is not a libel is a libel by suggesting a form in which a pleader may frame his language to allege a libel. Code Civ.Proc. § 460.

6. Libel and slander ⚷=82

The purpose of statute providing that in an action for libel it is sufficient to state generally that libel was published or spoken concerning plaintiff is to allow pleader to state his cause in general terms. Code Civ. Proc. § 460.

7. Libel and slander ⚷=82

If an alleged libelous publication does not in fact charge plaintiff with things set forth in innuendo and when fairly read it appears that plaintiff is not so charged, meaning of publication cannot be extended by innuendo to make publication constitute a libel against plaintiff. Code Civ.Proc. § 460.

8. Pleading ⚷=225(2)

Where plaintiff could not state a cause of action, trial court's refusal to order further privilege of amending complaint on sustaining demurrer was not an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Alexander Noral against Hearst Publications, Incorporated, for alleged libel. From a judgment dismissing the action after a general demurrer to the complaint was sustained, plaintiff appeals.

Affirmed.

Gallagher, Wirin & Johnson, of Los Angeles, for appellant.

Lawler, Felix & Hall and A. Laurence Mitchell, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff's action having been dismissed after the general demurrer to his complaint as amended had been sustained, he takes this appeal.

In a lengthy complaint, plaintiff alleges in substance that he is the president and chief official of the Workers Alliance of California; that he has conducted the affairs of his office in accordance with its constitution and by-laws and with honesty and fidelity; that there are only three paid officials in said organization and that $50 per week is the salary divided among the three; that on April 29, 1939, the said three officials presented before a committee of the state senate a factual statement, a copy of which is attached to the complaint; that about the same time said officials on behalf of the said Alliance sent an "open letter" contained in said "Exhibit A" to all California state legislators including Senator Metzger, chairman of said senate committee; that by reason of said open letter, said Metzger and the defendant knew that they were referring to said three paid officials of said Alliance when they referred to "officials of the Workers Alliance"; that the defendant well knowing the premises and with the intent to hold him up to shame and public obloquy and to deprive him of the confidence and good repute of the members of the Alliance and of the public at large, and with the intent to impute to the plaintiff the crime of embezzlement or larceny, did publish, in defendant's newspaper words contained in a false and untrue article entitled "State May Probe Red Activity Here", purporting to be a quotation of statements, made May 30, 1939, at Los Angeles, by California State Senator Jack Metzger, chairman of the state senate committee investigating pressure groups;

"That said article contained among others, the following false and scandalous words which the readers of the paper read and understood to be about and concerning the plaintiff in his capacity as a paid official of the state organization of the Workers' Alliance, namely, State President of said Alliance, to-wit:

"'*Californians are rapidly becoming aroused to the folly of taxing citizens to finance Moscow propaganda.' This occurs under the present set up he explained, because taxpayers pay the relief bill for the 31,000 Workers' Alliance members and their officials divert their membership dues to further Communist agitation under direct order from the Third Internationale headquarters in Russia.*"

In subsequent paragraphs of the pleadings, plaintiff pleads matters of inducement and innuendo for the purpose of removing doubt as to whether or not the published article referred to plaintiff and for the purpose of emphasizing the defamatory sense in which the language was used by the defendant. We omit them from our discussion for the reason that they will play no part in the consideration of the problem presented to us.

[1-3] The complaint must fail because the publication does not defame any ascertainable person. It appears from the exhibits attached to the complaint that the Workers' Alliance consists of 162 locals, besides county organizations. It must have at least 162 officials besides state officials and its board. Said exhibit declares that the activities must be performed by members and officers who serve in their spare time without compensation. In view of the fact that many of the officers serve without compensation, it is a reasonable inference that many of the offices of the Alliance are each held by a number of officials in the course of a year. This would enlarge the number of "officials of the Alliance". To say that "their officials divert membership dues" is an attack upon a large group of persons. An accusation such as that complained of cannot have the quality of a libel unless there be a certainty as to the individuals accused. There is nothing in the published article that makes a personal application to the plaintiff. He cannot by use of the colloquium make the language which is applicable to so large a group of persons be made specifically to refer to him. The reference to "their officials" who are accused of diverting membership dues to further Communist agitation applies no more to plaintiff than would a similar statement, accusing federal judges of encouraging violations of the import tax laws be made to apply to any one judge. It is no nearer a libel against plaintiff than it would libel the defendant by publishing a declaration that the metropolitan press of California is devoted to the corrupting of public life, lowering moral standards and debauching public officials. Certainly such general language against a class or group of people cannot constitute libel. Where a group is very large and nothing that is said applies in particular to the plaintiff he cannot recover. 17 R.C.L. 375; Louisville Times v. Stivers, 252 Ky. 843, 68 S.W.2d 411, 97 A.L.R. 277; 35 Cor.Jur. 1161.

In the case of Lynch v. Kirby, 74 Misc. 266, 131 N.Y.S. 680, the plaintiff as president of the International Typographical Union of North America sued the National Association of Manufacturers for libel when it caused the publication of its resolution accusing said union of "long-continued, cowardly, and recklessly illegal determination * * * to destroy the business of the Los Angeles Times * * * and recognizes this act of destruction of life and property as in line with the general policy of criminal unionism", etc. It was held that there was nothing in the publication that would warrant the court in finding that plaintiff was the individual referred to in the resolution; that the mere allegation that the libel had reference to the plaintiff was not sufficient unless some fact were alleged to show that the article was intended to refer to the plaintiff; that, although the article "referred to the union of which the plaintiff was an officer, and the mere fact that he was such officer cannot be construed to mean that he fostered such organization for the purpose of committing the crime referred to in the resolution".

A political sermon charged that the actual sovereigns of the city were 73 saloon keepers and wholesale dealers and that "officials, under its benumbing influence, violate their oaths of office". Although the district attorney was the official properly chargeable with the enforcement of the law, the Supreme Court of Wisconsin held that "it does not refer to the district attorney nor to the plaintiff, but to all officials who come under the benumbing influence of this deadly exhalation and under such influence they violate their oaths of office. * * * If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. * * * There is nothing to show that it points to the district attorney more than it does to any other officer, unless it be the innuendo which is not warranted by the context." Arnold v. Ingram, 151 Wis. 438, 138 N.W. 111, 114, 117, Ann.Cas. 1914C, 976.

In a published article containing the headline "Parking Lot Racket Probe Ordered Here", it was charged that the parking lot owners in the city of Washington made a practice of moving cars from parking lots on to the streets in order to make room for parking more cars. Although the plaintiff showed that, in the downtown section of Washington, there were 20 or more lots operated by 10 or 12 owners and though he was the operator of 9 of the lots, it was held that no libel was alleged. "The article could not reasonably be said to concern more than downtown parking lots and their owners as a class" and therefore there was no libel. *"On the one hand is the social interest in free press discussion of matters of general concern,* and on the other is the individual interest in reputation. *The courts have chosen not to limit freedom of public discussion except to prevent harm occasioned by defamatory statements reasonably susceptible of special application to a given individual."* Service Parking Corp. v. Washington Times Co., 67 App.D.C. 351, 92 F.2d 502, 503, 505, 506.

Even where there is a small group involved and the language fails to indicate affirmatively that all members were involved in the charge, it was held that "defamatory words must refer to some ascertained or ascertainable person, and that that person must be the particular plaintiff". Helmicks v. Stevlingson, 212 Wis. 614, 615, 250 N.W. 402, 91 A.L.R. 1158.

"In every action for defamation, two things are necessary: (1) A defamation apparent from the words themselves, for no innuendo can alter the sense. (2) Certainty as to the person who is defamed, for no innuendo can render certain that which is uncertain." Helmicks v. Stevlingson, supra; Schoenfeld v. Journal Co., 204 Wis. 132, 136, 235 N.W. 442.

The fact that a number of the cases have authorized recovery by a member of a small group where it was clear that the defamation applied to all of the group does not detract from the doctrine above announced or from the force of the decisions above cited. If a published article of a defamatory nature were to charge that the entire board of supervisors of a particular community, consisting of five members, is corrupt and diverts the public funds to the maintenance of brothels, each member of that board could recover but if a similar article were to charge all of the supervisors of the state with corruption, it would not be libelous as against an individual supervisor because the group accused would be too numerous. Weston v. Commercial Advertiser Ass'n, 184 N.Y. 479, 77 N.E. 660; Barron v. Smith, 19 S.D. 50, 101 N.W. 1105.

[4] Charges of libel against a publication which has reported or commented upon matters involving public policy should be viewed with caution. It is in such matters that the freedom of the press is of paramount concern. Without such freedom, the march of progress might be stayed or the venom of alien cultures might stealthily undermine cherished landmarks. "It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation." Ryckman v. Delavan, 25 Wend., N.Y., 186, 199.

[5] Plaintiff asserts that it is sufficient for him to allege that the published article referred to him and that it is a matter for investigation at the trial of the facts of the case to determine whether in fact his allegation be true. Code Civ.Proc. sec. 460. That section, in effect, declares that it is sufficient to state generally that the same was published or spoken concerning the plaintiff. But it appears to have been the intention of the legislature to establish a rule of pleading and not to assert a principal of substantive law. They could not have intended to declare what is not a libel is a libel by suggesting a form in which a pleader might frame his language to allege a libel.

[6, 7] The purpose of said section 460 is to allow the pleader to state his cause in general terms, not to enable him to reach the point of trial when he is unable to state a case. If the publication does "not in fact charge the plaintiff with the things set forth in the innuendo, and when fairly read it appears that the plaintiff is not so charged, its meaning cannot be extended by innuendo to make it constitute a libel against him". Hays v. American Defense Soc., 252 N.Y. 266, 169 N.E. 380, 381.

[8] In view of the foregoing, it will be unnecessary to consider defendant's second contention, to-wit, that the matters alleged do not constitute a libel per se. Also, plaintiff's grievance that the trial court abused its discretion in not ordering further privilege of amending the complaint is disposed of by our holding that plaintiff cannot state a cause of action.

The judgment is affirmed.

I concur: McCOMB, J.

PEOPLE v. CRAIG.*

Cr. 3356.

District Court of Appeal, Second District,
Division 1, California.

August 13, 1940.

Hearing Granted Sept. 12, 1940.

1. Rape 🔑1

The statute which contains a definition of rape, followed in six subdivisions by enumeration of circumstances under which the offense of rape may be committed, creates but one offense. Pen.Code, § 261.

2. Criminal law 🔑984

Where the allegations of both counts of an information charging offense of rape showed the offense was committed on the same person on the same day, and the only difference between the two counts was that force, violence, and resistance were alleged in one without an allegation as to age, whereas the other contained allegation regarding age without any allegation as to force, violence, or resistance, two judgments finding defendant guilty of two offenses were unauthorized. Pen.Code, § 261, subds. 1, 3.

3. Criminal law 🔑1189

Where count 1 of information charged offense of rape had been accomplished by force and violence and second count charged statutory rape, and trial was had before court sitting without a jury, appellate court reversing conviction because trial court had improperly entered two judgments was required to remand case for a retrial. Pen. Code, § 261, subds. 1, 3; § 264.

4. Indictment and Information 🔑114

In prosecution for rape, defendant's prior conviction for larceny of an automobile in sister state was properly charged in the information. Pen.Code, §§ 487, 969.

5. Criminal law 🔑1202(3)

In rape prosecution, records in connection with defendant's prior conviction for larceny of an automobile in sister state were properly received in evidence. Pen.Code, § 969b.

6. Criminal law 🔑1202(3)

In rape prosecution, evidence sustained trial court's finding that charge of prior conviction of larceny of automobile in sister state was true. Pen.Code, §§ 487, 969.

7. Criminal law 🔑1218

Under statute providing for direction regarding prison to which defendant is to be taken, a person previously convicted of felony is properly committed to state prison at Folsom even though he served no time in a penal institution as result of the prior conviction. Pen.Code, § 1202a.

8. Criminal law 🔑1134(3)

A defendant's contention, regarding constitutionality of statute relating to punishment of person previously convicted of felony so far as the statute referred to another statute providing for increased punishment where defendant had suffered conviction of two prior felonies, was not required to be considered where defendant was charged only with one previous conviction. Pen.Code, §§ 644, 668.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Arkell H. Craig was convicted of rape, and he appeals.

Attempted appeal from sentence dismissed. Judgment reversed, and cause remanded for a new trial.

Franklin B. MacCarthy and Henry F. Poyet, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was charged by information with the offense of rape. In count 1 of the information the offense was alleged to have been accomplished by force and violence (Pen. Code, sec. 261, subd. 3), while in count 2, "being a different statement of the same offense", defendant was accused of "statutory" rape, in that he committed an act of sexual intercourse with a female under the age of 18 years. Pen. Code, sec. 261, subd. 1. It was also charged that he had theretofore been convicted of a felony and served a term of imprisonment therefor. Trial was had before the court sitting without a jury, a jury having been expressly waived, and at the conclusion of the trial the court announced: "Defendant adjudged guilty as to Count 1; guilty as to Count 2." The court also found the charge of a prior conviction to be true. The record reveals that thereupon two judgments were pronounced, the first reciting that the defendant had been found guilty of rape as charged in count 1 of the information; the second reciting that he had been found guilty of rape as charged in count 2 of the information; and by each judgment defendant was sentenced to imprisonment in the state prison at Folsom "for the term prescribed by law", the sentences to run concurrently. From "the judgment and sentences of the court" this appeal is prosecuted.

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* Subsequent opinion 110 P.2d 403.

Appellant first contends that the evidence is insufficient to support the decision finding the defendant guilty of rape. This contention is without merit.

Appellant next insists that the decision and judgment is contrary to law, in that the court erred in finding the defendant guilty of two separate and distinct offenses of rape when the assault consisted of a single act of sexual intercourse. As to this last-mentioned contention appellant must be sustained. By section 261 of the Penal Code rape is defined as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances". Then follows in six subdivisions an enumeration of the circumstances under which the offense of rape may be committed.

[1, 2] The true question raised on this appeal is whether section 261 of the Penal Code creates one offense or six. If six offenses are created, then respondent's contention must be upheld; if but one offense is created, then appellant's position must be sustained. Reference to the information at once suggests that the district attorney did not intend to charge two separate and distinct offenses, but sought by count 2 to allege "a different statement of the same offense as set forth in Count 1". In other words, the pleader sought to charge but one offense—viz., one rape, committed on the prosecutrix on January 21, 1940. The very nature of the allegations in the two counts shows this very clearly. The only difference between the allegations of the two counts is that force, violence and resistance are alleged in one, without an allegation as to age, while in the other appears the allegation as to age without any allegations as to force, violence or resistance. The allegations of both counts show the offense of rape, committed on the same person on the same day, and indicate that the district attorney was simply setting forth the same transaction in different ways so as to bring the case within either subdivision 1 or subdivision 3 of section 261 of the Penal Code, as the evidence on the trial might show it to have been. It is well settled that section 261 creates but one offense. See People v. Jailles, 146 Cal. 301, 304, 79 P. 965. Also, see, People v. Snyder, 75 Cal. 323, 17 P. 208, and People v. Vann, 129 Cal. 118, 61 P. 776. The decisions relied upon by respondent are not in point. The trial court was without authority in the circumstances to find defendant guilty of two offenses, and hence without authority to enter two judgments.

[3] While the judgments must be reversed, we have given consideration to the question of whether a new trial must be had, and have concluded that in remanding the cause we must direct a retrial. Our conclusion in this regard is influenced by a consideration of the provisions of section 264 of the Penal Code, so far as it provides alternative punishments of either penitentiary or county jail sentences in cases of rape committed in violation of subdivision 1 of section 261 of the Penal Code. It is to be noted that rape is punishable by imprisonment in the state prison not more than fifty years, except that when the offense is "under subdivision one of section two hundred sixty-one of the Penal Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years"; and further, that "in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison". Manifestly, if the trial had been by jury and the jury had been permitted to return two verdicts, and on such verdicts two judgments had been pronounced, a reversal of such judgments with directions for a retrial would be inevitable. There appears to be no reason for distinguishing between a trial by the court and a trial by jury in this regard. In remanding the action it cannot be presumed by this court that the same trial judge who tried the action in the first instance will be available to remedy the error by the simple process of correcting the judgment. In that connection, we are not to be understood as suggesting that such a procedure would be valid even if practical, for it must be remembered that when a jury is waived the trial is by the *court*, and the personnel therefore cannot be taken into account.

For the guidance of the trial court upon a retrial, we have considered appellant's final contention that the prosecution failed to adequately or legally prove the prior conviction charged against him. We find no merit in such claim. A police officer who qualified as an expert on fingerprints testified that appellant's fingerprints taken by him were the same as fingerprints appearing on part of people's exhibit 2, the latter of which was a record certified to by the official custodian thereof, and which showed that appellant, at the time alleged in the information, was sentenced to imprisonment in the state prison of Illinois for a term not less than one nor more than twenty years; that such sentence was based upon a plea of guilty to a felony charge of automobile larceny as contained in an indictment. Further, upon the issue of the alleged prior conviction appellant himself testified as follows:

"Q. Did you get into some difficulty back in Ohio? A. Illinois, yes, sir.

"Q. Do you know what the charge was? A. Yes, sir, larceny of an automobile.

"Q. How old were you at the time? A. 17.

"Q. Were you sent to the State Penitentiary? A. I was first sentenced to the State Penitentiary, to be transferred to Pontiac, Illinois, which at the time was the reformatory."

[4-7] Larceny of an automobile constitutes grand theft, a felony in this state. Pen. Code, sec. 487. The allegation of appellant's prior conviction was properly charged in the information. Pen. Code, sec. 969. The records in connection with such prior conviction were properly received in evidence. (Pen. Code, sec. 969b), and with appellant's admission of such prior conviction while testifying at his trial provided abundant proof to sustain the court's finding that the charge of such prior conviction was true. Appellant's commitment to the state prison at Folsom was authorized by the provisions of section 1202a of the Penal Code, which provides for such place of imprisonment even though the previously convicted person served no time in a penal institution as a result of such prior conviction.

[8] It is unnecessary to give consideration to appellant's challenge of the constitutionality of section 668 of the Penal Code, so far as such section refers to section 644 of the same code, for the reason that section 644 is not involved in the case before us. That section provides for increased punishment where a defendant has suffered conviction of two prior felonies. In the instant case appellant was charged only with one previous conviction.

The attempted appeal from the sentences is dismissed.

The judgments are reversed and the cause remanded for a new trial.

YORK, P. J., being absent, did not participate in this decision.

40 Cal.App.2d 398

MORGAN et al. v. SOMERVELL et al.

Civ. 12003.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1940.

1. Constitutional law 🔑107

No one has a vested right in the statute of limitations until it has run in his favor.

2. Constitutional law 🔑191
Limitation of actions 🔑120

Where statute of limitations had not run at time action on installment note was commenced in superior court, which did not have jurisdiction of action, but had become operative as to every installment of principal or interest except two when action was transferred to municipal court by order of superior court, the 1935 amendment to statute allowing court in which an action is brought, which has no jurisdiction over it, to transfer the case to the proper court, which provided that an action transferred should be deemed to have been commenced at time complaint was filed in court from which it was originally transferred, was applicable, so as to preclude defendants from asserting statute of limitations, notwithstanding action was filed in superior court nearly two years prior to adoption of amendment. Code Civ.Proc. § 396.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by John W. Morgan and Adalene B. Morgan against Bertha K. Somervell, now known as Bertha K. Walker, and Lou Somervell, for unpaid balance due on note secured by trust deed. From an order of the superior court denying motion of defendant Bertha K. Somervell, now known as Bertha K. Walker, to dismiss the cause, and granting plaintiffs' motion to transfer the cause to the municipal court, Bertha K. Somervell, now known as Bertha K. Walker, appeals.

Affirmed.

Walter Gould Lincoln, of Los Angeles, for appellant.

No appearance for respondents.

WHITE, Justice.

In October, 1926, appellant executed and delivered her promissory note in the sum of $4,150, the principal being payable in monthly installments of $50 each commencing December 1, 1926, with interest on the unpaid principal at the rate of 7 per cent per annum, payable quarterly. In April, 1928, plaintiffs acquired ownership of this note, the payment of which was originally secured by a deed of trust, but the last-named instrument became valueless by reason of the foreclosure of and sale under a prior mortgage on the same property covered by the aforesaid deed of trust. On November 2, 1933, an action was commenced in the superior court of Los Angeles county to recover the unpaid balance due on the note, amounting to $1,780.68, which amount, with unpaid interest, totaled less than $2,000. On December 18, 1934, the superior court rendered judgment for plaintiffs in the sum of $1,780.68 with accrued interest. Upon appeal such judgment was reversed by Division Two of this court on March 5, 1937, for the reason that the superior court was without jurisdiction to enter the judgment from which the appeal was taken. Morgan v. Somervell, 19 Cal.App.2d 434, 65 P.2d 820.

Upon the going down of the remittitur plaintiffs made a motion in the superior court to transfer the cause to the municipal court of the City of Los Angeles, and at the same time appellant herein, as one of the defendants in the action, moved the court to dismiss the same. By its order made August 12, 1937, the superior court denied appellant's motion to dismiss and granted plaintiffs' motion to transfer the cause to the municipal court. From the last-mentioned order of transfer this appeal is prosecuted. No brief has been filed on behalf of respondents.

The order of transfer to the municipal court was made pursuant to the terms of section 396 of the Code of Civil Procedure, which section was amended in 1935, p. 1947, to include the following provision: "An action or proceeding which is transferred under the provisions of this section shall be deemed to have been commenced at the time the complaint or petition was filed in the court from which it was originally transferred."

[1, 2] Appellant contends that because this lawsuit was filed in the superior court November 2, 1933, nearly two years prior to the adoption of the foregoing Code provision, the terms of such provision cannot be invoked in the instant case, for the reason that if it is given a retroactive effect the rights of appellant to assert the statute of limitations as a defense would be nullified. The record indicates that while the statute had not run when the action was originally filed in the superior court, it had nevertheless become operative as to every instalment of principal or interest except two, in the sum total of $100, when pursuant to the order of the superior court the file was lodged in the municipal court on September 23, 1937. It is argued by appellant that she having obtained a vested right in the statute of limitations, it was beyond the power of the legislature, by the aforesaid amendment to section 396 of the Code of Civil Procedure, to divest her of such vested right. Appellant's contention in this regard is without merit. It is an established and fixed rule of law that no one has a vested right in the statute of limitations until it has run in his favor, and such is not the case here. The 1935 amendment to section 396 of the Code of Civil Procedure, with which we are here concerned, relates merely to procedure. It is in furtherance of a policy frequently exemplified in legislative acts to enable a party who, like the plaintiffs in the present proceeding, has seasonably filed a cause of action, to try it upon its merits, notwithstanding defects in the form or substance of pleadings, error in the remedy sought, or mistake in the tribunal invoked. Therefore, where, as here, the plaintiffs did not sleep upon their rights, but simply mistook the jurisdiction of the tribunal to which they applied for relief, no constitutional right of the defendant was impaired by a legislative enactment which permitted the court in which the action was erroneously brought to transfer it to a court having

power to adjudicate upon it. When the action was commenced within the statutory period no vested right of defendants was violated by a procedural legislative enactment such as the one with which we are here concerned.

For the foregoing reasons, the order appealed from is affirmed.

I concur: DORAN, Acting P. J.

WEST KEY NUMBER SYSTEM

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40 Cal.App.2d 381

SOBEY v. MOLONY et al.

Civ. 11353.

District Court of Appeal, First District, Division 1, California.

Aug. 13, 1940.

Hearing Denied Oct. 10, 1940.

1. Statutes 🔑147

By codification of law applicable to practice of medicine in the Business and Professions Code, Legislature did not intend to change substantive provisions of existing statutes, but simply intended to codify and clarify existing provisions. St.1929, p. 1427; Gen.Laws 1931, Act 4807, § 14; St.1937, pp. 1230, 1254, 1274, 1325, §§ 2, 4, 2002, 2377, 30003.

2. Statutes 🔑147

When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals older statute, new statute is but a continuation of the old, and there is no break in continuous operation of old statute and no abatement of any of the legal consequences of acts done under old statute, and such rule applies especially to consolidation, revision or codification of statutes, whether their subject is civil or criminal law.

3. Statutes 🔑144

In the consolidation, revision, or codification of statutes, intent of Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions and not to affect continuous operation of the law.

4. Statutes 🔑167(2)

A restatement of the law by Legislature through consolidation, revision, or codification of statutes without substantial change neutralizes any repeal, express or implied, and no saving clause or other expression of legislative intent is necessary to accomplish such result, since intent is derived from fact and purpose of a restatement without change.

5. Criminal law 🔑15

Independently of a saving clause, a person may be prosecuted, under a repealed and re-enacted statute, for a crime committed prior to date of re-enactment.

6. Physicians and surgeons 🔑2

Statutes regulating practice of professions and providing for discipline of offending members, such as provisions of the Business and Professions Code applicable to practice of medicine, while penal in nature, are intended to protect public from unscrupulous, careless, or dishonest practitioners. Gen.Laws 1931, Act 4807, § 14; St.1937, pp. 1230, 1254, 1274, 1325, §§ 2, 4, 2002, 2377, 30003.

7. Statutes 🔑212

District Court of Appeal was bound to assume, unless a different intent was clearly expressed to contrary, that Legislature did not intend by codification of law relating to medical practice to benefit offending physicians at expense of general public. Gen. Laws 1931, Act 4807, § 14, St.1937, pp. 1230, 1254, 1274, 1325, §§ 2, 4, 2002, 2377, 30003.

8. Constitutional law 🔑92

The Legislature could not, by statute, destroy vested rights, and, where Legislature expressly provided for preserving rights accrued, legislative intent was to preserve something that Legislature had legal capacity to abrogate.

9. Statutes 🔑271

The sections of Business and Professions Code providing that no proceeding commenced before code takes effect, and no right accrued, shall be affected by code, do not manifest a legislative intent, when applied to complaints against physicians for professional misconduct, to save only actions commenced prior to repeal of Medical Practice Act and to remit offenses committed prior to date on which code became effective where complaints had not been instituted prior to such date. Gen.Laws 1931, Act 4807,

§ 14; St.1937, pp. 1230, 1254, 1274, 1325, §§ 2, 4, 2002, 2377, 30003.

10. Statutes 🔑147

The sections of Business and Professions Code providing that no proceeding commenced before code takes effect, and no right accrued, shall be affected by code should be construed to continue the Medical Practice Act in effect. Gen.Laws 1931, Act 4807, § 14; St.1937, pp. 1230, 1254, 1274, 1325, §§ 2, 4, 2002, 2377, 30003.

11. Statutes 🔑176

Courts were bound to give effect to sections of a statute, if possible.

12. Statutes 🔑147

The section of business and professions code providing that provisions of code, in so far as they are substantially same as existing statutory provisions relating to same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments, was intended, among other things, as a saving clause where no substantial change was made in the law. St.1937, p. 1325, § 2.

13. Statutes 🔑231

The section of Business and Professions Code providing that no action or proceeding commenced before code takes effect, and no right accrued, shall be affected by code, may be reconciled with section providing that provisions of code, in so far as they are substantially the same as existing statutory provisions relating to same subject matter, shall be construed as restatements, and continuations thereof, and effect may be given to both sections. St.1937, p. 1325, §§ 2, 4.

14. Statutes 🔑195, 225½

The rules of expressio unius, and that penal statutes must be strictly construed in favor of accused, and that a special statute controls a general one, do not apply where to apply them would operate contrary to legislative intent.

Appeal from Superior Court, City and County of San Francisco; Andrew R. Shottsky, Judge.

Mandamus proceeding by Gifford Lyne Sobey, against William R. Molony and others, as members of the Board of Medical Examiners of the State of California, to compel the board to refrain from hearing a complaint charging respondent with professional misconduct. From a judgment granting a peremptory writ of mandamus, the Board of Medical Examiners of the State of California appeals.

Reversed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Earl Warren, Atty. Gen., and Harold W. Conklin, Deputy Atty. Gen., for appellants.

H. C. Lucas and Bradford M. Melvin, both of San Francisco, for respondent.

Philbrick McCoy, of Los Angeles, and Claude Minard, of San Francisco, amici curiæ for State Bar of California.

Gerald H. Hagar and Fred B. Wood, both of San Francisco, and Arthur McHenry, of Sacramento, amici curiæ for California Code Commission.

PETERS, Presiding Justice.

The State Board of Medical Examiners appeals from a judgment granting a peremptory writ of mandate directing the board to refrain and desist from hearing a complaint charging respondent with professional misconduct.

The petition for a writ of mandate, to which appellant demurred, discloses that on May 24, 1939, a complaint was filed with the appellant board charging respondent, a duly licensed physician and surgeon, with having committed certain designated acts which, it is alleged, constituted unprofessional conduct. The complaint alleged that on July 25, 1934, April 15, 1936, and March 15, 1937, respondent violated section 2377 of the Business and Professions Code, St. 1937, p. 1274. In his petition for a writ of mandate respondent urged that the complaint must be dismissed for the reasons that all of the acts alleged were committed prior to the effective date of the Business and Professions Code in August of 1937; that that code repealed the old Medical Practice Act; that, properly interpreted, the provisions of the new code when read in conjunction with the repeal had the effect of remitting all offenses theretofore committed but not at the time of the repeal the subject of prosecution. These arguments convinced the trial court, and the writ issued.

It was respondent's position in the trial court, and it is his contention here, that the legal effect of the adoption of the Business and Professions Code and the simultaneous repeal of the Medical Practice Act was, and is, to prohibit the institution, after August of 1937, of disciplinary proceedings against any offender where the offense charged was committed before that date. It is contended that this result must follow even though the acts set forth in the complaint constituted not only violations of the Business and Professions Code, but also constituted violations of the old Medical Practice Act.

To understand this contention reference must be made to certain provisions of the Medical Practice Act and of the Business and Professions Code. Section 14 of the Medical Practice Act (Deering's General Laws 1931, Act No. 4807; Stats.1913, chap. 354, p. 722), as amended, provided, at the time the offenses contained in the complaint were alleged to have been committed, that:

"The words 'unprofessional conduct' as used in this act, are hereby declared to mean:

"First—The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion." The original section as adopted in 1913 contained substantially the same language.

Section 2377 of the Business and Professions Code, as adopted in 1937 (this being the section that respondent is charged with violating) provides: "The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion constitutes unprofessional conduct within the meaning of this chapter."

The Medical Practice Act was repealed by section 30003 of the Business and Professions Code in 1937. Simultaneously, the Business and Professions Code, embodying section 2377 above quoted, was enacted. It therefore appears that since 1913 to date, there has never been a moment of time when the procuring of a criminal abortion did not constitute unprofessional misconduct.

Section 2 of the Business and Professions Code provides:

"The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations thereof, and not as new enactments."

Section 4 of that code provides: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." Substantially, the same language is to be found in section 2002 of that code, which is in that part of the code relating to the practice of medicine.

[1] It is a demonstrable fact not challenged by respondent, that, by the codification of the law applicable to the practice of medicine in the Business and Professions Code, the legislature did not intend or attempt to change the substantive provisions of existing statutes, but simply intended to codify and clarify existing provisions. This code does not stand alone. The code commission was created by Statutes of 1929, page 1427, chapter 750. Since that time it has prepared codifications of many branches of the law. The Business and Professions Code, as adopted in 1937, does not apply only to the practice of medicine but also to seventeen other businesses and professions. In codifying the law the code commission and the legislature avoided, wherever possible, any substantive change in existing law.

[2, 3] Before discussing the legal effect of sections 4 and 2002 of the Business and Professions Code, supra, reference should be made to several general principles. When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because, obviously, in such event the intent of the legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.

[4] This is the rule of decision in California and in the other states, even in the absence of legislative declaration. The cases have clearly established the rule that such restatement, without substantial change, neutralizes any repeal, express or implied. No saving clause or other expression of legislative intent is necessary to accomplish this result. The intent is derived from the fact and purpose of a restatement without change. Estate of Martin, 153 Cal. 225, 94 P. 1053; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 295 P. 1, 75 A.L.R. 439; Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27; Gastineau v.

Meyer, 131 Cal.App. 611, 22 P.2d 31. The cases from other jurisdictions are in complete accord. They are so numerous and so completely in harmony that their enumeration is not necessary. Many of them are collected and referred to in 59 Corpus Juris, page 1058, section 624.

[5] This rule of construction, based as it is on the presumed legislative intent, applies whether the subject of the statute is civil or criminal law. It is well settled that, independently of a saving clause, a person may lawfuly be prosecuted, under a repealed and re-enacted statute, for a crime committed prior to the date of the re-enactment. Lewis' Sutherland Statutory Construction [2d ed.], vol. 1, p. 445, sec. 238; Black on Interpretation of Laws [2d ed.], p. 421, secs. 124, 125; State v. Gumber, 37 Wis. 298; State v. Ware, 79 Or. 367, 154 P. 905, 155 P. 364; State v. Wish, 15 Neb. 448, 19 N.W. 686; Bauer v. State, 99 Neb. 747, 157 N.W. 968; State v. Brewer, 22 La.Ann. 273; Borough of Langhorne Manor v. Clayton, 129 Pa.Super. 557, 196 A. 584; see, also, Board of Dental Examiners v. Lazzell, 172 Md. 314, 191 A. 240.

None of the cases cited by respondent establishes any different rule. Without listing the cases cited by him, it is sufficient to state that some of them are cases of repeal without a re-enactment, some involve a repeal with the passage of a new statute making substantial changes in the old, while others involve statutes that contain clauses expressly remitting past penalties. None of these cases is in point.

In the present case sole reliance need not be placed on the general rule above referred to. The legislative intent is not left to construction at all. Section 2 of the Business and Professions Code, above quoted, expressly codifies the rule. This is not an isolated expression of legislative intent. Provisions substantially similar to section 2 of the Business and Professions Code appear in section 5 of the Civil Code of Civil Procedure, Penal and Political Codes, and in section 2 of the Probate, Elections, Harbors and Navigation, Health and Safety, Insurance, Labor, Military and Veterans, Public Resources, Revenue and Taxation, Streets and Highways, Vehicle, and Welfare and Institutions Codes, in section 3 of the Agricultural Code and in section 4 of the Fish and Game Code. The reasons why such provisions were placed in the original codes and carried into the new codes are not hard to ascertain. Prior to 1872 it had been held that when the legislature amended or revised a statute, and, in response to a constitutional requirement reprinted the text in full, it effected a complete new enactment and was not a continuation of the old. Billings v. Harvey, 6 Cal. 381; Billings v. Hall, 7 Cal. 1; Morton v. Folger, 15 Cal. 275; Clarke v. Huber, 25 Cal. 593; Bensley v. Ellis, 39 Cal. 309. The legislature, in adopting the codes, did not leave its intent to conjecture—it expressly codified its intent in the provisions above referred to and in section 325 of the Political Code, which are substantially similar to section 2 of the Business and Professions Code.

It thus appears that, if the legislature had not enacted any saving clause at all, or had merely enacted section 2 of the Business and Professions Code, there could be no doubt of the right of the appellant board to proceed against respondent after August of 1937 for offenses committed prior thereto. This is not, and cannot, seriously be challenged by respondent. He contends, however, that by sections 4 and 2002 of the Business and Professions Code above referred to, the legislature has expressed its intent to save only actions *actually commenced* prior to the repeal of the old Medical Practice Act or to save *rights accrued* thereunder, and that properly construed their legal effect was to remit all offenses where complaints had not been instituted prior to August of 1937 for offenses committed prior to that time. In this connection respondent points out that the law governing the practice of medicine is penal in nature (which is correct), and properly contends that penal statutes must be strictly construed in favor of the accused. Applying this rule of construction to these sections, and applying the rule of expressio unius est exclusio alterius, and the rule that a special statute controls a general one, respondent argues that the express saving of actions commenced and rights accrued, by necessary implication, evinces an intent to bar prosecution where action has not been commenced prior to the repeal and reenactment. Otherwise, so respondent argues, the saving clauses in sections 4 and 2002 would have no purpose.

[6, 7] The effect of respondent's argument is this: He concedes that, if the Business and Professions Code contained no saving clause or clauses at all, he could be prosecuted for offenses committed prior

to the adoption of that code; he further must concede that if section 2 were the only saving clause that the board could lawfully prosecute him; but, according to his view, by enumerating pending actions and rights accrued in sections 4 and 2002 it must be presumed that the legislature intended to remit all offenses committed prior to August, 1937, where prosecutions had not been instituted prior to that date. In other words, the sole purpose of sections 4 and 2002, according to respondent, was to remit offenses not being prosecuted at the time of the adoption of the new law. This would be to attribute to the legislature the intent of doing by indirection what it easily could have done directly. It is a most peculiar way to remit offenses by a provision specifically saving certain other offenses. Moveover, in attempting to ascertain the legislative intent, it must be kept in mind that statutes regulating the practice of professions and providing for the discipline of offending members, while penal in nature, are also intended to protect the public from unscrupulous, careless or dishonest practitioners. The legislature we must assume, unless a different intent is clearly expressed to the contrary, did not intend by the codification of the law relating to medical practice, to benefit offending doctors at the expense of the general public. Yet this would be the result if it should be held that by the codification of the law, with the simultaneous repeal of the old law, doctors were placed beyond prosecution for acts constituting grounds for revocation of license both under the former and existing law. Fortunately, neither reason nor authority calls for such a strained construction.

[8] On behalf of appellant it is urged that the provision appearing in sections 4 and 2002 saving rights accrued saves prosecutions for offenses committed prior to August, 1937, although complaints were not filed until after that date. It is urged that, as applied to the right of appellant board to initiate proceedings for revocation of a license, the term "right accrued" must be construed to mean "to arrive, to commence, to come into existence, to become a present enforceable demand". Respondent contends the terms only apply to vested rights. There is much to be said for appellant's construction. Obviously, the legislature has no power to destroy vested rights. When it expressly provided for preserving rights accrued, the intendment must be that it sought to preserve something it had the legal capacity to abrogate.

[9-14] There are other and compelling reasons, however, why sections 4 and 2002 should be construed to continue the old statute in effect. Provisions such as these sections are not peculiar to the Business and Professions Code. Substantially similar clauses are to be found in section 8 of the Political Code and Code of Civil Procedure, and in section 6 of the Civil Code. It must be kept in mind, as already pointed out, that these codes also have provisions substantially similar to section 2 of the Business and Professions Code. The two sections must be given effect, if possible. Obviously, section 2 was intended, among other things, as a saving clause where no substantial change was made in the law. Section 4 can be reconciled with section 2, and effect given to both sections, by holding that it was intended to cover situations, either where the codification made a substantial change in the law, or where the legislature at that or subsequent sessions amended the law in a substantial manner. This seems to reasonably explain why such provisions were inserted in the original codes and in the code now under consideration. It is true that no substantive changes were contemplated by the adoption of the Business and Professions Code. Yet the clauses still serve a useful purpose. At every legislative session there are introduced many bills dealing with the various professions, some of them affecting the substance of regulatory statutes. Many such bills were introduced during the legislative session of 1937 when this code was enacted. Some of them passed, and became effective on the same day that the code became effective. Sections 4 and 2002 were aimed at covering such situations and have no application to situations where no substantial changes have occurred. Under such circumstances the rule of expressio unius, and the other rules of construction relied upon, have no application. Those rules do not apply where to apply them would operate contrary to the legislative intent. Blevins v. Mullally, 22 Cal. App. 519, 135 P. 307. To construe the sections as contended for by respondent would be to necessarily create a repugnancy between section 2 and sections 4 and 2002. As construed in this opinion, there is no repugnancy between the sections. Each can and does have full play in its own field.

Respondent relies on several cases, the most important of which is State v. Showers, 34 Kan. 269, 8 P. 474, 475. In that case, as in this, there was a repeal and re-enactment of a liquor law, and the defendant was indicted for a violation committed prior thereto. In the new statute there was a saving clause providing that: "All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed." In addition, in the general laws of Kansas, was a general saving clause providing: "The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." Comp. Laws Kan.1879, c. 104, § 1.

The court held that the defendant could not be prosecuted after the re-enactment for the offense committed prior to the adoption of the new statute. The court apparently held that the special saving clause in the liquor law prevailed over the general statute, and that, under the special statute, the right to initiate proceedings for acts committed prior to repeal and re-enactment was barred by necessary implication. Appellant board attacks the authority of the Showers case. A fair reading of the decision, however, convinces us that, if the theory of that case were applied to the facts involved herein, the respondent would be immune from prosecution. But we are not convinced that the Kansas case is sound, and decline to follow it. It is our opinion that it fails to give proper weight to the doctrines of statutory construction set forth in this opinion. Moreover, the rationale of the Kansas case is contrary to cases from other jurisdictions. In Great Northern Ry. Co. v. United States, 8 Cir., 155 F. 945, 958, a railroad company was indicted after repeal and simultaneous re-enactment of a statute. A general federal statute (16 Stat. 432, 1 U.S.C.A. § 29), provided: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." (Italics ours.)

A saving clause in the special statute involved (34 Stat. 595), was as follows: "That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." The court rejected the contention that this saving clause by necessary implication extinguished the right to sue where a cause was not pending at the time of repeal and re-enactment, and held that the saving clause of general statute and special law should both be given effect, and that application of the general statute preserved the right to sue for violations committed before repeal and re-enactment although action had not theretofore been commenced. See, also, First Nat. Bank v. Weidenbeck, 8 Cir., 97 F. 896.

It is our duty in this proceeding to attempt to ascertain and to give effect to the intent of the legislature. In attempting to arrive at that intent we are required to give effect, if possible, to all of the provisions of the law. To adopt respondent's construction of the clauses would be to disregard section 2, to treat sections 4 and 2002 as repugnant to section 2, and to hold sections 4 and 2002 controlling as special statutes over the general one. The construction we have adopted gives full effect to both clauses. Moreover, the construction adopted herein is not only a reasonable one, but it also attributes to the legislature a desire and intent to adopt laws in the public interest. We cannot believe that the legislature was so solicitous of doctors who had violated their responsibilities to the public and who had been false to their trust, that it intended to abrogate all prosecutions for offenses committed prior to the codification of the law. It is much more reasonable to assume that no such intent existed.

The judgment appealed from is reversed.

We concur: KNIGHT, J.; WARD, J.

40 Cal.App.2d 391

RICE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11496.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1940.

1. Criminal law ⚿576(1)

The defendant in a criminal action is entitled to a speedy trial, and unless good cause to the contrary is shown, information must be dismissed if he is not brought to trial within 60 days after filing of information. Pen.Code, §§ 681a, 686, 1050, 1382, subd. 2; Const. art. 1, § 13.

2. Criminal law ⚿575

The statute requiring that defendant be brought to trial within 60 days after filing of information is applicable to a defendant, whether he is in custody or on bail. Pen. Code, § 1382, subd. 2.

3. Criminal law ⚿576(2)

Where trial was continued on several occasions over repeated objection of defendant, but only showing in support of alleged inability to locate a material witness was testimony of police officer on first day set for trial that witness had left his former address and former employer without leaving any information concerning his whereabouts, "good cause to the contrary" was not shown in sense contemplated by statute requiring that defendant be brought to trial within 60 days after filing of information unless "good cause to the contrary" is shown. Pen.Code, §§ 681a, 686, 1050, 1382, subd. 2; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause to the Contrary".

◆

Mandamus proceedings by Ray Thomas Rice against the Superior Court of the State of California, in and for the City and County of San Francisco, and others, to compel the court to dismiss an information against petitioner.

Peremptory writ granted.

Millard Smith, of San Francisco, for petitioner.

No appearance for respondents.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel the respondent court to dismiss an information against petitioner upon the ground that petitioner has not been brought to trial thereunder within sixty days after the filing of said information. Pen.Code, sec. 1382, subd. 2. Upon the filing of the petition herein, an alternative writ was issued and was served upon respondents. Said alternative writ was made returnable on August 12, 1940, but respondents have made no appearance in response thereto.

It appears from the petition on file herein that the information was filed on May 13, 1940, and that the trial of petitioner was continued on several occasions over the repeated objection of petitioner and in spite of his repeated demands that the cause proceed to trial. It further appears that on July 17, 1940, petitioner duly moved the respondent court for an order dismissing the information, which motion was denied.

[1-3] Upon the showing made, we are of the opinion that petitioner has made out a clear case for the issuance of the writ. A defendant in a criminal action is entitled to a speedy trial, Const. art. I, sec. 13; see also, Pen.Code, secs. 681a, 686 and 1050, and unless good cause to the contrary is shown, the information must be dismissed if such defendant is not brought to trial within sixty days after the filing of the information. Pen.Code, sec. 1382, subd. 2. No "good cause to the contrary" has been shown here. It is indicated in the petition that respondents were of the view that the last-mentioned section did not apply as the defendant had been released on bail, but it is settled that said section is applicable to all defendants, whether in custody or on bail. Ex parte Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267; Ford v. Superior Court, 17 Cal.App. 1, 118 P. 96. It is further indicated in the petition that the prosecution showed in the trial court that a material witness could not be located. It appears, however, that the only showing made in this connection was made through the testimony of a police officer on June 19, 1940, the first day set for the trial. It was then shown that the officer had endeavored to subpoena the witness but that said witness had left his former address without leaving a forwarding address and had left his former employer without leaving any information concerning his whereabouts. The officer further testified that he believed the witness could be located

and that he had a bench warrant for the witness on a "check charge". This was the entire showing made at that time and it does not appear that any further showing was made on the subsequent dates to which the trial was continued. Such showing falls far short of the showing required to warrant a continuance beyond the sixty-day period over the objections of the defendant. Ford v. Superior Court, supra.

Let a peremptory writ of mandate issue as prayed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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40 Cal.App.2d 341

BARDEEN v. COMMANDER OIL CO. et al.

Civ. 12421.

District Court of Appeal, Second District, Division 2, California.

Aug. 9, 1940.

Rehearing Denied Sept. 5, 1940.

Hearing Denied Oct. 7, 1940.

1. Appeal and error 🔑1011(1)

A finding based upon sufficient evidence, though contradicted, will not be disturbed on appeal.

2. Mines and minerals 🔑79(7)

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of oil produced, evidence supported finding that no 30-day production test of well was made as required by contract for determination of amount of bonus payable under contract.

3. Mines and minerals 🔑79(7)

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of oil produced, evidence supported finding that defendants' predecessor had waived 30-day production test of well required by contract for purpose of determining total amount of bonus payable, so as to entitle plaintiff to recover on contract.

4. Mines and minerals 🔑79(7)

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of total oil produced, witness' testimony of conversation with defendants' predecessor for purpose of showing that defendants' predecessor had waived 30-day production test of well required by contract was admissible, where it was shown that record title of leasehold to which contract related was vested in defendants' predecessor.

5. Mines and minerals 🔑79(7)

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of total oil produced, where testimony of witness' conversation with defendants' predecessor was introduced for purpose of showing that defendants' predecessor had waived 30-day production test of well required by contract, such testimony could be overcome by proof that defendants' predecessor was only one of several associates interested in leaseholds to which contract related, and that he had no authority to bind his associates.

6. Evidence 🔑467

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of total oil produced, witness' testimony of conversation with defendants' predecessor for purpose of showing that defendants' predecessor had waived 30-day production test of well required by contract was not inadmissible on ground that it altered terms of written contract by an unexecuted oral agreement. Civ. Code, § 1698.

7. Evidence 🔑467

A waiver of full performance of one of provisions of written contract may be effected by parol evidence. Civ.Code, § 1698.

8. Evidence 🔑99

Weakness of evidence is no test of its admissibility. Code Civ.Proc. § 1870, subd. 4.

9. Evidence 🔑236(1)

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of total oil produced, witness' testimony of conversation with defendants' predecessor relative to waiving 30-day production test of well drilled as required by contract was not inadmissible on ground that defendant's predecessor had died prior to trial, and that evidence of his declaration was of a weak and unsatisfactory character, but testimony was competent for whatever it was worth. Code Civ.Proc. § 1870, subd. 4.

10. Appeal and error ⚷1052(5)

In action on drilling contract for payment of oil bonus and royalties, which were to be payable out of 25 per cent. of total oil produced, if trial court's action in receiving in evidence telephone and telegraphic reports offered for purpose of proving quantity of oil produced from well drilled was error, it was not prejudicial, where trial court did not accept records as proof of production capacity of the well.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by H. A. Bardeen against Commander Oil Company and others on a contractual obligation for the payment of oil bonus and royalties. From judgment for plaintiff, the defendants appeal.

Affirmed.

Don S. Irwin, of Los Angeles, for appellants.

Oliver O. Clark, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff having recovered judgment against defendant in the sum of $10,211.67 on a contractual obligation for the payment of oil bonus and royalties, defendant appeals. Inasmuch as the primary ground relied upon by defendant for a reversal judgment is the claim of insufficiency of the evidence to support the judgment it will be necessary to review the history of the transactions out of which the controversy arose.

In May, 1928, the owners of certain oil lands in Ventura county leased three parcels thereof (parcels 2, 3 and 4) to the Reservoir Hill Gasoline Company, hereinafter referred to as Reservoir Company, which was a subsidiary of the Rio Grande Oil Company, at a monthly rental of $150. September, 1929, the Reservoir Company assigned its lease to one Thornton contemporaneously with an agreement between Thornton and said Reservoir Company whereby Thornton agreed to commence drilling of a well within 120 days and to continue the drilling to a depth of 3,500 feet unless oil in commercial quantities should be encountered at a lesser depth. The contract provided a graduated scale for the payment of the bonus whereby. if the well produced more than 50 barrels and less than 100 barrels per day the first 30 days of production, Thornton might retain the lands by paying $25,000 and in the event the well should produce 100 barrels and less than 250 barrels per day during said first thirty days of production, Thornton was obligated to pay the Reservoir Oil Company $50,000 out of 25 per cent of the total production from such well or other wells drilled. Prior to July 2, 1930, Thornton commenced the drilling of a well on said parcel 2 and on said date no oil having been encountered and his treasury having been depleted he employed the Rio Grande Oil Company to drill a well 3,500 feet or to a commercial well. The production of a commercial well by said contract was fixed at the same quantity of production as that provided for in the original lease of said Reservoir Company. Said Rio Grande Oil Company, having suffered vicissitudes in its attempt to fulfill its contract, finally placed a well on production at a depth of not to exceed 960 feet, at which depth oil was first discovered. A pump was installed and the production of oil began on the 7th day of November, 1930, and continued until December 14, 1930, with an average daily production of 37 barrels. This production not being equal to that required by the terms of the drilling contract, the Rio Grande continued sinking a well until February 14, 1931, when the well was again placed on production and continued to produce until February 26, 1931, when the well was shut down for lack of sufficient storage facilities. In the meantime said Thornton had surrendered to the Reservoir Company the leases on parcels 3 and 4 and on February 7, 1931, just before said well was placed upon production the second time, he assigned his interest in the lease to one Ethridge who assumed and agreed to pay such bonus as might thereafter be fixed on the basis of production developed from said well. Said Ethridge subsequently on August 24, 1931, assigned the lease on said parcel 2 to the defendant herein.

While the production of oil was temporarily discontinued, on the 26th day of February, 1931, the said Ethridge and the said Reservoir Company orally agreed that the production of the well as proved between the 14th and the 26th day of February, was sufficient in volume to enable them to determine that the capacity of the well was in excess of 100 barrels per day and less than 250 barrels per day, notwithstanding the fact that the full 30-day production test had not been made and could not be made because of the lack of storage facilities and that the bonus of $50,000 provided for in the said drilling contract should thereafter be payable out of 25 per cent of the total oil produced. Intermittent production continued thereafter until April, 1932, during which period 25 per cent of the production was paid to the said Reservoir Company by said Ethridge on account of said obligation arising from said drilling contract.

During the four years following said April, 1932, the defendant produced oil from said well in the amount of $10,503.61. During the same period the Bardeen Petroleum Company, Ltd., and its trustee in bankruptcy produced oil from the same premises by means of two slant wells which were drilled from the adjoining lands into said parcel 2. For this oil which was wrongfully taken, defendant, being rightfully entitled thereto, had been compensated in the sum of $25,475.92. It was for the recovery of 25 per cent of the total amount of oil so produced from said premises that plaintiff brought this action.

[1, 2] In support of its contention that the proof is insufficient to support the judgment, defendant argues that the evidence shows that the only 30-day production test ever made was that recorded between November 7 and December 14, 1930, when the average production was only 37 barrels per day and that since that 30-day test showed less than 50 barrels per day capacity, no bonus obligation arose under said drilling contract and certainly no obligation could arise whereby defendant should pay 25 per cent of the production upon the basis of 100 barrels per day capacity. While the evidence is conflicting as to the results of the operation of the well during November and December, 1930, there is some evidence beyond question that a production test was made during said period although it was of a temporary character for the purpose of determining the kind of fluid in the hole and to show that the well was not properly conditioned for the purpose of making an adequate production test. Moreover, the evidence shows that the pumping operations of November and December, 1930, were not carried out in the manner required by the drilling contract for a production test, that is to say "in accordance with the best usages and customs in vogue in oil fields in the state of California". Inasmuch as the record shows no finding of fact as to the character of the pumping operations during the last-mentioned period, we must assume that the trial court resolved the conflict in the evidence and impliedly found that no production test was made in November and December, 1930. There is also other evidence in the record to justify said finding. Such a finding based upon sufficient evidence, though contradicted, will not be disturbed. Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, 25 P. 2d 429.

[3] The court found that the 30-day production test of said contract was waived by defendant's predecessor Ethridge. This finding is based primarily upon the fact that, when Ethridge and the said Reservoir Company discovered that the storage facilities were inadequate to carry out said 30-day production test, they agreed: (1) that the production from February 14 to February 26, was sufficient to justify the determination; (2) that the potential productivity of said well would exceed 100 barrels per day and not over 250 barrels per day; (3) that by reason of the inadequacy of storage facilities, the well should be shut down rather than keep it on production for a full 30-day period; and (4) that consequently said $50,000 bonus provided for in the Thornton-Reservoir Company contract of September, 1929, should thereafter be payable. Said agreement between Ethridge and said Reservoir Company is corroborated by the following:

(1) One Morgan, vice-president of the Rio Grande Oil Company, and agent for said Reservoir Company, testified that at about the time of the shut down in February, 1931, he had a conversation with said Ethridge in which Ethridge congratulated him upon production of the well and upon the fact that the said Morgan's prediction of a 200 barrel daily production had been justified by the actual results from the well; and that Ethridge stated to him that this would bring in money under the contract; that the $50,000 bonus out of 25 per cent of the oil would be payable; that he, said Ethridge, was interested in the fact that it might be possible for his side organization to pay the bonus out of production rather than in cash; and that whereas the obligation arising out of the production of 100 barrels daily or less would have required the payment of a bonus to the Reservoir Company in cash,

yet by reason of the stipulated production of more than 100 barrels daily, they "could share the 50,000 out of the 25 per cent of the oil as would be produced from the well".

(2) Said Morgan's narrative of his said conversation with Ethridge is borne out by the fact that 25 per cent of the value of the oil produced was actually paid to the Reservoir Company until August, 1931, by Ethridge and thereafter by defendant until April, 1932.

(3) Furthermore, after April, 1932, Mr. Snow, president of defendant company, in a number of conversations with the said Morgan, discussed the possibility of securing a waiver of said bonus obligation. In one of these conversations, he stated "that he was unable to operate the property, especially unable to drill further wells under the load of the 25 per cent gross royalty which he was obliged to pay the Reservoir Gasoline Company from the production" and that he was unable to finance further operations because of said 25 per cent oil bonus payable to the Reservoir Company.

(4) There was no denial of liability during the six years following.

In view of this evidence and of the fact that after payments had been made, no denial of liability was suggested during said six years, we must conclude that the trial court had ample evidence upon which to base the finding and the judgment.

[4, 5] Defendant contends that the court erred in admitting Morgan's said testimony of the Ethridge conversation over objection. It argues that since Ethridge was only one of several associates interested, he had no authority to bind his associates. But it is to be remembered that Thornton assigned the leasehold to Ethridge alone, which entitled Ethridge to speak as the owner of the property. Under the circumstances it was unnecessary for plaintiff, in laying the foundation for the admission of the Ethridge conversation, to do more than show that the conversation was with Ethridge in whom the record title of the leasehold was vested. Said testimony could be overcome by proof that Ethridge was actually representing certain principals who did not appear of record in the transaction and that he was without authority to speak for them but no such evidence was offered.

[6, 7] It is further objected that said testimony of Morgan was inadmissible by reason of the fact that its effect was to alter the terms of a written contract by an unexecuted oral agreement. Civ.Code, sec. 1698. However, its effect did not vary the terms of the writing; it merely waived full performance of one of the provisions of said writing after the drilling of the well provided thereby to be done had been completed. Such a waiver may be effected by parol evidence. Miller & Lux v. San Joaquin Light etc., 120 Cal.App. 589, 8 P. 2d 560.

[8, 9] Finally defendant contends that the said Morgan's testimony was inadmissible because of the fact that the said Ethridge had deceased prior to the trial and that evidence of his declarations is of a weak and unsatisfactory character. However, its weakness is no test of its admissibility. Code Civ.Proc. sec. 1870, subd. 4. If it had stood alone, it might have been insufficient to carry the burden but taken in connection with the other factors above enumerated, it is competent for whatever it is worth. The trial court presumably accorded some weight to the testimony and if not there was sufficient to support the court's finding without it.

[10] Finally the assignment that error was committed in receiving in evidence certain telephone and telegraphic reports is without merit. They consisted of daily records of the well's progress and production. The purpose of their introduction was to prove the quantity of oil produced from February 15 to February 26, 1931, and to demonstrate that the necessity of closing down the pump was the lack of storage facilities. But the court specifically found that there was no evidence to prove what the production from said well would have been during the first 30 days after the well was placed on production "if production of oil from said well had not been discontinued before the expiration of said 30-day period".

In view of said finding, it is clear that the court did not accept said records as proof of the production capacity of the well. Therefore, if the court's action was error, it was clearly not prejudicial.

The judgment is affirmed.

I concur: McCOMB, J.

40 Cal.App.2d 76

OCEAN PARK PIER AMUSEMENT CORPORATION v. CITY OF SANTA MONICA.

No. 11297.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1940.

Hearing Denied Sept. 6, 1940.

1. Appeal and error ⚷832(4)

A rehearing will not be granted for the sole purpose of considering a point presented therein for the first time.

2. Appeal and error ⚷832(4)

A rehearing would not be granted for sole purpose of considering a point not presented in trial court, nor on appeal by way of printed briefs and not passed upon in opinion of reviewing court. Code Civ.Proc. §§ 588, 589, 591.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 104 P.2d 668.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Robert N. Baker, of Santa Monica, for respondent.

PER CURIAM.

[1, 2] In the petition for rehearing, it is stated at page eighteen: "It is the desire of the respondent city to have the entire franchise declared void if the Court feels that it does not have authority to enter into it in its entirety." This point, according to the record, was not presented on the trial of the case, nor was it presented by way of printed briefs on appeal; it was touched upon only incidentally in the oral argument in connection with the main issue; and it is well settled that a rehearing will not be granted for the sole purpose of considering a point presented therein for the first time. Pasadena Ice Co. v. Reeder, 206 Cal. 697, 705, 275 P. 944, 276 P. 995; Conner v. East Bay Municipal Utility Dist., 8 Cal.App.2d 613, 619, 620, 47 P.2d 774, 48 P.2d 982.

Furthermore, in view of the point now urged by counsel for respondent, raising the legality of the entire franchise, we deem it proper to say that subsequent to the submission of the appeal for determination the justices of this court in conference caused a letter of inquiry to be sent to counsel representing the respective parties, to ascertain their views upon the question of whether on the record before us we were called upon to consider or determine any issue as to the validity of the entire franchise in the event this court should reach the conclusion that the city had no power to collect the two per cent of appellant's income derived from the privately owned lands; and in this connection it was stated that if counsel desired to brief the point and to re-argue it, the submission would be set aside. In response to such inquiry counsel for appellant expressed himself unequivocally that since no issue as to the validity of the entire franchise was raised by the pleadings, nor presented to or heard or determined by the trial court, such an issue was in no way involved within the scope of the present appeal. The reply received from counsel for respondent, however, was extremely indefinite. The pertinent portions thereof read: "It was my understanding that the only matter before your Court at the present time was one of interpretation of an ambiguity and not one of the validity of the contract. * * * However, if I am to understand from your letter that the Court feels that the question is raised as to the authority of the city to collect the gross per cent as is provided in the franchise, when it is shown that part of the property described is publicly-owned and part of it is privately-owned, then I believe that we are specifically confronted with the problem as to the illegality or invalidity of the franchise in its entirety. In this latter event, it is the desire of the city to raise the question of the illegality or the invalidity of the franchise and file briefs thereon. As to whether or not the city desires to raise issues which are not before the Court, I will have to await reply to this letter."

Such being the nature of the replies received from counsel, the question of the validity of the entire franchise was not passed upon, but was specifically left open to be litigated by the parties if they so desired in the proper tribunal, namely, the trial court. Code Civ.Proc., secs. 588, 589, 591. The court in its opinion in this regard said, 104 P.2d 668: "No claim has been made that the franchise is void as containing two incongruous subjects (Washington Water Power Co. v. Rooney, Wash., 101 P.2d 580, 127 A.L.R. 1044), and we refrain from expressing an opinion in connection therewith. However, a new trial is granted which will give the parties an opportunity to apply to the superior court for permission to amend the pleadings should they deem such action advisable."

It is hereby ordered that the letters above referred to be filed with the clerk of this court.

The rehearing is denied.

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40 Cal.App.2d 361

PHELPS et al. v. AMERICAN MORTGAGE CO. et al.

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. METROPOLITAN LIFE INS. CO. et al.

Civ. 11300, 11301.

District Court of Appeal, First District, Division 1, California.

Aug. 12, 1940.

Hearing Denied Oct. 10, 1940.

1. Lis pendens ⇨25(1)

Rights of successors in interest of mortgage guarantee company were measured by the rights of that company, where a lis pendens was on file when their interests came into existence.

2. Mortgages ⇨155

The fact that part of consideration paid by beneficiary named in trust deed was the cancellation of a pre-existing indebtedness owing to it by the grantor, would not prevent the beneficiary from being a "bona fide incumbrancer". Civ.Code, § 1606.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Incumbrancer".

3. Estoppel ⇨72

Where one of two innocent parties must suffer for the wrongdoing of a third, he who by his conduct enabled the wrongdoer to accomplish the wrong must bear the loss. Civ. Code, § 3543

4. Estoppel ⇨75, 76

Where an owner deposits his property with another and gives the depository such indicia of ownership that a third person as a reasonable man, dealing with such agent, is reasonably led to believe that the agent is the owner of the property, and the third person parts with value in reliance thereon, the third person will be protected, even though the true owner is guilty of no more than misplaced confidence. Civ.Code, § 3543.

5. Estoppel ⇨72

Where an owner deposits his property with another and gives the depository such indicia of ownership that a reasonable man, dealing with such agent, is reasonably led to believe that the agent is the owner of such property, and he parts with value in reliance thereon, the misplaced confidence is "negligence" within the meaning of the statutory maxim that, where one of two innocent persons must suffer by the act of a third, he by whose "negligence" it happened must be the sufferer. Civ.Code, § 3543.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

6. Estoppel ⇨72

Where certain holders of notes secured by trust deed delivered their notes endorsed in blank to mortgage company for collection, and mortgage company, acting in fraud of holders, delivered notes to trustee with request for a reconveyance, and thereafter the mortgage company borrowed money from a lender which had no knowledge of the fraud, giving trust deed on realty as security for the loan, the statute providing that where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer, was applicable. Civ.Code, § 3543.

7. Escrows ⇨14(1)

The rule that where an instrument of title, such as a deed, is delivered by an escrow holder before happening of condition on which delivery was to take place, the deed is ineffective and no title passes, even to a bona fide purchaser, even if in force in California, was not applicable where certain holders of notes secured by trust deed delivered their notes endorsed in blank to mortgage company for collection, and mortgage company, acting in fraud of holders, delivered notes to trustee with request for a reconveyance, and mortgage company thereafter borrowed money, giving trust deed on realty in question as security for the loan.

8. Bills and notes ⚿368

Where a negotiable note reaches the hands of a holder in due course, he is protected by the statute under which a valid delivery is conclusively presumed as to a holder in due course. Civ.Code, § 3097.

9. Estoppel ⚿75, 76

Where holders of notes secured by trust deed delivered their notes endorsed in blank to mortgage company for collection, and mortgage company, acting in fraud of holders, delivered notes to trustee with request for a reconveyance, and mortgage company thereafter borrowed money, giving trust deed on realty as security, the holders of those notes were in no position to raise the point in actions to hold trust deed securing their notes valid and to foreclose the lien, that holders of other notes secured by the same trust deed did not actually receive payment for their notes until after recordation of reconveyance to mortgage company.

10. Estoppel ⚿75, 76

Where holders of notes secured by trust deed delivered their notes endorsed in blank to mortgage company for collection, and mortgage company, acting in fraud of holders, delivered notes to trustee with request for a reconveyance, and mortgage company thereafter borrowed money, giving trust deed on realty as security, holders of notes were "estopped" from challenging trustee's reconveyance which they, by their conduct, induced the trustee to make.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

11. Trusts ⚿203

The rule that a transfer by a trustee in contravention of the express provisions of the trust is void was not applicable where circumstances creating an estoppel were present, and a purchaser taking title without notice of breach of trust secured an unimpeachable title. Civ.Code, § 870.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Foster C. Phelps and others against the American Mortgage Company, George E. Kennedy, and others, to obtain an adjudication that plaintiffs held a valid first deed of trust on certain property, and action by the Security-First National Bank of Los Angeles, executor of the last will and testament of Rosa M. Begley, deceased, substituted as party plaintiff, and others against the Metropolitan Life Insurance Company, Jessie D. Karnes, and others to foreclose an alleged lien. The actions were consolidated for trial. From adverse judgments, George E. Kennedy in the first action and Jessie D. Karnes in the second action appeal.

Judgments affirmed.

Mott, Vallee & Grant, Paul Vallee, and Otho S. Vernon, all of Los Angeles, and Thomas B. Reed, of Covina, for appellants.

M. J. Rankin, Seth I. Colver, Milo V. Olson, and Walter S. Home, all of Los Angeles, for respondents Title Guarantee & Trust Co., Metropolitan Life Ins. Co. and Elmo M. Sellers.

Fleming & Robbins, and Clay Robbins, all of Los Angeles, for respondent Mortgage Guarantee Co.

Kenton A. Miller, of Los Angeles, for respondents Kenton A. and Sarah E. Miller.

PETERS, Presiding Justice.

Action numbered 11300, the Phelps case, was brought to obtain an adjudication that plaintiffs named therein hold a valid first deed of trust on property in the city of Los Angeles. Action numbered 11301, the Begley case, was brought to foreclose the alleged lien. These appeals are prosecuted from judgments which decreed that plaintiffs have no interest in the property. The actions were consolidated for trial and appeal. The sufficiency of the complaint in the Phelps action was upheld on a former appeal. Phelps v. American Mortgage Co., 6 Cal.2d 604, 59 P.2d 95.

On November 22, 1926, Arthur Gilman and Nellie Gilman, owners of the property in question, executed one hundred and twenty-five promissory notes in favor of American Mortgage Company, each in the sum of $1,000, and as security therefor gave the payee a single deed of trust covering the property. This deed of trust constituted a first lien on the property. The notes were due five years from date, or prior thereto upon the payment of a bonus. They were given for a loan made by American Mortgage Company to the Gilmans, that company being then engaged extensively in the financing of apartment houses and hotel buildings. Upon the property was an apartment house known as the Nellman Apartments.

The American Mortgage Company offered the notes for sale to its clientele, and they were all sold and transferred to purchasers. In the course of dealings with these notes they were referred to as the Nellman notes. The plaintiffs herein are the holders of some, but not all, of these notes. Other note holders who did not join as plaintiffs were named as defendants, and certain of them filed answers praying for the same relief as plaintiffs.

In 1927 or 1928 the American Mortgage Company of California succeeded to all rights of the American Mortgage Company the new corporation having the same officers, directors and stock ownership as its predecessor. Both corporations will be referred to herein as the American Mortgage Company. On April 7, 1931, a federal receiver was appointed for the mortgage company.

Early in February, 1931, the American Mortgage Company, by letter, telephone, or personally, requested the holders of the Nellman notes to bring them in to the company, as they were to be paid. Letters written to some of the note holders stated that the notes were to be placed in escrow for collection. The plaintiffs and some of the other Nellman note holders delivered their notes to the American Mortgage Company endorsed in blank, as requested by that company, and were given receipts therefor. They signed instructions, which recited that the notes were handed to the company "for collection", and which set forth the amount of principal and interest which the company was to "collect", and the disposition the company was to make of the proceeds "when collected". Of the one hundred and twenty-five notes, one hundred and five were surrendered to the company at this time.

In the meantime, before the holders of the notes were asked to bring them in for collection, the American Mortgage Company had become the owner of the Nellman Apartments through foreclosure of a second deed of trust also executed in its favor in November, 1926. The note holders in general. and the plaintiffs in particular, were not aware of this fact. Without receiving any funds in payment of the notes, and acting in fraud of the rights of plaintiffs, the American Mortgage Company delivered the endorsed notes to Title Guarantee and Trust Company, trustee under the first deed of trust, with a request for a reconveyance. The request recited that the American Mortgage Company was the legal owner of the one hundred and twenty-five promissory notes and of all other indebtedness secured by the deed of trust, that the notes had been fully paid, and that they were surrendered for cancellation. A letter dated February 11, 1931, and one hundred and five notes accompanied the request. The letter stated that $20,000 would be paid to the trustee to hold for presentation of the twenty outstanding notes. The reconveyance was recorded at the request of the trustee on February 14, 1931. It reconveyed the property "to the person or persons legally entitled thereto", as provided in the deed of trust. The court found that the trustee, Title Guarantee and Trust Company, had no notice of plaintiffs' interest in the notes and deed of trust, and that it acted in good faith and without negligence. Whether the trustee had the $20,000 on hand on the date the reconveyance was recorded, or received it several days later, is one of the controverted questions in this case.

[1] The American Mortgage Company, upon the security of the real property, then obtained a loan of $80,000 from the Mortgage Guarantee Company, for which a note and deed of trust were executed by Fred A. Giesy and wife, who held title for the American Mortgage Company. This deed of trust was also recorded on February 14, 1931, at the request of Title Guarantee and Trust Company, which was named as trustee therein. The proceeds of the loan made by Mortgage Guarantee Company to American Mortgage Company were used in part to pay the twenty outstanding notes, funds being remitted to Title Guarantee and Trust Company for that purpose, and in part to discharge pre-existing indebtedness of the American Mortgage Company to Mortgage Guarantee Company. The respondents are the Mortgage Guarantee Company, and its successors in interest. Their rights, however, are measured by the rights of that company, a lis pendens being on file when their interests came into existence.

The plaintiffs, holders of Nellman notes, seek in these actions to set aside the reconveyance which the American Mortgage Company wrongfully procured without collection of funds to pay said notes, and to reinstate the deed of trust securing these notes as a first lien as against those claiming through defendant Mortgage Guarantee Company. The court found that this company was an encumbrancer for value, and was without notice that the reconveyance was obtained in fraud of rights of the Nellman note holders.

[2] This basic finding is attacked by appellants. Among other contentions, it is asserted in the briefs of appellants that Mortgage Guarantee Company cannot be a bona fide encumbrancer because part of the consideration paid by it was the cancellation of a pre-existing indebtedness of the American Mortgage Company. On the oral argument appellants' counsel conceded that this point was without merit. The concession is, of course, in accordance with the law. Civ.Code, sec. 1606.

There is no contention made that the Mortgage Guarantee Company had actual knowledge of the fact that American Mortgage Company was acting wrongfully in fraud of the rights of the Nellman note holders. The complaint which was held sufficient on the former appeal alleged that all defendants had full knowledge. The appellants do contend, however, that the Title Guarantee and Trust Company acted in violation of the terms of the trust when it reconveyed the property. This contention will be considered later in this opinion.

The main contention of appellants is that the notes were deposited with the American Mortgage Company subject to an escrow, and that it held the notes in escrow under instructions to surrender them only on collection. Based on this premise, it is urged that, where delivery is made by an escrow holder in violation of escrow instructions, such delivery is ineffective even as to bona fide purchasers and encumbrancers.

[3] The theory of respondents, sustained by the trial court, is that the Nellman note holders by delivering their notes to the American Mortgage Company endorsed in blank clothed that company with indicia of title and ownership, and appointed that company their undisclosed agent for the purpose of collecting said notes, and that, by reason of carelessness and negligence of the note holders in this respect, they are estopped as against respondent, the bona fide encumbrancer, and those claiming through it from asserting any interest in the property which secured the notes. In respondents' analysis this case calls for application of the maxim that, where one of two innocent parties must suffer for the wrongdoing of a third, he, who by his conduct enabled the wrongdoer to accomplish the wrong, must bear the loss. For decisions applying this maxim see cases listed 10 Cal.Jur. 506; 5 Cal.Jur. (10 Yr.Supp.) 499; 21 Cor.Jur. 1176, sec. 180 et seq. This maxim is codified, although not exactly in these terms, in section 3543 of the Civil Code. That section provides: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

It is to be noted that the Civil Code section uses the term "negligence". It is appellants' theory that they are not chargeable with negligence, but only with misplaced confidence in a trusted agent, and that misplaced confidence is not negligence. It is urged that, under the cases, the doctrine that a person is estopped from claiming title when he has entrusted another with indicia of ownership only applies where it is shown that the owner of the property has been guilty of actual negligence. Appellants point out that the trial court did not find that they were guilty of actual negligence, but found, in effect, that they were guilty of misplaced confidence and that this constituted negligence. It is urged that this finding or conclusion cannot be supported.

[4, 5] After reading the cases, and giving consideration to their rationale, we are convinced that, where an owner deposits his property with another and gives the depository such indicia of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such property and parts with value in reliance thereon, the third person will be protected even though the true owner is guilty of no more than misplaced confidence. Such misplaced confidence must be held to be negligence within the meaning of the maxim above referred to.

That this is the true rule was recognized by the Supreme Court in Camerer v. California Sav., etc., Bank, 4 Cal.2d 159, 172, 48 P.2d 39, 45, 100 A.L.R. 667, where the court stated: "We are mindful of cases where an estoppel has been raised against the owner of indorsed certificates of stock or bearer bonds based on an intrustment of possession coupled with authority to deal in some manner with the securities, although the owner cannot be said to have been negligent in the sense that as a man of reasonable prudence he had cause to doubt the integrity of his agent. Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 73 A.L.R. 1398; Lynch v. International Banking Corp., 68 Cal.App. 432, 229 P. 968; Grange v. Judah Boas Co., 60 Cal.App. 484, 213 P. 712; 13 Cal.Law Rev. 251; 17 Cal.Law Rev. 403. In such cases the owner is the victim of misplaced confidence, and can be said to be negligent only in the restricted sense that he has placed it within the power of his agent to accomplish a fraud. This doctrine is applied to protect bona fide purchasers and pledgees, and may also be invoked in other situations where equity and good conscience dictate."

[6] It is true that in the Camerer case the court held that the above-quoted doctrine was not there applicable because the stocks and bonds involved had not passed to a bona fide purchaser, but where the rights of a bona fide purchaser or encumbrancer are involved, we are convinced from the standpoint of equity and fairness that the doctrine is applicable and that the rule above quoted is sound.

Appellants rely strongly on Verder v. American Loan Society, 1 Cal.2d 17, 32 P.2d 1081. That case, similar to the present case as to some of its facts, involved another note sold by the American Mortgage Company and returned to it for collection. But that case did not involve the rights of persons who were purchasers or encumbrancers in good faith. 1 Cal.2d 17, at pages 27-30, 32 P.2d 1081. While it is true that the decision uses language from which it may be implied that something more than misplaced confidence must be present before the doctrine of entrustment with indicia of ownership may be invoked by a bona fide purchaser, such language is in direct conflict with the court's later remarks in Camerer v. California Sav., etc., Bank, supra. We are of the opinion that the Camerer case states the proper rule.

The appellants also contend, as noted above, that the doctrine of entrustment with indicia of title may not be relied on by a bona fide purchaser where instruments are delivered by an escrow holder in violation of instructions. They find authority for a rule that where an instrument of title, such as a deed, is delivered by an escrow holder before the happening of the condition upon which delivery was to take place, the deed is ineffective and no title passes even to a bona fide purchaser. The decisions are in conflict on this proposition. See notes, 48 A.L.R. 405; 54 A.L.R. 1246; 19 Am. Jur. 439; 4 Tiffany Real Property (3d ed.) 236; 10 Cal.Jur. 591; 5 Cal.Jur. (10 Yr. Supp.) 529; 16 Cal.Law Rev. 141.

In Promis v. Duke, 208 Cal. 420, 427, 281 P. 613, the Supreme Court stated that, according to the weight of authority, a deed delivered in violation of escrow instructions is ineffective even as to purchasers in good faith. But a decision on this point was not necessary in that case since the party whose rights were at issue took with knowledge. That the court may not have intended definitely to declare that this was the rule in this state is indicated by the fact that the opinion further states that it was unnecessary to determine the rights of the innocent encumbrancer for the reason that the trial court had protected him and the respondent had not appealed.

[7] In the instant case we do not find it necessary to pass upon the above proposition, concerning which the authorities are in conflict, for the reason that, in our opinion, even if the escrow rule is in force in this state, it is not applicable to the facts involved herein.

The basis of the decisions which protect the grantor where a deed is delivered by an escrow holder in violation of instructions even though the property has reached a bona fide purchaser is that without a valid delivery the deed never becomes effective. The theory is expressed in Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S.W. 823, 824, as follows: "It is elementary law that the delivery of a deed is requisite to its validity as a conveyance. To take effect, it is quite as necessary that it should be delivered as that it should be signed. To complete a delivery in its legal sense, two elements are also essential. The instrument must not only be placed within the control of the grantee, but this must be done by the grantor with the intention that it shall become operative as a conveyance. It follows from these first principles that an instrument which passes into the possession of the grantee, without such intention on part of the grantor, is wholly inoperative; and that a purchaser from the former acquires in law no title to the property which it purports to convey. It is accordingly held that even a vendee from the grantee, who has paid value without knowledge of the facts, is not an innocent purchaser in such a case." See, also, Forcum v. Brown, 251 Ill. 301, 96 N.E. 259; Franklin v. Killilea, 126 Wis. 88, 104 N.W. 993; 16 Cal.Law Rev. 141.

In the instant case respondents seek to avoid application of the escrow rule, if that rule is in effect in this state as contended by appellants on the ground that a true escrow was not created. Respondents find the law to be that a deposit in escrow, except where death of the grantor is the condition, must be pursuant to a binding contract between parties beneficially interested who agree on deposit with a third party. Holland v. McCarthy, 173 Cal. 597, 160 P. 1069; 10 Cal.Jur. 580; 5 Cal.Jur. (10 Yr.Supp.) 522. The question as to necessity of an agreement usually arises where the right of a grantor to recall the instrument, or the effect of his death before performance by the grantee is involved. But where the question is as to the rights of a subsequent purchaser following delivery by one having indicia of ownership, it seems anomalous that his rights should depend on whether the deposit was pursuant to binding contract or was unilateral, or on whether the depositary is an agent for one party only, as is usual where an instrument is deposited for collection, or is an agent of both parties agreeing on the escrow holder. For this reason we prefer to place our decision herein on other grounds than the absence of a true escrow. It is not clear from the cases whether or not California has adopted the so-called escrow rule relied upon by appellants. For the purposes of this opinion we may assume, without deciding, that the escrow rule is in effect in this state. Even if this be assumed, we are of the opinion that that rule would have no application to the facts of the instant case.

The real basis of the so-called escrow rule, as indicated by the cases above referred to is that the documents that were there involved that were delivered to the escrow holder to be delivered upon performance of certain conditions, were not binding obligations or deeds until delivered by the escrow holder upon performance of the conditions. When the escrow holder delivered them to the third party without performance of the conditions, he was delivering documents that never had represented binding obligations and never became binding, even as to bona fide purchasers, because of lack of a proper delivery. That defect rendered the instrument as defective as if it were incomplete on its face. But that is not the present case. When the Gilmans executed the Nellman notes in 1926 and delivered them to the American Mortgage Company as payee, the notes became valid binding obligations. These notes were then transferred to the appellants and others as binding existing obligations. When the appellants delivered these notes to the so-called escrow holder endorsed in blank they were not entrusting that holder with a dead, incomplete, inoperative document, as where an undelivered grant or deed is deposited, but they were entrusting the depositary with apparent title to a live, complete, operative instrument representing an existing and binding obligation. The distinction is between entrusting a depositary with a document totally invalid until delivered, and entrusting him with the indicia of ownership to a valid instrument representing a valid existing obligation.

There are numerous cases from this and other jurisdictions holding that bona fide purchasers or encumbrancers from a depositary of valid instruments representing valid binding existing obligations, where the owner has entrusted the indicia of ownership to the depositary, and he has delivered the instruments in violation of his instructions, will prevail over the true owner. This equitable principle is frequently applied to stock certificates endorsed in blank. The law applying to stock certificates was extensively reviewed in Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 73 A.L.R. 1398. (This case is the subject of a note in 73 A.L.R. 1405, where the California cases are listed at page 1407.). In that case the owner of stock certificates entrusted them, endorsed in blank, to two men who falsely represented that they were agents of the issuing corporation, which was taking up all its stock to correct its records. The stock reached the hands of a bona fide purchaser whom the court protected by its decision.

[8] Where a negotiable promissory note reaches the hands of a holder in due course, he is protected by section 3097, Civil Code, under which a valid delivery is conclusively presumed as to such holders. But there is a field for application of the equitable doctrine of entrustment with indicia of ownership as to such instruments where it is the maker or other person, not a holder

within the meaning of section 3097, supra, who is deceived by the appearance of title. It has been held that where an agent for collection of a note, appearing to be the owner by virtue of the form of endorsement, accepts a partial cash payment and new notes due at a future date in satisfaction, or accepts a transfer of property in discharge of the note in violation of the instructions of his principal, the maker will be protected. Kaku v. Giffen, 13 Cal. App.2d 683, 57 P.2d 1001; Home Savings Bank v. Stewart, 78 Neb. 624, 110 N.W. 947; 21 C.J. 1177; see, also, Earle v. Fletcher American Nat. Bank, 70 Ind.App. 559, 123 N.E. 706.

In Kaku v. Giffen, supra, the court said (13 Cal.App.2d. at page 685, 57 P.2d at page 1002): "The essential question here is not who was in fact the owner of the note or whether Wells [agent for collection] exceeded the authority given him by the appellant. The real question is whether respondents were justified in dealing with Wells as the owner of the note, and this must be answered in their favor. The appellant had clothed Wells with the apparent ownership of the note and power to dispose of the same; the apparent ownership was confirmed by the filing of a suit; the respondents had dealt with Wells in getting the suit dismissed; and they had no knowledge that the indorsement was not what it appeared to be."

In the instant case it was not the maker who was deceived by the appearance of ownership in American Mortgage Company created by the Nellman note holders, but the trustee under the deed of trust securing them. Acting upon this appearance of ownership, the trustee reconveyed, and thereby enabled the American Mortgage Company, through its nominee Giesy, to hold record title free and clear of encumbrances. The Mortgage Guarantee Company, relying in good faith on the record title, advanced funds and extended credit on the security of a deed of trust executed in its favor. The reconveyance from the trustee, it is true, was procured by the fraudulent representation of American Mortgage Company, clothed with indicia of ownership, that the notes had been paid in full. But the execution and delivery of the reconveyance by the trustee, which held legal title, was valid as to bona fide purchasers and encumbrancers although induced by fraud, in like manner as other transfers secured through fraud practiced on the grantor are binding as to such persons.

Cases which hold that the owner is not estopped even as against a bona fide purchaser where an instrument incomplete in essential particulars is filled in without authority, where the owner's signature is forged or the amount of a promissory note raised, or where there is a theft of an instrument, and hence no sufficient entrustment, do not govern the instant case. For such cases see, Bryce v. O'Brien, 5 Cal.2d 615, 55 P.2d 488; Trout v. Taylor, 220 Cal. 652, 32 P.2d 968; Burns v. Ross, 190 Cal. 269, 212 P. 17; Walsh v. Hunt, 120 Cal. 46, 52 P. 115, 39 L.R.A. 697; Kohn v. Sacramento Electric, Gas & Ry. Co., 168 Cal. 1, 141 P. 626; The Yamato v. Bank of S. California, 170 Cal. 351, 149 P. 826.

[9, 10] Appellants also contend that the reconveyance by the Title Guarantee and Trust Company was made in violation of the terms of the original deed of trust, in that the company reconveyed without having in its possession the funds to pay the twenty outstanding notes, together with interest and bonus thereon, on the date (February 14, 1931) it caused the reconveyance to be recorded. The record is not entirely clear as to whether the trustee actually had the proceeds with which to pay the twenty outstanding notes in its possession when it recorded the reconveyance, or whether on that date it had merely been promised that that sum would be deposited out of the proceeds of the $80,000 loan. There is evidence that the trustee did not actually receive the $20,000 until several days after February 14, 1931. At any rate, it is an admitted fact that the trustee never received any sum to pay the delinquent interest or the bonus on the twenty outstanding notes. We may assume, for the purposes of this opinion, that the trustee did not receive the $20,000 to pay the principal of the twenty outstanding notes on the date it recorded the reconveyance. This fact would not assist appellants. They are in no position to raise the point. Their notes, endorsed in blank, were in the hands of the trustee on that date. If the trustee violated its duty to the holders of the twenty outstanding notes that had not been deposited with the American Mortgage Company, such violation could not legally affect the rights of appellants. The holders of these twenty outstanding notes were paid, by the trustee, the principal of their notes. They are not parties to this action and are not attacking the reconveyance. Appellant

are estopped from challenging the reconveyance which they, by their conduct, induced the trustee to make. As to the Mortgage Guarantee Company, a subsequent bona fide purchaser and encumbrancer for value, through whom respondents claim, appellants, who entrusted their notes to American Mortgage Company, with indicia of ownership, are in the same position as if their notes had actually been paid, and are estopped from attacking the title of such purchaser or encumbrancer.

[11] As already pointed out, Mortgage Guarantee Company, and respondents who claim through that company, are bona fide purchasers. Although it is the law that a transfer by a trustee in contravention of the express provisions of the trust is void (Civ.Code, sec. 870), that rule has no application to the factual situation here presented. Where circumstances creating an estoppel are present, as here, a purchaser taking title without notice of the breach of trust secures an unimpeachable title. 65 Cor.Jur. p. 774, sec. 644; 65 Cor.Jur., p. 776, sec. 647; 27 R.C.L. p. 694, sec. 458. The appellants, for reasons already set forth, inasmuch as they were not injured by the asserted violations of the trust, are estopped from setting up these violations for the purpose of defeating respondents' title. The same reasons that estop appellants from attacking the reconveyance on the ground that they had not been paid, are applicable to estop them from attacking the reconveyance on the ground that there was a violation of the terms of the trust.

We are not unmindful of the fact that appellants have been seriously injured by reason of the fraudulent and criminal acts of the American Mortgage Company. They have lost large sums of money through the criminal and fraudulent acts of the officers of that company. The appellants had no intent to deceive or defraud. They are completely innocent of any wrongful intent. But the respondents are also innocent. They invested their money in the honest belief that appellants had been paid in full. Appellants, innocently, it is true, created the situation that made the consummation of the fraud possible. Under such circumstances, although we sympathize with appellants, they having created the situation, must, as against respondents, bear the loss.

The judgments appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.

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40 Cal.App.2d 395

PEOPLE v. DUFFY.

Cr. 532.

District Court of Appeal, Fourth District, California.

Aug. 14, 1940.

Criminal law ⚿1104(6)

The filing of application for preparation of transcript of phonographic reporter's notes being made a necessary prerequisite to prosecution of appeal from judgment of conviction, the Appellate Court was without jurisdiction to consider appeal where such application was not filed, and appeal would be dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 2, § 7.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Dennis O. Duffy was convicted of burglary and theft, and he appeals.

Appeal dismissed.

H. M. Tashjian, of Visalia, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On May 8, 1940, defendant and appellant filed a notice of appeal from a judgment of conviction of the offenses of burglary and petit theft, with prior felony convictions. From the record before us it appears that the statement of the grounds of appeal and notice and application for a transcript of the phonographic reporter's notes required to be filed under the provisions of section 7 of rule II of the rules of the judicial council of the state of California, promulgated for the Supreme Court and District Courts of Appeal, have not been filed. Respondent on August 13, 1940, moved to dismiss the appeal upon the ground that said application and statement were not filed in conformity with the provisions of the said rule which provides that upon an appeal by a defendant from a judgment of conviction the appellant must, within five days after giving notice of appeal, file with the clerk of the court and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which appellant relies and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. The rule further provides that if such application is not filed within said time the appeal shall be dismissed.

Inasmuch as the filing of an application for the preparation of a transcript of the phonographic reporter's notes is made a necessary prerequisite to the prosecution of an appeal from the judgment of conviction, the appellate court is without jurisdiction to consider the appeal where such an application is not filed and the appeal will be dismissed. People v. Rutledge, 114 Cal.App. 728, 300 P. 828; People v. Lau, 19 Cal.App.2d 243, 64 P.2d 1142; People v. Lewis, 219 Cal. 410, 27 P.2d 73; People v. Gilbert, 28 Cal.App.2d 121, 82 P.2d 25.

The motion to dismiss the appeal is granted and the appeal is dismissed.

I concur: BARNARD, P. J.

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40 Cal.App.2d 257

HOSPELHORN v. VAN DUSEN.

Civ. 2367.

District Court of Appeal, Fourth District, California.

July 29, 1940.

Rehearing Denied Aug. 23, 1940.

Hearing Denied Sept. 25, 1940.

1. Limitation of actions ⇨2(1)

Three year limitation prescribed by statute on actions to enforce liabilities created by law applied to an action to enforce the liability of stockholders of Maryland banking corporation and not the statute of limitations of Maryland. Code Civ.Proc. § 359.

2. Limitation of actions ⇨58(1)

Under statute providing that an action to enforce a liability created by law must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty for forfeiture attached or the liability was created, limitations run from the date upon which the liability was created instead of from the date upon which a cause of action to enforce the liability accrued to the aggrieved party. Code Civ.Proc. § 359.

3. Courts ⇨95(2)

In determining the nature of obligation of a stockholder of a Maryland banking corporation and time when stockholder's liability under the statutes of Maryland was created, construction given by the courts of Maryland to its statutes would be recognized and given full effect by California courts.

4. Limitation of actions ⇨58(5)

In California, statutory liability of stockholder of banking corporation is created upon the date the assessment is made and not upon the date the assessment is made payable, and limitations run from the date the assessment is made. Gen.Laws 1937, Act 652a.

5. Limitation of actions ⇨58(5)

Under Maryland statute establishing liability of stockholders of a banking corporation, liability is created, at the time the assessment is levied and not at the time the stock is registered. Code Pub.Gen.Laws Md.1924, art. 11, § 72; § 9, as amended by Laws 1933, c. 529, § 1; § 71M, as added by Laws 1933, c. 46.

6. Limitation of actions ⇨58(5)

Where Maryland court ordered that bank receiver collect from the stockholders certain sum per share and sum was assessed as their liability imposed by law, liability of stockholders was created and right to enforce stockholder's liability in California was barred by limitations where three years expired before action to enforce liability was commenced. Code Civ.Proc. § 359; Code Pub.Gen.Laws Md.1924, art. 11, § 72; § 9, as amended by Laws 1933, c. 529, § 1; § 71M, as added by Laws 1933, c. 46.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by John D. Hospelhorn, receiver of the Baltimore Trust Company, against Wanda V. Van Dusen, sometimes also known as Mrs. Charles A. Van Dusen, to recover on a statutory stockholders' liability under the statutes of Maryland. From an adverse judgment, plaintiff appeals.

Affirmed.

Liggett & Liggett, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondent.

GRIFFIN, Justice.

In this action plaintiff and appellant, as receiver for the Baltimore Trust Company, a banking corporation, sued one of its stockholders, Wanda V. Van Dusen, defendant and respondent, residing in California, to recover on a statutory stockholders' liability under the statutes of Maryland. Respondent defended on the ground that her liability was barred by the provisions of section 359 of the Code of Civil Procedure of the state of California.

[1, 2] Appellant concedes that the statute of limitations (sec. 359, Code Civ. Proc.) of this state is the statute to be applied in determining the question to be presented in respect thereto, and not the statute of limitations of Maryland. Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139. Section 359 of the Code of Civil Procedure provides that "* * * such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or *the liability was created*". The question then presented is this: When was *the liability created?* It should be noted that the statute of limitations here involved is different from the ordinary statute of limitations in that it runs from the date "upon which * * * the liability was created" instead of from the date upon which *a cause of action to enforce that liability* accrued to the appellant. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87. The Supreme Court in that case held that the statute had run, *even though the plaintiff's cause of action to enforce the liability had accrued within three years,* since the *liability* itself had been *created* more than three years before suit was filed. To the same effect are Wells v. Black, 117 Cal. 157, 163, 48 P. 1090, 37 L.R.A. 619, 59 Am.St. Rep. 162; Bank of San Luis Obispo v. Pacific Coast Steamship Company, 103 Cal. 594, 596, 37 P. 499; Chambers v. Farnham, 182 Cal. 191, 194, 187 P. 732; Gardiner v. Royer, 167 Cal. 238, 139 P. 75; Coombes v. Getz, 217 Cal. 320, 18 P.2d 939; Royal Trust Co. v. MacBean, supra; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939.

[3] We then must look to the laws of Maryland to determine the nature of respondent's obligation and the time when the stockholder's *liability was created.* People v. Goddard, 84 Cal.App. 382, 386, 258 P. 447. The rule is that the construction given by the courts of a foreign state to its statutes will be recognized and given full effect in the courts of the forum. Smith v. Shepler, 8 Cal.App.2d 717, 720, 48 P.2d 999; McManus v. Red Salmon Canning Co., 37 Cal.App. 133, 137, 173 P. 1112; 5 Cal.Jur. pp. 429, 430.

Appellant, in his statement of the question involved and throughout his brief, argues that the liability must have been created either by an order of February 5, 1935, or by an order of November 13, 1935, hereinafter mentioned. It is respondent's affirmative argument that under the Maryland law, *liability was created* either before these orders were made or if the liability was created on the date of the first order the statute of limitations accordingly has run. The evidence clearly establishes that the bank incurred all the debts for the payment of which the assessment here in question was levied prior to February 5, 1933. The so-called interlocutory order directing the levy of assessment was signed February 5, 1935. This action was instituted September 1, 1938.

In support of appellant's contention he cites section 72 of article XI, Annotated Code of Maryland, which reads in part: "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock * * * and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction."

Appellant also cites Robinson v. Hospelhorn, Receiver, 169 Md. 117, 179 A. 515, 522, 184 A. 903, 103 A.L.R. 740, wherein the court defined the nature of the liability as follows: "* * * when it [the statute] went on to say that that 'asset' should be for the benefit of the depositors and creditors of the corporation, 'if necessary to pay the debts of such corporation,' it seems clearly to mean that it is conditional and contingent, and that while it exists as a reserve for the benefit of creditors, it is dormant and unenforceable until it is needed to pay the debts of the corporation. It is therefore, technically, neither a primary nor a secondary liability, but has some of the characteristics of both. It is primary in that it is an original undertaking, and arises by force of the statute out of the stockholders' original subscription. It is secondary in that it may not be enforced until it sufficiently appears that the corporation is unable to pay its debts from its other assets and then only to the extent of the deficit. * * *

"The contingency * * * is that the liability is needed to pay debts. * * *

"'Manifestly there is no obligation upon the stockholder to pay anything until the amount he is required to pay has been determined by an order of a court of competent jurisdiction.' The express language of the statute * * * compel the conclusion that under the statute the contingency which determines whether the additional liability is enforceable is a justiciable fact to be ascertained by a court rather than summarily by some administrative official. * * *

"The double liability statute does not speak of, nor does its application depend upon, final liquidation, but upon facts, wherever and however judicially established, that the liability is needed to pay the debts of the corporation after the exhaustion of its tangible assets."

In Ghinger v. Stockholders of People's Banking Co., 169 Md. 678, 182 A. 558 (syllabus): "'Stockholders' against whom double liability on bank stock is enforceable are only those who are such at time it becomes necessary to enforce liability, and not those who own stock at time when various transactions, out of which bank's indebtedness arose, took place. (Code Pub.Gen.Laws 1924, art. 11, §§ 9, 72; Acts 1933, c. 46; Const., art. 3, § 39)".

Appellant also relies on Richardson v. Craig, 11 Cal.2d 131, 77 P.2d 1077, construing the California Bank Stockholders' Liability Act (Stats.1931, p. 338, Deering's Gen.Laws, Act 652a), which he contends is "strikingly similar" to the Maryland statute, and argues that the California law creates no liability under the act *until an assessment is levied* by the superintendent of banks; that in Maryland, the bank commissioner does not have power under the law to make the assessment himself nor to create the liability; that the Maryland statute provides for the creation of the liability by the act of a court of competent jurisdiction; that the only noticeable procedural distinction between the two statutes is that the bank commissioner of Maryland renders to the court his report on the condition of the insolvent bank corporation; that the court then makes a preliminary order, in the nature of an order to show cause, on stockholders; that after evidence is taken and the court has determined the necessity of an assessment and fixed the amount and percentage thereof, a final decree is made, actually levying the assessment and ordering the bank commissioner to collect it; that in the instant case that final order was made November 13, 1935; and that this action was commenced within three years from that date.

It is further argued that under the National Banking Act, 12 U.S.C.A. § 63, it is the act of the comptroller in levying the assessment that creates the liability and starts the statute of limitations to running; that the construction given that act in Johnson v. Greene, D.C., 14 F.Supp. 945, affirmed in 88 F.2d 683, is applicable to the Maryland statutes, and that therefore the liability in the instant case was not *created* until November 13, 1935.

The trial court held that the action was barred under section 359 of the Code of Civil Procedure. Respondent points out the fact that appellant testified and the trial court has found that the bank incurred all of the debts for the payment of which the assessment here in question was levied prior to February 25, 1933, and maintains that appellant's liability was created prior to that date. In Hospelhorn v. Poe, 174 Md. 242, 198 A. 582, 596, 118 A.L.R. 682, the appellant, as receiver of the bank, sued various Maryland shareholders to recover on the assessment which is the basis of the instant case. That court held that Poe was liable although he had ceased to own the stock January 15, 1934, long before either of the orders of assessment had been levied, and stated that the liability of the stockholders was one of the assets of the trust company which was transferred to the bank commissioner as receiver, and "The liability for an assessment accrues when the stock is registered in the name of the holder and continues while the stock is so registered. The liability to pay the assessment accrues due upon the determination of the amount to be paid by an order of court of competent jurisdiction." It is therefore contended that if the liability of respondent as one of the bank's shareholders was an asset which was transferred to appellant, it obviously must have been created prior to that time, i. e., more than three years prior to the commencement of the present action; that the stockholder's liability under the Maryland law is *created* in the language of the court, "when the stock is registered in the name of the holder" even though no cause of action to enforce this liability may *accrue* until an assessment is levied. It is therefore argued that appellant's contention is untenable under the Maryland law as established in the case cited, because it is clearly shown that the liability for certain obligations was *created* when the stock was first registered in the name of the stockholder, so as to impose a liability upon a shareholder who had transferred his stock before the assessment was levied in 1935. Respondent likewise argues that appellant cannot urge in California that the liability for those same obligations was not created until November, 1935, in order to escape the peculiar provisions of the California statute of limitations; and that if the liability of Poe was created prior to January 15, 1934, then the liability of respondent for the same assessment was created prior to that date; that if Poe's statutory liability was an asset of the appellant as receiver of the bank on January 5, 1935, when he took possession of its assets, then the liability of respondent was also an existing asset at that time; that if it was necessary by the Emergency Banking Act to "*preserve* this liability for the benefit of creditors and depositors in the event it should be necessary to enforce the payment of this liability" then the liability so preserved must have been created prior to March 4, 1933, when the Emergency Banking Act took effect. Otherwise, there could have been *nothing to preserve*.

In Hospelhorn v. Boyce, 174 Md. 275, 198 A. 597, even after the sale of the stock on March 15, 1933, the court held a shareholder liable under the same assessment here involved. From these authorities respondent contends that the liability was created in the instant case prior to the levy of the assessment or, at any rate, when the levy of assessment was first made, and that accordingly the construction given our statute of limitations in Chambers v. Farnham, supra, is applicable.

[4] The Supreme Court, in Richardson v. Craig, supra, has definitely set at rest the question as to when the liability was created in construing the Bank Act of California and has determined that such liability is created upon the date the assessment is made and not upon the date the assessment was made payable as respects the running of the statute of limitations of this state. In this interpretation the Supreme Court adopted with approval a similar holding in Johnson v. Greene, supra, wherein it is said: "The assessment by the Comptroller gives rise to the right which it is sought to enforce in this action. It is the act which fixes the starting point of the liability", 14 F.Supp. at page 947, and "that the contingent obligation of the stockholder to pay an assessment is made absolute by the Comptroller's action ordering one." 88 F.2d 684.

In this connection it should be noted that the National Banking Act (12 U.S.C.A. § 63) is substantially the same as that established by our own law. Richardson v. Craig, supra. The distinguishing difference between the Maryland Act and the California Act is that under the latter it is by virtue of the act of the superintendent of banks that the liability is created. Under the National Banking Act it is by virtue of the act of the comptroller. But under the Maryland Act (sec. 9, art. 11, Code of Public General Laws, as amended by Acts of 1933, chap. 529, sec. 1) a bank commissioner is authorized to take possession of the property, assets and business of the bank. This occurred on January 5, 1935, and by force of the terms of the section these assets were in the hands of the bank commissioner as receiver "as though he had been appointed by an order of court". Hospelhorn v. Poe, supra, 174 Md. 242, 198 A. at page 595, 118 A.L.R. 682. The commissioner immediately instituted proceedings in the name of the state of Maryland against the bank for the purpose of having the court assume jurisdiction over its property and business for final liquidation.

The so-called interlocutory order dated February 5, 1935, provided in part "that the receiver pay and he is hereby directed to demand and collect from the stockholders of the Baltimore Trust Company who were such on March 4, 1933, and from their subsequent transferees of record at the date of this order, the sum of $10 per-share, *which sum is now assessed as their liability to creditors imposed by law* * * * that * * * the receiver shall, before taking action hereunder, give a notice to stockholders. * * * Leave, however, is by said order granted to any stockholder to appear and show cause on or before the 25th day of February, 1935, why payment should not be made as ordered." (Italics ours.) A notice to this effect was ordered sent to all stockholders and respondent admits receiving such a notice, but did not pay the amount demanded therein nor make any appearance. The final order dated November 13, 1935, provided: "This court having set for hearing all questions relating to the statutory liability of the stockholders * * * finds * * * that the liabilities * * * exceed the value of its assets * * * and that an assessment of $10 per share is necessary to meet the statutory liability of the stockholders. * * It is ordered * * * that an assessment of $10 per share * * * is levied and imposed * * * and * * * receiver * * * is * * * authorized and directed to demand and collect * * $10 for each * * * share * * *; to * * * institute * * * suits against any and all parties liable. * * *"

The liability of the stockholders, under section 72 of article XI of the Maryland Code, and of the transferors and transferees of stock after March 4, 1933, under section 71M of chapter 46 of the Acts of 1933, were assets of the trust company for the benefit ratably of all its depositors and creditors, if necessary to pay the debts of the corporation.

Under section 71M it is provided: "Any person who may be a stockholder *at the commencement of said period of custody* and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be *jointly and severally liable to the receiver for the statutory assessment on said shares.*"

[5, 6] It is quite apparent that the courts of Maryland have not considered the question here presented, i. e.: When was the *liability created* for the purpose of applying the bar of the statute of limitations as set forth in section 359 of the California Code of Civil Procedure? The courts of this state as well as the federal courts have held that the particular liability here involved is not *created* at the time the stock is registered but at the time the assessment is levied, and we are convinced that this interpretation should be given to the Maryland law. However, if we accept the argument in the case cited (Hospelhorn v. Poe, supra, 174 Md. 242, 198 A. at page 596, 118 A.L.R. 682), wherein the court said: "*The liability for an assessment accrues* when the stock is registered in the name of the holder and continues while the stock is so registered. The liability to pay the assessment accrues due upon the determination of the amount to be paid by an order of a court of competent jurisdiction;" which in effect holds that the liability was created when the stock was registered, the holding of the trial court in the instant case must be sustained, for the statute would have run. In the light of the decisions and the interpretation given to the statutes involved, we are of the opinion that the liability was created in the instant case, within the meaning of section 359 of the Code of Civil Procedure, and binds the owner of the stock as of January 5, 1935, the date of the beginning of the custody under the act, or on February 5, 1935, at which time the court made the order that the receiver "collect from the stockholders $10 per share * * * which sum is now assessed as their liability * * * imposed by law". Under either interpretation more than three years have expired prior to the date of the filing of the instant action.

The judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

40 Cal.App.2d 396

PEOPLE v. BICE.

Cr. 533.

District Court of Appeal, Fourth District, California.

Aug. 14, 1940.

Criminal law 🔑1071, 1104(6)

Where no statement of grounds of appeal or application for transcript was filed in conformity with court rule, District Court of Appeal was without jurisdiction to consider defendant's appeal and would dismiss appeal on motion. Rules for Supreme Court and District Courts of Appeal, rule 2, § 7.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Herbert Bice was convicted of grand theft with prior felony convictions, and he appeals. On motion by the People of the State of California to dismiss the appeal.

Motion granted, and appeal dismissed.

H. M. Tashjian, of Visalia, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On May 6, 1940, defendant and appellant filed a notice of appeal from a judgment of conviction of the offense of grand theft with prior felony convictions. The certificate of the county clerk of Tulare county, dated May 18, 1940, discloses that no statement of grounds of appeal or application for transcript were filed as required by section 7 of rule II of the rules of the judicial council of the state of California promulgated for the Supreme Court and District Courts of Appeal. Respondent on August 13, 1940, moved to dismiss the appeal upon the ground that said statement and application have not been filed in conformity with the provisions of the said rule which provides that upon an appeal by a defendant from a judgment of conviction the appellant must, within five days after giving notice of appeal, file with the clerk of the court and present an application to the trial court stating in general terms the grounds of the appeal and the points upon which appellant relies and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time the appeal shall be dismissed. The appellate court is without jurisdiction to consider the appeal where such an application is not filed. People v. Rutledge, 114 Cal.App. 728, 300 P. 828; People v. Lewis, 219 Cal. 410, 27 P.2d 73; People v. Gilbert, 28 Cal. App.2d 121, 82 P.2d 25.

No appearance has been made in this court by appellant to resist the granting of the motion. It is therefore ordered that the motion of respondent to dismiss the appeal be granted and the appeal is dismissed.

I concur: BARNARD, P. J.

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40 Cal.App.2d 354

MILLS MUSIC, Inc., v. LAMPTON, County Clerk, et al.

Civ. 12652.

District Court of Appeal, Second District, Division 2, California.

Aug. 9, 1940.

Rehearing Denied Sept. 5, 1940.

1. Appeal and error 🔑1010(1)

Generally, appellate court will not interfere with judgment based upon substantial evidence.

2. Prohibition 🔑10(1)

The determination of jurisdictional facts cannot be collaterally attacked in proceeding for writ of prohibition.

3. Corporations 🔑668(16)

In determining whether New York corporation was doing business in California so as to be subject to service of summons, it was not incumbent upon trial court to require plaintiffs to explore books and files of corporation in state of New York to find evidence of extent to which corporation had authorized its business to be transacted in California, but fair dealing on part of corporation obligated it to declare its purpose and to disclose the extent of its activities in California. Civ.Code, § 405; Code Civ. Proc. § 411.

4. Corporations ⚷642(4½)

A foreign corporation maintaining an office in California for two years to advertise its wares and to interview its patrons was not performing a limited service not requiring a license from state of California.

5. Corporations ⚷642(4½)

A New York music company maintaining in California for two years a "professional office" in charge of a resident manager, for purpose of advertising company's music and soliciting bandmasters to play such music, and conducting substantial part of its business in California, was "doing business" in California, so as to be subject to service of summons on manager. Civ.Code, § 405, Code Civ.Proc. § 411.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

◆

Prohibition proceeding by Mills Music, Incorporated, against L. E. Lampton, County Clerk, and the Superior Court of the State of California in and for the County of Los Angeles.

Alternative writ discharged, and petition for peremptory writ denied.

Law Offices of Nathan O. Freedman, of Los Angeles, and Patrick H. Ford, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, and Harold D. Geffen, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

The respondent court having refused to quash service of a summons made upon a corporate defendant, petitioner herein, upon the ground that it was not doing business in this state, this court issued its alternative writ of prohibition to said court staying further proceedings. Said summons had been issued in an action instituted by Lois Goldberg and Selma Shelley against Mills Music, Inc., a foreign corporation, for damages arising from alleged plagiarism in California and for an accounting.

On the 21st day of March, 1940, summons and complaint in said action were served upon one Bernard Pollack as the agent of defendant; thereafter on March 27th said plaintiffs and defendant stipulated that defendant might "have to and including the 13th day of April, 1940, to enter a plea on the above mentioned case". April 5, 1940, pursuant to notice of motion theretofore served, said defendant moved the superior court for an order to quash said summons. Although nothing appears to show the ground of its motion, yet, from the general context of the petition and exhibits, we must assume that the issue presented was as above stated. Said notice stated that "said motion will be based upon this notice and upon the original summons on file herein and upon affidavits and *oral testimony* on behalf of the above named defendant, Mills Music, Inc.". Thereafter, on the 17th day of April, 1940, said defendant filed an affidavit requesting an order allowing it until May 7, 1940, within which to plead to the complaint. In the interim defendant filed its said petition in this court.

The affidavit of petitioner's agent filed in the trial court contains the following:

"That I, Bernard Pollack, am a member of the professional staff of Mills Music, Inc., which is a New York corporation maintaining offices in the City of New York, State of New York.

"That Mills Music, Inc., maintains a professsional office at 1537 North Vine Street, Hollywood, California. That Mills Music, Inc. maintains no bank account in the State of California, publishes no music within the State of California.

"That the sole purpose of maintaining a professional office with Bernard Pollack as manager within the City of Los Angeles, County of Los Angeles, State of California, is to enable Bernard Pollack to contact singers, bands and band leaders to the end that they might play Mills Music, Inc. copyrighted songs.

"That all the music of Mills Music, Inc. is published in the State of New York, sold in the State of New York, and all orders for the same are filled in the State of New York."

From the affidavit of one Geffen, plaintiffs' attorney, presented at the same time, it appears that for more than two years petitioner has maintained its said office in Hollywood, a part of Los Angeles, and that its general manager has actually solicited and accepted orders for products distributed by petitioner; that said Bernard Pollack is the general manager in charge of the Pacific coast territory; that in said office petitioner has copies of music published by petitioner; that said copies are actually distributed to musicians as a part of the business of petitioner, and that orders for the sale of said copies are accepted at said office; that said general manager and other employees of said office have their residence in Los Angeles county; that a substantial portion of the business of the company is actually carried on in said county and employees are maintained for the purpose of promoting the sale for profit of petitioner's said music; that customers of petitioner in the state of California are actually contacted by the employees of petitioner.

Upon the facts above recited, respondent has raised a number of questions in which it is contended that petitioner made a general appearance in the trial court, that the order to quash the summons is an appealable order, and that prohibition does not lie where the determination of the question of jurisdiction of the lower court depends upon a finding of fact by said court. However, in view of the conclusion that we have reached upon the question presented by petitioner, it will be unnecessary to discuss said points of respondent.

The question to be determined is whether or not petitioner was actually engaged in doing business in California in contemplation of section 405 of the Civil Code which defines transacting intrastate business as "entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce". While the affidavit on behalf of plaintiffs was based upon information and belief, these averments were, in substantial matters, corroborated by said Pollack's affidavit. The defendant (petitioner) declined the privilege offered by the court of refuting said averments with further proof. The petitioner is a foreign corporation. Acting upon the implied invitation arising out of comity between the states it opened and maintained a "professional office" in this state for the purpose of rendering a valuable service to itself. By reason of its activities, the manager of its said professional office was served with a summons and complaint which attempted to state a cause of action for plagiarism alleged to have been committed in this state. Although said Geffen's affidavit was based upon information and belief, it was in the main corroborated by said Pollack's affidavit. It appears that petitioner is conducting a substantial part of its business in California and that its employees in said office reside in this state. The court offered petitioner additional time within which to present further proof of its contention that it was not doing business in the state of California. It offered neither oral testimony nor affidavits as promised. In view of the contents of said Pollack's affidavit as well as that of Geffen, and of the offer made by the trial court to allow additional time within which to present further proof, petitioner should not be relieved from the service made upon its said manager. If an affidavit founded on information and belief is sufficient to raise a factual issue (In re Roth, 3 Cal.App.2d 226, 39 P.2d 490), surely such affidavit is sufficient when corroborated and confronted by such circumstances as those above outlined.

[1, 2] In the Roth case the court had under consideration the accusing affidavit upon which Roth had been committed for contempt. It was there held that since the petitioner had received a full and fair hearing and given a full opportunity to present his defense a judgment of conviction could not be held to be void because some of the charges were made on information and belief. Ex parte Acock, 84 Cal. 50, 23 P. 1029. The trial court herein made a finding of the ultimate fact that the petitioner was doing business in the state of California. Under these circumstances the general rule that an appellate court will not interfere with a judgment based upon substantial evidence will prevail. "To hold otherwise, and to reach a conclusion different in any respect from that reached by the trial court, would amount to nothing less than a new trial by this court on the facts, and a substitution of the conclusion by this court thereon for the conclusion with reference to such facts as found by the trial court". Lumas Film Corp. v. Superior Court, 89 Cal.App. 384, 386, 264 P. 792. In the case of Beaulieu Vineyard v. Superior Court, 6 Cal.App. 242, 91 P. 1015 (cited in the Lumas case), it was held that the writ of prohibition lies to prevent a proceeding in excess of jurisdiction and does not lie to review the regularity of the proceedings of the trial court or to determine a question of error in the exercise of jurisdiction. The determination of a jurisdictional fact cannot be collaterally attacked in a proceeding for a writ of prohibition. Murphy v. Superior Court, 84 Cal. 592, 24 P. 310.

[3, 4] Upon the matters averred by petitioner's affidavit, and in the absence of proof by it, plaintiff's affidavit together with the averments of said Pollack, were sufficient to warrant the finding by the trial

court herein that petitioner was doing business in the state of California. It was within the power of petitioner to have presented specific proof, if available, negativing the Geffen affidavit both with reference to petitioner's contract with Pollack and the nature of the business transactions had with its California customers. Under the circumstances, it was not incumbent upon the trial court to require plaintiffs to explore the books and files of petitioner in the state of New York to find evidence of the extent to which it had authorized is business to be transacted in California. Fair dealing on the part of a corporation crossing the hospitable threshold of a sister state, obligates it to declare its purpose and to disclose the extent of its activities there. The usual course of a foreign corporation is to file its Articles and to pay the filing fee and license tax appropriate to its authorized capital and to designate its agent for service of process. In event of such compliance with our laws arguments as to its presence are avoided. But oftentimes a corporation created within another jurisdiction, in good faith, sends its emissaries into another state to perform what it considers a limited service, not requiring a license. However, we cannot agree that a corporation that maintains an office here for two years to advertise its wares and to interview its patrons is performing such a limited service.

[5] In the case of Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 22 P.2d 271, a New Jersey corporation manufactured engines in that state and sold them to purchasers in California. Plaintiff purchased a Diesel engine from said corporation and after its delivery encountered mechanical defects. After complaint the company sent one Runyon, a graduate engineer, to aid and assist customers in California with the maintenance and service of engines theretofore delivered in this state. The engineer was authorized to employ mechanics to do the work. He advertised the virtues of the standard Diesel engine and requested the public to call upon him. He was neither officer nor stockholder in the corporation and was not authorized to execute contracts. He had frequent conferences with the plaintiff to adjust the differences with said corporation and promised to replace Milbank's engine with a later type. Their negotiations having failed, Milbank brought his action. Runyon was served with summons and it was held that his corporation was doing business in California. The court there said, at page 70 of 132 Cal.App. at page 272 of 22 P.2d: "The phrase 'doing of business' is equivalent to the words 'transacting business' and has reference to a continuation in some form of business. * * * There must be the carrying on of business to such an extent by the corporation as to manifest its presence in the state even though the transactions are entirely *interstate* in character. * * *. The continuous endeavor to service the engines of customers in order to correct their mechanical defects and increase their efficiency was a substantial and important branch of its ordinary business. It is apparent that the maintenance of such a service does not logically fall within the category of a merely casual or incidental activity of defendant." Likewise, it may be said that the maintenance of an office by petitioner for the purpose of advertising its music and for the purpose of soliciting band masters to play its music is not an incidental activity of petitioner but is itself a part of the business of distributing the products which it produces in the state of New York.

While no complaint was made in the motion to quash or in any exhibit of the lack of capacity of said Pollack to be served as managing agent of petitioner, such complaint may be deduced inferentially from the petition. On the authority of the Milbank case, the service of summons upon the said Pollack as a managing agent of petitioner in California was a service in contemplation of section 411 of the Code of Civil Procedure. He and his predecessor had for two years managed the Pacific Coast office of petitioner, in Hollywood, and he rushed to the aid of petitioner in its endeavor to quash said service. In the case of Roehl v. Texas Co., 107 Cal.App. 691 at 704, 291 P. 255, 260, the court said: "We hold the true rule to be * * * that 'every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprized of the service made' * * *. Whether in any given case the agent in question is a 'managing agent' within what we have decided the meaning of that expression to be must depend on the particular facts involved. It is impracticable to lay down a more concrete test of general validity."

For the reasons given the alternative writ heretofore issued is discharged and the petition for a peremptory writ is denied.

I concur: McCOMB, J.

REEVES v. VALLOW.

L. A. 17406.

Supreme Court of California.

Aug. 22, 1940.

Rehearing Denied Sept. 19, 1940.

1. Work and labor ⚷29(2)

One rendering continuing services at request of promisor for compensation to be paid on termination of services can recover reasonable value of such services as distinguished from contract price of services.

2. Limitation of actions ⚷46(5)

Where payment for continuing services is to be made at death of promisor, statute of limitations does not begin to run against claim for reasonable value of services until the termination of the services on promisor's death.

3. Appeal and error ⚷193(1)

Where action against administrator for value of services rendered to decedent was tried upon theory that a cause of action was stated for reasonable value of continuing services performed by plaintiff at request of decedent which were to be paid for at termination of services on decedent's death, and no demurrer was filed to complaint, administrator could not on appeal object to any formal deficiencies in claim or in statement of cause of action if it was supported by evidence.

4. Wills ⚷433

In action against administrator for reasonable value of services rendered to decedent under alleged oral contract to compensate plaintiff therefor from decedent's estate, a copy of a will alleged in verified complaint to have been executed by decedent in plaintiff's favor was admissible as "declaration against interest," notwithstanding that allegations as to the will were stricken from the complaint, where plaintiff's witnesses had testified as to portion of the contents of the will, notwithstanding that statements relied on by the defendant in the will were in nature of self-serving declarations of decedent.

See Words and Phrases, Permanent Edition, for all other definitions of "Declaration against Interest".

5. Appeal and error ⚷1048(6)

In action against administrator for reasonable value of services rendered to decedent where administrator on direct examination did not testify as to mental capacity of the decedent, which was not an issue in the case, it was reversible error on cross-examination to question administrator concerning decedent's mental capacity in order to lay a foundation whereby complaint in an action instituted by the administrator against the plaintiff in which it was alleged that the decedent was mentally incompetent could be admitted in evidence for impeachment purposes.

6. Appeal and error ⚷1050(1)

In action against administrator for reasonable value of services rendered to decedent, admission of the assignment to the plaintiff of a note and deed of trust and testimony that assignment was for valuable consideration was reversible error, where defendant was denied permission to make contrary showing or to show that decedent was mentally unsound at the time of transaction.

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Clara Reeves against Jesse A. Vallow as administrator of the estate of John Fletcher Kratzer, deceased, for value of services rendered for deceased by plaintiff. From a judgment for plaintiff, defendant appeals.

Reversed.

Rehearing denied; EDMONDS and HOUSER, JJ., dissenting.

For prior opinion, see 95 P.2d 945.

Edwin J. Miller and Samuel H. Peck, both of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff sued the defendant administrator of the estate of John Fletcher Kratzer, deceased, on a creditor's claim for $30,500. The jury returned a verdict for the plaintiff in the sum of $25,000. The defendant appealed from the judgment entered on the verdict. The jury found for the defendant on a second cause of action for a small sum of money alleged to have been advanced by the plaintiff to the decedent. No appeal was taken from the judgment entered on the latter verdict.

The plaintiff filed an original and an amended claim against the estate. The original claim was "For Services rendered per contract as companion, nurse, and assistant to the deceased which constituted caring for deceased's financial affairs, and nursing deceased during his life time; that said services were rendered at the special instance and request of the deceased and were continuous from May 1st, 1928, to March 7th, 1936, $20,000.00." The amended claim was in the same form with the exception that the amount claimed was $30,500. The administrator took no action on the amended claim within ten days. The claimant elected to consider the claim rejected and brought the present action to recover the amount thereof.

The complaint sets forth that in his lifetime and on May 1, 1928, the decedent moved into the plaintiff's home and thereafter lived with the plaintiff until his death on March 7, 1936; that on said May 1, 1928, the decedent requested the plaintiff to care for him, assist him in his business and act as companion and nurse to him as long as he lived; that he stated he would richly compensate her for her labors; that in 1931 he told her that he would give her $20,000, payable upon his death and out of his estate, and the further sum of $100 per month until distribution thereof; that in 1935 the decedent agreed to deliver to the plaintiff in addition to the $20,000, a house of the value of $10,500. The complaint alleges performance on the plaintiff's part and that the reasonable value of the services was the sum of $30,500.

The defendant answered and pleaded as special defenses the statute of limitations (sec. 339, subd. 1, Code Civ. Proc.), and the statute of frauds (sec. 1624, subd. 6, Civ.Code).

[1-3] The defendant contends that, inasmuch as the alleged contract was oral, the plaintiff was limited to recovery, if at all, of the value of services performed within two years prior to the death of Mr. Kratzer. He also contends that there is a fatal variance between the claim and the complaint, and that neither the claim nor the complaint states a cause of action. The defendant did not demur to the complaint. The trial was had upon the theory that the plaintiff had stated a cause of action for the reasonable value of continuing services performed by the plaintiff at the special instance and request of the decedent, which were to be paid for at the termination of the services, in this case, at the death of the decedent, for which payment was not furnished nor provided. That recovery may be had for the reasonable value of such continuing services, as distinguished from the contract price therefor, and that when payment is to be made at the death of the promisor the statute of limitations does not begin to run until the termination of the services by his death, is well settled in this state. Long v. Rumsey, 12 Cal.2d 334, at page 342, 84 P.2d 146, with cases cited; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562. If the evidence is sufficient to support the cause of action for the reasonable value of the continuing services, it is now too late for the defendant to object to any formal deficiencies in the claim or in the statement of the cause of action. Both were sufficient to apprise the administrator of the general nature of the claim and the cause of action upon which the plaintiff would be entitled to rely under the foregoing authorities. Syler v. Katzer, 12 Cal. 2d 348, 84 P.2d 137, 119 A.L.R. 422; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84.

Prior to 1918, John Fletcher Kratzer and his wife lived in Des Moines, Iowa, where he manufactured and sold buggies. In that year he came to California with his wife and his fortune, and in 1920 settled in Hollywood in the home of his nephew, Charles Kratzer. Mr. Kratzer thereupon engaged in the business of lending money and buying and selling real estate.

In 1918 the plaintiff, Clara Reeves, also came to California from the middle west where, at least until 1902, she had resided with her husband, a son and a daughter. In California Mrs. Reeves commenced the business of selling cosmetics. After she met the Kratzers, which was during or prior to 1920, she was a frequent visitor at their home, and they assisted her financially.

In 1926 Mrs. Kratzer died. The nephew, Charles Kratzer, removed to Lemoore, California, and the elder Kratzer lived in hotels until 1928. In that year he suffered injuries in an automobile accident and went to the plaintiff's home in Hollywood. The plaintiff and Mr. Kratzer later occupied a house owned by Mr. Kratzer, located on Taft avenue in Hollywood, where Mrs. Reeves continued to live and which she managed, continuing such management and the care and nursing of the decedent until his death in March, 1936. At the time of his death, Mr. Kratzer was eighty-four years of age and Mrs. Reeves was seventy-two.

By an amendment to the complaint proposed by the plaintiff and allowed during the course of the trial, the copy of a will which was annexed to the original complaint and made a part thereof, and the allegations of the complaint referring to such will, were deleted from the complaint. It nevertheless appeared in evidence introduced by the plaintiff that Mr. Kratzer executed before witnesses a will in March, 1931, in which he bequeathed $20,000 to Mrs. Reeves and provided for payment to her of $100 per month until payment of the legacy, and that in 1934 the will was destroyed. Mr. Kratzer died without making another will. It also appeared by the plaintiff's evidence received over the defendant's objection that in 1934 Mr. Kratzer transferred by assignment to Mrs. Reeves a $38,000 note and deed of trust on improved real property. Ever since the assignment to her of the deed of trust, Mrs. Reeves has received the interest therefrom amounting to $158 a month. The evidence as to whether the decedent intended to buy for or deed to Mrs. Reeves any residence as her home was sharply conflicting. It is not questioned, however, that during the period involved Mrs. Reeves also received from Mr. Kratzer sums of money for her own use in excess of $4,300, and in addition many gifts of furniture, rugs, a piano, and an automobile.

The defendant sought to introduce in evidence the copy of the will originally annexed to the complaint, for the benefit of the inference which it might afford that the $20,000 legacy therein to Mrs. Reeves was intended as a gift rather than as compensation for her services. The copy contained the following statement: "I have been residing with Clara Reeves and all sums due her are paid except for the current month." This appeared with a declaration in the will of the decedent's assets and liabilities. The court sustained an objection to its introduction on the ground that the declaration of the decedent therein was self-serving.

[4] The complaint as originally filed, with the allegations referring to the copy of the will annexed thereto as an exhibit, was verified by the plaintiff. By striking out the allegations of the complaint referring to the will and the copy annexed thereto, and by introducing evidence of the execution of the will and its later destruction and testimony of a portion of its contents, the plaintiff sought to present to the jury only the inferences therefrom which were favorable to her. But inasmuch as the plaintiff's witnesses had testified to a portion of the contents of the will, the defendant was entitled to introduce the entire copy of the will for the purpose of rebutting the inferences sought to be attributed to it by the plaintiff. The plaintiff was not entitled to rely on a portion of the will as proof of the decedent's intent in her favor, if a different intent was discoverable when the entire will was considered. That the statements relied on by the defendant might have been self-serving declarations of the decedent was immaterial. The plaintiff had verified the allegation that the copy sought to be introduced by the defendant was a copy of the will of the decedent upon which she was relying. She had vouched for its authenticity as a copy thereof. That authentication was an admission against her interest, and the copy was admissible as against her to the end indicated.

The plaintiff sought to rebut the inference that the $38,000 note and deed of trust assigned to her about the time the will was destroyed was intended by the decedent as performance of any promise to richly compensate her. She introduced evidence that she gave valuable consideration for the assignment. It appeared that she delivered to Mr. Kratzer $6,000 worth of Edison Company stock. There was testimony that the balance of the valuable consideration consisted of "cash". However, no receipts or other tangible evidence, direct or circumstantial, was produced to show that anything in addition to the Edison Company stock was given to Mr. Kratzer by the plaintiff.

On direct examination the defendant was asked about the physical appearance of Mr. Kratzer. He testified that Mr. Kratzer's height was six feet one, that he weighed about 190 pounds, had white hair and mustache, was straight as a ramrod, a very dignified and fine-looking man, was sparsely built and not inclined to be overweight, and who walked so briskly that on many occasions the defendant had to exert himself to keep up with him. On cross-examination he was asked whether Mr. Kratzer was mentally sound up to the time of his last illness. The question was objected to on the ground that it was improper cross-examination and not relevant to any issue in the case. The court overruled the objection and the defendant answered that so far as he knew the decedent was mentally sound, but that he had not seen him during his last illness. After some further cross-examination on the same subject, purportedly to impeach the defendant in respect to such testimony, the plaintiff introduced a complaint filed by the defendant herein as plaintiff in an action against Mrs. Reeves. In that action, brought subsequent to the commencement of the present action, the administrator sought to have the court set aside the assignment to Mrs. Reeves of the $38,000 note and deed of trust on the ground that no consideration was given therefor and that at the time of the transaction the decedent was mentally incompetent to comprehend the nature thereof. The introduction of that complaint in evidence was objected to on the ground that the testimony on cross-examination and the complaint were not relevant to any issue in the action and that the complaint was therefore improper impeaching evidence. The objection was overruled.

[5, 6] The defendant also assigns as prejudicial error the rulings of the court admitting in evidence the assignment to the plaintiff of the $38,000 note and deed of trust and the complaint in the action against Mrs. Reeves, contending that the issues relating to the consideration for the note and deed of trust and the mental capacity of the decedent were not involved in the action then before the court.

The rulings were erroneous. Neither the assignment nor the consideration therefor, or the mental capacity of the decedent, were issues in this case. Furthermore, the defendant on direct examination had not testified concerning the mental capacity of the decedent. It is apparent from the record that the only purpose of the improper cross-examination was to lay a foundation whereby the complaint in the other action could be brought to the jury's attention. The reading of that complaint in evidence was calculated to, and undoubtedly did, have the effect of inculcating a belief that the plaintiff might not receive compensation for services for which she was entitled to be paid unless she were awarded a substantial verdict in the present action. The defendant offered evidence of the mental incapacity of the decedent to comprehend the nature of the transaction at the time of the assignment of the note and deed of trust to Mrs. Reeves. The plaintiff's objection to this offer was sustained. That ruling was also erroneous. The court permitted the plaintiff to introduce in evidence the assignment of the note and trust deed and testimony that the assignment was for a valuable consideration, while it denied permission to the defendant to make a contrary showing on that question or to introduce evidence on the question of the decedent's mental capacity in respect to that transaction. When evidence of the assignment was brought into the case, the jury should also have been given the opportunity to consider all the evidence on both questions. The contention that the rulings were not prejudicial cannot be sustained. There was evidence of admissions by the plaintiff that everything she had, she received from Mr. Kratzer; also that the note and trust deed were accepted by her in fulfillment of his promise to richly compensate her. It becomes manifest that, had the jury been permitted to hear all the evidence relating to the assignment of the note and deed of trust, the verdict might have been for the defendant. A consideration of the entire record compels the conclusion that the erroneous rulings were prejudicial.

It is unnecessary to refer to other claimed erroneous rulings in the admission or rejection of evidence, or in the giving or refusal to give specified instructions to the jury. It may be assumed from what has been said that any erroneous rulings will not be repeated on a retrial.

The judgment is reversed.

We concur: GIBSON, C. J.; CARTER, J.; HOUSER, J.; CURTIS, J.

EDMONDS, Justice (concurring).

I concur in the order of reversal but am of the opinion that, for the reasons stated by me in Syler v. Katzer, 12 Cal.2d 348, 350, 84 P.2d 137, 119 A.L.R. 422, it should include directions to the superior court to dismiss the action.

The claim sued upon specified that $30,500 was due "for services rendered per contract as companion nurse, and assistant to the deceased, which constituted caring for deceased's financial affairs, and nursing deceased during his lifetime; that said services were rendered at the special instance and request of the deceased from May 1st, 1928, to March 7, 1936". It does not assert, as the complaint based upon it alleges, that the services were rendered under any continuing contract, or that Mr. Kratzer agreed to give plaintiff $20,000 payable upon his death, or provide for her in his will.

If either of the agreements pleaded in the complaint was made and services were rendered in consideration of it, the claim should have so stated. But the respondent has pleaded a cause of action and offered evidence thereon which is entirely different from that asserted in her claim.

It is true that the administrator did not demur to the complaint, but at the commencement of the trial his counsel objected to the introduction of any evidence to prove its allegations upon the ground that the complaint does not state a cause of action. At the same time, counsel moved for judgment upon the pleadings, calling attention to the variance between the claim and the allegations of the complaint. Under these circumstances, I cannot agree with the conclusion of my associates that "it is now too late for the defendant to object to any formal deficiencies in the claim or in the statement of the cause of action".

It is settled law that a claimant against an estate may only recover upon the cause of action stated in his claim. Obviously, a recovery upon grounds entirely different from those specified in the claim would be directly contrary to the purpose of such claims, which is to safeguard the property of decedents and require a claimant to submit the particulars of any indebtedness which he asserts against an estate before bringing suit.

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16 Cal.2d 130

THOMPSON v. KERR, Registrar of Voters, et al.

S. F. 16458.

Supreme Court of California.

Aug. 23, 1940.

1. Constitutional law 🔑9(1)

The statute providing that each signer of an initiative petition shall, at time of signing the petition, himself affix thereto the date of his signing, constitutes reasonable legislative regulation in furtherance and not limitation upon the initiative power reserved in the constitution. St.1939, pp. 51, 53, §§ 15, 45.

2. Mandamus 🔑154(2)

Where petition in proceeding to compel the certification of certain names alleged to have been signed to supplemental initiative petition proposing a constitutional amendment alleged that the signer of initiative petition had affixed the date in his original handwriting at the time of signing, and the allegation was not made by the petitioner but by the proponent of the initiative measure who was not a party to the proceeding, in the absence of an amendment to show that petitioner made such allegation, allegation was stricken and demurrer to the petition sustained on the ground that signers of the initiative petition failed to affix personally the date of signing as required by statute. St.1939, pp. 51, 53, §§ 15, 45.

3. Constitutional law 🔑9(1)

Under constitutional provision requiring that all sections of an original initiative petition circulated in any county or city shall be filed at the same time, and that supplemental petition should be circulated within 40 days from the transmission of the original petition, only the names of voters signed to the supplemental petition during the extended period may be included among those required to qualify the initiative measure. Const. art. 4, § 1.

4. Constitutional law 🔑9(1)

An allegation, in a proceeding to compel the certification of certain names alleged to have been signed to supplemental initiative petition proposing a constitutional amendment, that the officers had improperly rejected certain signatures appearing on the supplemental initiative petition because the dates on which they were affixed were prior to the time of the filing of the original petition, was demurrable, since under the Constitution only names of voters signed to supplemental petition during a period specified may be included among those required to qualify the initiative measure. Const. art. 4, § 1.

◆

In Bank.

Original proceeding for a writ of mandate by Hugh M. Thompson against William M. Kerr, Registrar of Voters of the County of Los Angeles, and others. On general and special demurrers to the amended petition.

Writ denied.

Lawrence W. Allen, William Schreider, and Philip C. Boardman, all of Los Angeles, and Joseph Seymour, of Riverside, for petitioner.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and R. Robert Hunter, Asst. Dist. Atty., all of Oakland, for respondent G. E. Wade, County Clerk of Alameda County.

O'Melveny & Myers and Louis W. Myers, all of Los Angeles, for respondent William M. Kerr, Registrar of Voters of County of Los Angeles.

Earl Warren, Atty. Gen., and Robert W. Harrison, Chief Asst. Atty. Gen., for respondent Paul Peek, Secretary of State of California.

PER CURIAM.

In this original proceeding for a writ of mandate, the petitioner seeks to compel the certification of certain names alleged to have been signed to a supplemental initiative petition proposing a constitutional amendment relative to "Retirement Life Payments". The signatures which it is sought to have certified were rejected by the respondent county officers either because the signers had not personally affixed the date thereto or because they antedated the filing of the original initiative petition.

[1] An original and an amended petition for mandate have been here filed. Respondents have demurred both generally and specially to the amended petition. In our opinion the demurrers are well taken. In the original petition it was alleged that the respondents Kerr and Hallowell had improperly and arbitrarily rejected 4120 and 708 signatures, respectively, because the signers assertedly had not personally affixed the date after their respective signatures, it being petitioner's contention that any requirement therefor is directory and not mandatory. The Elections Code, adopted in 1939, St.1939, p. 49, provides that each signer of an initiative petition "shall at the time of signing the petition or paper himself affix thereto the date of his signing * * *". Sec. 45. This code also declares: "'Shall' is mandatory and 'may' is permissive." Sec. 15. That the provisions of section 45, supra, constitute reasonable legislative regulations in furtherance of and not limitations upon the initiative power reserved in the Constitution is now definitely settled. Uhl v. Collins, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370.

[2] In the amended petition for mandate a shifting of position is evident. It is there expressly alleged for the first time that each of the above-mentioned signers had affixed the date in his "original handwriting". However, it appears upon examination of such amended petition that the allegation just referred to purports to be made not by the petitioner, who verified the petition, but rather by one designated in the petition as the "proponent" of the initiative measure and who is not a party to this proceeding. Obviously, an allegation by one not a party to the proceeding is meaningless and can have no bearing upon the determination thereof. Upon the argument, the respondents moved to strike such allegation from the amended petition. In so doing, however, they expressed in open court a willingness to waive other grounds of demurrer if the petition were amended in a manner that the petitioner, rather than a stranger to the litigation, should undertake to make the allegation with respect to the matter of the dates having been affixed personally by the signers. Counsel for petitioner thereupon stated in open court that "if there is a change either by word or amendment or substitution of the word 'petitioner' for the word 'proponent', it will come from the petitioner. I have no privilege to substitute the term and I do not feel that it is incumbent upon me or that it is a responsibility that I have assumed." In the absence of such amendment, the motion to strike must be, and it is, granted, and the demurrers are hereby sustained to the cause of action directed to the signatures rejected because of the failure of the signers to affix personally the date of signing.

[3, 4] The demurrers must likewise be sustained as to the cause of action wherein it is alleged that the respondents Hallowell and Wade had improperly and arbitrarily rejected 304 and 1554 signatures, respectively, appearing on the supplemental initiative petition because the dates on which they were affixed were prior to the time of filing the original petition. Inasmuch as the constitutional provision requires that "all said sections [referring to the sections of an *original* initiative petition] circulated in any county or city and county shall be filed at the same time" (Const., art. IV, sec. 1), and in view of the further provision therein that a supplemental petition is to be circulated "within forty days from the transmission of the said [original] petition", obviously only the names of voters signed to a "supplemental" petition during the extended period may be included among those required to qualify the initiative

measure. In this connection, see, also, Thompson v. Vaughan, 192 Mich. 512, 159 N.W. 65.

What we have said adequately disposes of this proceeding, and it is unnecessary that we here determine the propriety of the action of the respondent Secretary of State in refusing to accept 420 duly certified signatures from Tuolumne county on the ground that they were received at his office two days after the asserted deadline for their receipt. Under the allegations of the petition herein, this group of signatures, even if improperly rejected, would not serve to make up the deficiency otherwise existing in the number of qualified signatures.

The alternative writ is discharged and a peremptory writ is denied.

16 Cal.2d 127

BADAL v. ADAMS et al.

Sac. 5281.

Supreme Court of California.
Aug. 23, 1940.

1. Fraudulent conveyances 🔑299(13)

Evidence authorized judgment for judgment creditor in creditor's proceeding against debtors and their son to subject to lien of judgments land owned by debtors, the record title to which had been transferred to son by means of an alleged fraudulent foreclosure of a deed of trust and sale.

2. Fraudulent conveyances 🔑310

Judgment debtors' son could not contend, as against judgment creditor who sought to subject debtors' land to lien of judgments, that son had obtained a good title to land by transfer from bank to which debtors had executed a deed of trust covering land, in view of finding that son was a party to original fraud to defeat creditor's judgment liens.

In Bank.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding by David J. Badal against Isaac Adams and wife and Albert Isaac Adams, to subject real property owned by defendants to the lien of plaintiff's judgments. From a decree for plaintiff, defendants appeal.

Affirmed.

Hjelm & Hjelm, of Turlock, for appellants.

Wilcox & Rodin, of Turlock, and Cleveland R. Wright, of San Francisco, for respondent.

PER CURIAM.

[1] Plaintiff, a judgment creditor of defendants Isaac and Sarah Adams, brought this action to subject to the lien of his judgments certain real property owned by said defendants, the record title to which had been transferred to their son, defendant Albert Adams, by means of an alleged fraudulent foreclosure and sale. Trial of the cause resulted in a decree in favor of plaintiff from which defendants have appealed. Their principal contention is that the evidence is insufficient to support the judgment. We are of the opinion that the evidence is sufficient.

On July 11, 1931, plaintiff secured a judgment against Isaac and Sarah Adams for $1,091.85. He renewed this judgment in November, 1936, for the sum of $1,508.64, and at about the same time he became the assignee of a $214 judgment against them. Abstracts of these judgments were recorded, and the judgments thus became liens upon real property owned by the judgment debtors in Stanislaus county.

The only real property standing of record in the names of Isaac and Sarah Adams in 1931 was their ranch home, upon which they had resided for many years. They had previously executed a deed of trust on this property to the People's State Bank of Turlock, and on February 15, 1933, they renewed the encumbrance, giving the bank a new deed of trust in the sum of $5,000. Their actual indebtedness, however, exceeded that amount by several thousand dollars, and the bank was anxious to realize something from the loan. On January 12, 1934, an effort was made to refinance the obligation through the Federal Land Bank of Berkeley, but the application for a loan was rejected when a title search disclosed the presence of plaintiff's judgment liens. The property was then sold under the power contained in the deed of trust, and was purchased by the bank at the trustee's sale for $7,400, which was approximately the amount owing the bank by Isaac and Sarah Adams. The trustees' deed to the bank was dated February 26, 1934. Thereafter the bank executed a deed to Albert Adams dated March 12, 1934. The consideration for the conveyance to Albert was paid from the proceeds of a $5,000 loan obtained on the property from the Federal Land Bank under the file number of the prior loan application made by Isaac and Sarah. The Federal Land Bank required Isaac and Sarah to join with Albert in signing two promissory notes evidencing the loan, but the deeds of trust given to secure the notes were signed by Albert alone. The trustees' deed to the People's Bank, the deed from it to Albert and the deeds of trust from Albert to the Federal Land Bank, were all recorded on June 23, 1934. The People's Bank did not make any entry crediting the account of Isaac and Sarah with the payment of $5,000 on their indebtedness until July 19, 1934. The president of the People's Bank testified that they knew when the foreclosure proceeding was instituted that the bank had a prospective purchaser in Albert. Isaac and Sarah continued to reside at the ranch home, and there was no change of possession or control of the property. Witnesses testified to certain statements made by Isaac and Albert subsequent to the transfer of title to Albert, which indicated no change of ownership to Albert was intended. One witness testified that in 1935 he asked Albert what he would sell the property for, and that Albert replied: "I don't know, I don't know whether my father wants to sell the property or what he would want for it. I'll have to write to him and find out"; and the same witness testified that on another occasion Albert stated that some people with a judgment against his father were trying to get the property, and added: "it has been fixed so they cannot get the property". Another witness testified that in January, 1935, Isaac stated in response to a question concerning the ownership of the property, "I am the owner."

The effect of the foreclosure and the purchase of the property by the People's Bank and of the subsequent sale to Albert was to clear the record title, and thus make it possible to secure the refinancing of the $5,000 encumbrance. The lower court found that at all times Albert acted solely on behalf of his parents and not for himself; that he personally paid no consideration for the conveyance of the property and was not a bona fide purchaser thereof; that the payment was made and title taken in his name as a dummy for his parents for the purpose of defrauding plaintiff and defeating plaintiff's judgment liens; and that although there was a change in the record title of the property there was actually no change of ownership. The decree adjudged that Albert had no right, title or interest in the property except as trustee for his parents who were the owners in fee, and it directed him to convey the property to them subject only to the deeds of trust in favor of the Federal Land Bank and the plaintiff's judgment liens subordinate thereto.

[2] The express finding that Albert was a party to the original fraud completely disposes of his contention that he obtained a good title by transfer from the bank.

There are no other questions which merit discussion.

The judgment is affirmed.

16 Cal.2d 103

PEOPLE v. WARREN et al.

Cr. 4300.

Supreme Court of California.

Aug. 22, 1940.

1. Criminal law 🔑200(1)

The offense of "first-degree robbery," which requires proof that crime was perpetrated by person armed with a dangerous or deadly weapon, and crime consisting of violation of the Deadly Weapons Act by possession of a weapon capable of being concealed on the person by a person who has been convicted of a felony are distinct crimes and conviction or acquittal of either does not operate as a bar to subsequent prosecution for the other. Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 211, 211a, 654, 687, 1023.

See Words and Phrases, Permanent Edition, for all other definitions of "First-Degree Robbery".

2. Criminal law 🔑200(1)

The Legislature has power to create two or more offenses which may be committed by a single act, each of which is punishable by itself. and a conviction or acquittal under each statute would be no bar to a conviction under the other, for accused would not be twice in "jeopardy" for one offense. Pen. Code, § 1023.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

3. Weapons 🔑17(1)

Under Deadly Weapons Act prohibiting possession of a firearm capable of being concealed on the person, by a person who has been convicted of a felony, possession of such firearm may be continuous and constitute but one offense, especially where information does not charge possession of a firearm on a specific date or on a particular occasion. Gen.Laws 1937, Act 1970, § 2.

4. Weapons 🔑17(1)

Where an indictment for carrying a concealed weapon in violation of Deadly Weapons Act charges commission of offense in general terms, state may prove commission of offense at any time within statutory period next preceding finding of indictment, but if an indictment charges a distinct carrying of a concealed weapon on a particular occasion, state is confined to proof of specific offense therein charged. Gen.Laws 1937, Act 1970, § 2.

5. Criminal law 🔑678(1)

In prosecution for violation of Deadly Weapons Act, wherein information charged commission of offense on or about a named date, on basis of proof establishing that offense was committed on named date and on two other dates, defendant was not entitled to an election by prosecution as to which date it intended to rely on. Gen.Laws 1937, Act 1970, § 2.

6. Criminal law 🔑739(4)

While question of once in jeopardy and former acquittal is generally one of fact, question becomes one of law when evidence in support thereof is uncontradicted and is insufficient to sustain plea as a matter of law, and in such case it is proper for trial court to instruct jury to find for prosecution on such issue.

7. Criminal law 🔑739(4)

In prosecution for violating Deadly Weapons Act, pleas of once in jeopardy and former acquittal, which involved construction by the court of the statute providing for the charging that a defendant was armed at time of commission of prior offense or arrest and application of such statute to Deadly Weapons Act presented a question of law for the trial court, and hence trial court properly instructed jury to find for prosecution on such pleas. Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 969c, 1168(2) (b).

8. Criminal law 🔑655(1)

Under constitutional provision authorizing comments by trial court to jury in criminal case, such remarks should be temperate and unemotional in tenor, but trial court is not confined to specific comments or to recital of facts, and the right of comment may be exercised in a manner which trial court deems necessary for proper determination of the case. Const. art. 6, § 19.

9. Criminal law 🔑766

In prosecution for violation of Deadly Weapons Act, trial court's comments that pleas of once in jeopardy and former acquittal based on conviction of two of the defendants for robbery and of being armed at time of commission of offenses and also at time of their arrest, and acquittal of other defendant on same charges were not available to defendants were not objectionable as an invasion of province of jury Gen.Laws 1937, Act 1970, § 2; Pen.Code, §§ 211, 211a, 654, 687, 969c, 1168(2) (b); Const. art. 6, § 19.

10. Criminal law 🔑742(2)

Evidence was not insufficient as a matter of law to sustain defendant's conviction for violating Deadly Weapons Act on ground that only testimony supporting conviction was given by an accomplice, where reasonable minds could have differed on question as to whether witness whose testimony implicated defendant was an accomplice. Gen. Laws 1937, Act 1970, § 2; Pen.Code, § 1111.

11. Criminal law 🔑824(7)

In prosecution for violation of Deadly Weapons Act, where evidence strongly suggested that witness, giving only testimony tending to implicate defendant, was an accomplice, failure to instruct jury on law relating to insufficiency of uncorroborated testimony of an accomplice constituted prejudicial error, notwithstanding that defendant did not specifically request such instructions. Gen.Laws 1937, Act 1970, § 2; Pen.Code, § 1111.

12. Criminal law 🔑790, 824(1)

Generally, in criminal cases, trial court must give, of its own motion, instructions on general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves, but trial court need not give instructions upon specific points developed through the evidence introduced at the trial unless such instructions are requested by the party desiring them.

13. Criminal law ⚷824(1)

Where trial court fully and fairly charges jury upon law appertaining to the facts, trial court's failure to instruct on any particular matter deemed essential is not error in absence of a request for such instruction.

14. Criminal law ⚷824(7)

Whenever testimony given upon trial is sufficient to warrant conclusion upon part of jury that a witness implicating a defendant was an accomplice, trial court must instruct jury on subject of accomplice, and failure of trial court to so instruct jury with or without a special request for such instructions constitutes error. Pen.Code, § 1111.

15. Criminal law ⚷1134(1)

In event of failure of trial court to instruct on subject of accomplice where such instruction should have been given, the entire record must be considered in determining whether such error constituted prejudicial error requiring a reversal of judgment of conviction. Pen.Code, § 1111.

CURTIS, J., dissenting in part.

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In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Jack Warren, William A. Henry, and Bud Lilly were convicted of violating the Deadly Weapons Act, and they appeal.

Judgments and orders with respect to defendants Henry and Lilly affirmed, and judgment and order with respect to defendant Warren reversed and caused remanded.

For prior opinion, see 99 P.2d 1058.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PER CURIAM.

Our consideration of the appeals of the three appellants herein leads us to the conclusion that the opinion of the District Court of Appeal, written by Mr. Presiding Justice York, satisfactorily disposes of all contentions of the three appellants except certain contentions which relate solely to the appeal of appellant Warren. We therefore adopt certain portions of said opinion as the opinion of this court and will thereafter consider the remaining contentions. The portions of said opinion so adopted are as follows:

"Appellants were charged by an amended information with violation of section 2 of the so-called 'Deadly Weapons Act' (Act 1970, Deering's General Laws, 1937 edition), together with certain prior convictions of felonies. This is an appeal from the judgments of conviction and from the order by which appellants' motions for new trial were denied, the following points being urged as grounds for a reversal of said judgments and order: (1) That appellants have been once in jeopardy; (2) that appellant Warren was formerly acquitted of the charge; (3) that the evidence is insufficient to support the verdict as to appellant Warren; (4) that the court erred in failing to compel an election; (5) that the court erred in instructions given and refused.

"The facts which form the basis of the instant cause are as follows: Around the hour of 1 o'clock on the afternoon of January 9, 1939, appellants Henry and Lilly were arrested in apartment No. 201 of an apartment house located at 2030 South Vermont avenue in the city of Los Angeles, at which time the arresting officers found wrapped in a sweater two guns, People's exhibits 10 and 11, on a shelf in a closet back of a disappearing bed in the living room. Another gun, People's exhibit 9, and shells, were found by the officers in a drawer in this closet. Later in the afternoon appellant Warren was arrested as he was ringing the doorbell of this apartment. In a conversation with the officers, appellant Henry stated that he lived in the apartment; that appellant Lilly had stayed there on the previous night; that the two guns wrapped in the sweater were brought there by appellant Warren and one Kessler and that the gun found in the closet drawer was his (Henry's). Appellant Lilly, in a conversation with the officers, stated that he had put the guns 'there' on the previous night; that two of the guns were brought to the apartment by appellant Warren and said Kessler, and that the third gun belonged to appellant Henry.

"The trial in the instant cause took place on April 20 and 21, 1939, following the trial of action No. 75205, in which the jury convicted appellants Henry and Lilly of four counts of robbery and with being armed at the time of the commission of the offenses, to-wit: on December 23, 1938, and also at the time of their arrest on January 9, 1939. The jury acquitted appellant Warren on each of the counts with which he was charged in the information in cause No. 75205, and found that he was unarmed at the time of the commission of the offenses as well as at the time of his arrest.

"At the instant trial the testimony of one Polonsky relating to the crimes committed on December 23, 1938, of which appellants Henry and Lilly were convicted, as aforesaid, was introduced in evidence to the effect that on said December 23rd, appellants Henry and Lilly held him up and robbed him in an apartment at 365 South Cloverdale, said witness identifying People's exhibit 9 as the gun he saw in the hands of appellant Henry at the time of the robbery, and identifying People's exhibit 10 as being similar to the gun he saw in the hands of appellant Lilly at that time. Said witness also testified that he was ordered by appellant Henry to turn his pockets inside out and to turn over his wrist watch while appellant Lilly went into a closet and took the witness' wallet out of his coat. The witness Groom testified that around the middle of December, 1938, appellants visited him at his home, at which time appellants Henry and Warren were in possession of People's exhibits 9 and 10.

"Following his arrest on January 9, 1939, appellant Henry stated to officer Tetrick, one of the arresting officers, that before committing the robbery on south Cloverdale, appellants obtained the guns from a man named Cramer with whom they had previously left them. Appellant Lilly told the officers that on the night of December 23, 1938, he was in possession of the nickel-plated gun and appellant Henry was in possession of the blue steel gun. Appellants entered a plea of once in jeopardy and in addition appellant Warren entered a plea of former acquittal, the jury herein returning verdicts for the People on each of said pleas. Certified copies of prior convictions relating to each of the appellants were received in evidence and marked People's exhibits 1, 2, 3 and 4.

"The instant prosecution is based upon section 2 of the Deadly Weapons Act, supra, which provides as follows: 'On and after the date upon which this act takes effect, no person not a citizen of the United States of America and no person who has been convicted of a felony under the laws of the United States, of the state of California, or any other state * * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. * * * Any person who shall violate the provisions of this section shall be punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year or by fine not exceeding five hundred dollars, or by both fine and imprisonment.'

"Section 969c of the Penal Code provides: 'Whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of subdivision 2 of section 1168 of the Penal Code relating to "Certain Minimum Penalties" * * * the fact that the defendant was so armed shall be charged in the indictment or information or complaint. This charge shall be added to and be a part of the count or each of the counts of the indictment or information or complaint which charge the offense at the time of the commission of which or at the time of the arrest for which the defendant was armed with a weapon.'

"With reference to the first point raised in this appeal, i. e., that appellants have been once in jeopardy for the offense charged by the information herein, it is urged that 'it was obviously the intention of the legislature in adopting section 969c of the Penal Code to provide for the economy of trials and the consolidation of the issues of being armed with a deadly weapon at the time of the commission of the offense or at the time of arrest and upon the finding affirmatively of the jury thereon to give to the defendant the additional punishment which the law prescribes under such conditions, this being an additional five-year minimum period of imprisonment. Sec. 1168, sub. (2) (b), of the Pen.Code. * * * The defendants in Case No. 75205, Superior Court, were each charged with a prior conviction of felony. Each admitted this prior conviction. * * * The issue of whether they were armed at the time of the commission of the offense on December 23, 1938, was specifically placed before the jury. The jury found specifically that Henry and Lilly were so armed on each occasion and further found that Warren was not so armed. Pursuant to these findings judgments were entered against Henry and Lilly and under the law, each of them, by reason of said findings, must receive a minimum sentence of ten years on each count—or five years additional punishment by reason of their *previous conviction* of felony, plus five years by reason of being previously convicted of having been armed with a dangerous or deadly weapon at the time of the commission of the offense and at the time of their arrest * * *. The legislature having seen fit to provide for a single trial to cover both issues herein set forth and the jury having passed *on both issues* the convicted defendants now facing double long and additional punishments on both issues certainly have been once in jeopardy.'

"The sections of the Penal Code pertinent to the point here under discussion are as follows:

"'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear'. Sec. 211, Pen. Code.

"'All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree.' Sec. 211a, Pen.Code.

"'An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *' Sec. 654, Pen.Code.

"'No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.' Sec. 687, Pen.Code.

"'When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information.' Sec. 1023, Pen.Code.

[1] "It is true, as contended by appellants that it was necessary to prove that they were armed when they robbed the witness Polonsky on the night of December 23, 1938, in order to constitute the crime then committed as robbery in the first degree. On the other hand, it is also true that the offense which is prohibited by section 2 of the Deadly Weapons Act, i. e., possession or control of a firearm by persons who had been previously convicted of crime, was complete before the robbery took place for the reason that without possession of the deadly weapons which were used in the perpetration of the robbery, that crime could not have been consummated. The possession of a deadly weapon, which is calculated to provoke assaults or worse, has been made an offense under the Deadly Weapons Act for the very purpose of preventing personal violence, and it is therefore incorrect to say that because robbery in the first degree may result from the possession of a firearm in the hands of an ex-convict, that such possession, as a matter of law, becomes so integral a part of the crime of first degree robbery that the conviction or acquittal thereof is a bar to a subsequent prosecution for the crime of possession of such deadly weapon.

[2] "'A single act may be an offense against two statutes; and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. * * * Undoubtedly it is within the power of the legislature to create two or more offenses which may be committed by a single act, each of which is punishable by itself. A conviction or acquittal in such case under either statute would be no bar to a conviction under the other, for the accused would not be twice in jeopardy for one offense, but only once in jeopardy for each offense.' (15 Am.Jur. p. 67.) In the case of People v. Bentley, 77 Cal. 7 [18 P. 799, 11 Am. St.Rep. 225], it was held that a conviction of an assault with a deadly weapon, under an information charging an assault with intent to commit murder, is not a bar to a subsequent conviction of an attempt to commit robbery, although the offenses were so closely connected in point of time that it is impossible to separate the evidence relating to them.

"In People v. Perry, 99 Cal.App. 90, at [page] 93 [277 P. 1080], it was held that the crime of carrying a concealed weapon in violation of the Firearms Act (Stats. 1923, p. 695), is separate and distinct from the crime of robbery, and defendant was subject to separate indictment, conviction and punishment for carrying a concealed weapon, irrespective of the result of the robbery prosecution, and notwithstanding that both crimes may have grown out of the same continuous transaction and were committed at the same time.

"It must therefore be concluded that appellants' first and second points have no merit for the reason that the two offenses herein referred to are separate and distinct crimes and the conviction or acquittal of either does not operate as a bar to the subsequent prosecution for the other.

[3-5] "Appellants urge that where the prosecution relies upon more than one act in a series of alleged acts, the defendant is entitled to an election by the prosecution as to which act it intends to rely upon. It is pointed out that the information charges the offense to have been committed on or about the 9th day of January; that after the trial got under way, the prosecution presented as its first evidence the date of December 23, 1938, on which date the robbery of Seymour Polonsky took place; that the testimony of Maynard Groom referred to a different date and that when officer Tetrick took the stand, he testified to the events which transpired on January 9, 1939.

"Section 2 of the 'Deadly Weapons Act' prohibits the possession, custody or control of a pistol, revolver, or other firearm capable of being concealed upon the person, by a person who has been convicted of a felony. The statute does not provide that it is an offense for each day that the ex-convict is in possession of the weapon, hence such possession may be continuous and constitute but one offense, especially where, as here, the information does not charge the possession on a specific date or on a particular occasion.

" 'Where an indictment for carrying a concealed weapon charges the commission of the offense in general terms, the state may prove the commission of the offense at any time within the statutory period next preceding the finding of the indictment, but accused will be protected from any prosecution for having carried a concealed weapon about his person within that period. If, however, in an indictment for carrying a concealed weapon, the descriptive averments are so specific as to charge a distinct carrying of a concealed weapon on a particular occasion, then the state is confined to proof of the specific offense therein charged; and in such a case accused would not be in jeopardy of being convicted for having carried a weapon concealed at another time and under different circumstances.' 16 Cor.Jur. 269.

"It is therefore obvious that the court did not err in refusing to require the prosecution to elect as to which one of the three dates it intended to rely upon for a conviction.

"The appellants finally contend that the court erred in instructions given and refused.

"A motion by appellants for diminution of the record herein was granted by this court, and pursuant to an order which was made on January 22, 1940, a supplemental clerk's transcript has been filed containing the amended information in case number 75205, hereinbefore referred to; as well as a supplemental reporter's transcript containing the comments made, and the oral instructions given, by the court to the jury just prior to the latter's retirement for deliberation in the instant cause.

"It is here contended that the following oral instruction was erroneously given by the court to the jury:

" 'It is my opinion and I so instruct you at this time that as to the question of once in jeopardy in this case that said plea is not available to each of the defendants at this time and that there is no merit in that plea at this time and that under my instruction to find on the question of once in jeopardy or former acquittal you should find for the People on each and every one of those charges, and I so admonish you and instruct you at this time; but of course under the law you may render the opposite verdict if you desire. That is your privilege and you are the sole and exclusive judges of the facts and of the weight of the evidence. * * * You are entirely free to exercise your own judgment on any question of fact at issue in this case but as a matter of law I instruct you that in so far as this issue is concerned that I think you should return a verdict for the People on the question of once in jeopardy. * * *

" 'Mr. Lavine: May I ask the Court to instruct the jury that the comment on the question of jeopardy did not affect the question of guilty or innocent?

"'The Court: I think I have fully and fairly completed the instructions to this jury, Mr. Lavine, and I have admonished them and I have so advised them that they are entirely free to exercise their own judgment as to any question of fact submitted to them at this time in this case, and in my opinion they should find for the People on the question of once in jeopardy but they are entirely free to exercise their own judgment on that question; but my opinion is that they should find for the People on that question. The record may so show.'

[6, 7] "While the question of once in jeopardy and former acquittal is ordinarily one of fact, the 'question becomes one of law when the evidence in support thereof is uncontradicted and is insufficient to sustain the plea as a matter of law. When such is the case, it is proper for the trial court to instruct the jury to find for the prosecution upon this issue'. 8 Cal.Jur. 286, citing People v. Newell, 192 Cal. 659 [221 P. 622]. The pleas of once in jeopardy and former acquittal, which were interposed in the instant cause, involved the construction by the court of section 969c of the Penal Code and its application to section 2 of the 'Deadly Weapons Act'. Necessarily, this was a question of law, therefore, the court properly instructed the jury to find for the prosecution upon such pleas. See, also, People v. Conson, 72 Cal.App. 509, 511 [237 P. 799].

[8] "Referring to comments made by the court to a jury in a criminal case which are now authorized by article VI, section 19, of the Constitution of this state, it was said in People v. Eudy, 12 Cal.2d 41, at [page] 47 [82 P.2d 359, 361]: 'Although such remarks should be temperate and unemotional in tenor, he is not confined to specific comments. The right may be exercised in the manner which the judge deems "necessary for the proper determination of the case", and is not confined to a colorless recital of facts. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211. Even an expression of his opinion concerning the guilt or innocence of a defendant has been held to be within the scope of comment which may be made, provided the province of the jury is not invaded.'

[9] "The comments of the trial court in the instant case did not amount to an invasion of the province of the jury.

"A careful review of the instructions which were given to the jury conclusively shows that they were fully and fairly informed with regard to the various aspects of the law involved herein, and even though one certain instruction may have been somewhat misleading, as is contended by appellants, it was not so prejudicial as to constitute a miscarriage of justice under section 4½ of article VI of the Constitution. This is also true with respect to the two instructions requested by appellants and which the court refused to give."

The remaining contentions which relate solely to the appeal of appellant Warren are (1) that the evidence is insufficient to support the judgment against him and (2) that the trial court committed prejudicial error in failing to instruct the jury as to what constitutes an accomplice and the necessity for corroboration of the testimony of an accomplice. The first of these contentions is based upon the claim that the only testimony tending to implicate appellant Warren was the uncorroborated testimony of one Groom and upon the further claim that the uncontradicted testimony showed as *a matter of law* that said Groom was an accomplice. The second of these contentions is based upon the claim that even if the uncontradicted testimony did not show *as a matter of law* that Groom was an accomplice, there was ample evidence to sustain a finding to that effect and therefore the trial court should have submitted this question to the jury under appropriate instructions.

Section 1111 of the Penal Code provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

The testimony shows that Groom, like each of the appellants, had been previously convicted of a felony. The testimony further shows that he had been in the company of the three appellants shortly before the commission of the above-mentioned robbery on December 23, 1938. He was arrested at about the time of the arrests of the three appellants but was later released. He was called by the prosecution as a witness against appellants upon this charge of violating section 2 of the Deadly Weapons Act. It is therefore apparent that if said Groom had been in joint possession with appellants of the weapons in question, he would have been liable to prosecution for the identical offense charged.

The testimony of Groom, which implicated appellant Warren, related to a visit of all three appellants, together with one Kessler to Groom's home shortly before the above-mentioned robbery. His testimony showed that appellants were at that time in possession of the guns which were admitted in evidence, appellant Henry having one of the guns and appellant Warren having the other. Groom denied that he owned or handled either gun, but he admitted that he had previously been given the cylinder of one of the guns and some money by Kessler and had gone to the hardware store with the cylinder where he had purchased some bullets to fit the cylinder and had then returned and given the cylinder and bullets to Kessler.

[10] The consideration of the contentions of appellant Warren is simplified to some extent by the concession of respondent that the only evidence in the record which may be considered as implicating appellant Warren is the testimony of Groom. In making this statement it is conceded that the evidence of the extrajudicial statements of appellants Henry and Lilly, made outside of the presence of appellant Warren, could not be considered against appellant Warren and that the trial court properly excluded said evidence as to said appellant Warren. It is contended, however, by respondent that the evidence concerning Groom did not show *as a matter of law* that Groom was an accomplice and that it therefore cannot be said *as a matter of law* that the evidence was insufficient to sustain the conviction of appellant Warren. While we believe that there was ample testimony from which the jury might have concluded that Groom was in joint possession with appellants of the weapons in question and was therefore an accomplice, we further believe that reasonable minds might have differed on this question. It therefore cannot be said *as a matter of law* that the evidence was insufficient to sustain the conviction of appellant Warren.

[11] The more serious question, however, is raised by appellant Warren's second above-mentioned contention. If the jury had been instructed on the subject of what constitutes an accomplice and the necessity for corroboration of the testimony of an accomplice, it might well have concluded that Groom was an accomplice and that appellant Warren was entitled to an acquittal by reason of the lack of corroboration of Groom's testimony. The trial court did not instruct the jury on this subject and appellant Warren contends that its failure to do so constituted prejudicial error. Under the circumstances presented by the record before us, we are of the opinion that this contention must be sustained. While it is true that appellant Warren did not propose instructions on the subject, we believe it was prejudicial error here for the trial court to fail to give such instructions of its own motion. People v. Heddens, 12 Cal.App.2d 245, 55 P.2d 230; see, also, People v. Curran, 24 Cal.App.2d 673, 75 P.2d 1090.

[12, 13] The general rules prescribing the duty of the trial court in the giving of instructions in criminal cases have been stated as follows: "It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction." 8 Cal.Jur. 309, and cases cited. All of these general principles should be considered in determining whether the trial court has performed its duty in any particular case.

It may be conceded that the necessity for accomplice instructions is "developed through the evidence introduced at the trial", but can it be said that the court "fully and fairly charges the jury upon the law appertaining to the facts of the case", when the evidence strongly suggests that the witness, giving the only testimony tending to implicate the accused, is an accomplice and the trial court fails to instruct the jury on the law relating to the insufficiency of the uncorroborated testimony of an accomplice? We think not. Such instructions deal with the vital question of the sufficiency of the evidence to sustain the conviction under the salutary rule laid down in section 1111 of the Penal Code. We therefore believe that it was prejudicial error for the trial court to fail to give such instructions in the present case even though such instructions were not specifically requested by appellant Warren.

In so holding, we are aware of the fact that there is language in certain decisions which may seem at variance with the views above expressed. See People v. Olds, 86 Cal.App. 130, 260 P. 321; People v. Lewis, 136 Cal.App. 405, 29 P.2d 305; People v. Yates, 71 Cal.App. 788, 236 P. 185; People v. Keller, 124 Cal.App. 673, 12 P.2d 1066. Mr. Justice Houser, who is not participating in this decision, wrote the opinions in People v. Olds, supra, People v. Lewis, supra, People v. Yates, supra, and he concurred in the opinion in People v. Keller, supra. Thereafter he wrote the concurring opinion in People v. Heddens, supra. In the last-mentioned concurring opinion, Mr. Justice Houser said, 12 Cal.App.2d at page 248, 55 P.2d at page 231, speaking of the decision in People v. Olds, supra: "But, as this court now understands the law, the declaration in that case of the legal principle that, because the defendant in that action did not request that an instruction be given to the jury respecting the necessity of corroboration of testimony that was given by an accomplice, on appeal from the judgment the appellant was in no position to complain, was too broad, if not inaccurate." Said concurring opinion then points out that there was ample corroboration of the testimony of the accomplice in People v. Olds, supra, and that "in the light of the record in that case, no prejudice resulted of the nature that would have warranted a reversal. The judgment therein, in any event, should, and probably would, have been affirmed by virtue of the mandate of section 4½ of article 6, of the Constitution."

In People v. Lewis, supra, there was likewise ample corroboration of the testimony of the alleged accomplice. In People v. Yates, supra, the testimony of the accomplice Goslyn was corroborated by the witnesses Moore, Tona and Morena and while the appellant there claimed that these three were also accomplices, the court said, 71 Cal.App. at pages 793 and 794, 236 P. at page 187, "The record discloses no evidence from which it may be deduced that any one of the corroborating witnesses was an accomplice within the meaning of the statute." In People v. Keller, supra, the court points out on page 676 of 124 Cal.App. on page 1067 of 12 P.2d that the evidence indicated that the witnesses were "only feigned accomplices" and that the court "instructed the jury on the law concerning feigned accomplices". It therefore appears that the cases of People v. Olds, supra, People v. Lewis, supra, People v. Yates, supra, and People v. Keller, supra, are all distinguishable upon their facts and that all of said decisions might well have been rested upon the ground that the records in said cases did not show *prejudicial* error requiring a reversal. We are in accord with the views expressed by Mr. Justice Houser in the concurring opinion in People v. Heddens, supra, indicating that the language employed in the opinion in People v. Olds, supra, was "too broad, if not inaccurate".

[14, 15] Owing to the conflicting views found in the language of the several opinions above mentioned and in order that our views may not be misunderstood, we deem it appropriate to state that we are of the opinion that whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice, it is the duty of the trial court to instruct the jury upon the law as set forth in section 1111 of the Penal Code; that the failure of the trial court to so instruct the jury under such circumstances, with or without a specific request for such instructions, constitutes error; but that in the event of such failure in any case, the entire record must be considered in determining whether such error constituted prejudicial error requiring a reversal of the judgment of conviction.

As above indicated, there was ample testimony in the present record to warrant the conclusion upon the part of the jury that Groom was an accomplice. It was therefore error for the trial court to fail to instruct upon the law as set forth in section 1111 of the Penal Code. If the jury had been so instructed and had determined upon said instructions that Groom was an accomplice, then it would have been its duty under said instructions to acquit appellant Warren as there was no testimony whatever, other than the testimony of Groom, to implicate appellant Warren. Under these circumstances, the failure to give such instructions was necessarily prejudicial and a reversal is required as to appellant Warren.

The judgments and order with respect to defendants Henry and Lilly are affirmed. The judgment and order with respect to defendant Warren are reversed and the cause is remanded for a new trial as to defendant Warren.

CURTIS, Justice (concurring and dissenting).

I concur in that part of the judgment affirming the conviction of Henry and Lilly, but dissent from that portion thereof reversing the conviction of the defendant Warren.

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16 Cal.2d 133

TRETHEWAY v. TRETHEWAY.

Sac. 5280.

Supreme Court of California.

Aug. 24, 1940.

1. Trial 🔑140(1)

It is within the province of the trier of facts to disbelieve and ignore the uncontradicted testimony of a witness where such testimony is so surrounded by elements of uncertainty, improbability, and fraud as to justify the disbelief.

2. Trusts 🔑372(3)

Where son, who was cotrustee with mother under trust created by father's will, withdrew sums from a joint bank account in his name and that of his mother, presumption arising from confidential relationship of son to his mother and fact that her strength was impaired mentally and physically and that she was under his undue influence, coupled with evasive statements and inability to account for funds withdrawn or to recall the use to which they were put, justified trial court in concluding that purpose in opening a joint account was to enable the son to have access to mother's money for his own purposes without necessity of having her sign for its withdrawal, notwithstanding that son's testimony with respect to the disposition of funds withdrawn was uncontradicted.

3. Trusts 🔑372(1)

Where son, who was coexecutor and cotrustee under trust created for benefit of mother under father's will, obtained money from mother by undue influence, son could not complain that sums for which he was ordered to account were duplicated and certain credits to which he was entitled were withheld in absence of anything to show duplication.

4. Trusts 🔑372(3)

Where son was coexecutor and cotrustee under trust created for benefit of mother under father's will, and it was shown that son had access to certain of mother's funds and that they passed through his hands and that his property and hers was commingled and that no accurate or complete accounts were kept, burden was on the son to prove that he acted in utmost good faith in handling such funds, and that he did not appropriate them for his own purposes, and executor seeking an accounting was not required to prove what specific funds were received by the son.

5. Trusts 🔑372(3)

Where son, who was executor and cotrustee under a trust created by father's will for benefit of mother, was shown to have obtained mother's funds by use of undue influence, and there was evidence that son deliberately attempted to confuse his mother's affairs and commingle her property with his to such an extent that no asset could with certainty be proved to belong to either of them, evidence was sufficient to establish son's status as constructive trustee charged with the duty to account fully with respect to his handling of mother's affairs.

◆

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Suit for an accounting by Fred H. Tretheway, as executor of the last will and testament of Mary A. Tretheway, deceased, against Harry B. Tretheway, sometimes known and written H. B. Tretheway.

From a judgment for the plaintiff, defendant appeals.

Affirmed.

O. C. Parkinson, of Stockton, for appellant.

Louttit, Marceau & Louttit, of Stockton, for respondent.

CARTER, Justice.

This appeal questions the correctness of that portion of the judgment of the trial court which requires defendant to account for the sum of $13,431.49, obtained by undue influence from his aged mother over the period of eleven years prior to her decease.

The facts forming the background of the litigation are set forth in Estate of Tretheway, 32 Cal.App.2d 287, 89 P.2d 679. George P. Tretheway died in 1925. He was survived by his wife, Mary A. Tretheway, and four. children, George, Fred, Harry, and Emma. Upon probate of his will, his estate, consisting of one-half of the community property, was distributed in trust to his widow, to the son, George, and to attorney H. Nelson French, as trustees. The other half of the community property went to the widow in absolute ownership. The terms of the trust were that the widow should have the income from the trust estate, together with as much of the principal, not exceeding $2,000 a year, as she should find necessary for her support, and that upon her death the remainder of principal should pass to the four children and certain grandchildren.

No segregation was ever made between the half of the property which passed subject to the trust and the remaining half which was distributed to the widow without restriction. Attorney French declined to act as trustee, and after about two years the son, George, also practically ceased to act. This left the widow as the only active trustee, and she dealt with the trust estate and her own property as a unit.

Over the entire period from the death of her husband in 1925, to her own death in 1936, she carried on her business transactions, including those of the trust, largely through her son, Harry, the defendant herein. Harry had been residing with his parents in Stockton at the time of the father's death and thereafter he continued to reside with his mother. In the fall of 1928, the two had a disagreement, and the mother went to live with the daughter, Emma, in Berkeley, but after a few months she returned to Stockton, and at her request Harry resumed his residence with her. She passed away on April 6, 1936, at the age of about 83 years, and Harry and the son, Fred, were made executors of her will.

Harry, as executor, filed an account on behalf of decedent as trustee under her husband's will, but in this he was not joined by either George, as cotrustee, or Fred, as coexecutor. The account, as finally affirmed (Estate of Tretheway, supra), showed that decedent had consumed principal assets of the trust estate at the rate of almost $2,000 a year, which was the maximum permitted by the terms of the trust.

On June 28, 1937, Fred, as executor, filed the present action against Harry, his coexecutor, charging that Harry had taken advantage of his mother's weakened mental condition and of his influence over her, to induce her to turn over various properties and moneys to him, which assets he had converted to his own use, in violation of his relation to her of confidence and trust. The prayer of the complaint was that such assets be impressed with a trust, and that Harry be required to account for them, and to return them to the mother's estate. During pendency of the cause Harry was suspended as executor.

A prolonged trial resulted in the entry of findings and judgment in favor of plaintiff, impressing a trust upon certain property and, among other things, requiring defendant to account to plaintiff for the sum of $13,431.49. Although defendant gave notice of appeal from the entire judgment, both as originally entered and as modified on motion for new trial, his attack is confined to the $13,431.49 item of accounting, and the bill of exceptions contains only the evidence bearing upon that issue. As to all other issues, it is conceded that there was evidence sufficient to support the findings and that they are therefore conclusive.

Among the findings to which no exception is taken are the following: Between May 9, 1925 (date of death of George P. Tretheway), and April 26, 1934, Mary A. Tretheway was in a weakened condition both in mind and in body, to such an extent that she was an easy prey to the designs of defendant, unable to resist his importunities, and between April 26, 1934, and April 26, 1936, her said condition was such that she was incapable of knowing what she was doing, or comprehending the ordinary routine of her daily life and the terms and effect of any business transaction, or the management of her business affairs, and she was unable in law and in fact, to transact any business, or to make any valid disposition of her property. At all times this condition was known to defendant, for the most confidential relationship existed between his mother and himself and she reposed the greatest confidence and trust in him, and entrusted him with the conduct of her business affairs, believing that he would deal fairly and justly with her. Defendant, however, with the object and intention of securing a large portion of her property for himself alone, depriving her of it and preventing his brothers and sister from receiving any part, gained control and domination and an undue influence over her mind and affection. While managing her property he took advantage of the confidence and trust which she reposed in him, and used it to induce her to deliver and entrust large sums of money to him, all in pursuance of his fraudulent purpose. He paid no consideration for this money, nor was it intended to constitute a gift to him. He secured possession of it solely by reason of his exercise of said undue and fraudulent influence.

The money obtained by defendant from his mother, commingled with such personal funds as he may have possessed, was used for divers purposes. Substantial amounts were invested and reinvested. Personal loans were made and property and security interests were acquired, title being taken in some instances in the name of the mother, in other instances in her name and that of defendant as joint tenants, or in his name alone, or in his name and that of a woman friend as joint tenants. Some of these interests were found by the trial court to belong to defendant, but one parcel of real property, standing in his name and that of his mother as joint tenants, was found to be held by him in trust for her estate. He takes no exception to these findings or to the portions of the judgment predicated upon them. His sole contention is that the evidence fails to support the further findings upon which the court based its adjudication that plaintiff is entitled to recover the sum of $13,431.49.

This total amount of $13,431.49 is made up of twenty-nine smaller sums of from $50 to $1,029, representing moneys received by defendant from his mother on various dates between March 14, 1927, and January 1, 1936, together with interest thereon from said respective dates. Instead of investing these sums for the mother's use and benefit, so the court found, defendant repudiated the trust, and retained and converted the funds to his own use and benefit.

The first eighteen items, totaling the sum of $3,874, exclusive of interest, cover the period from March 14, 1927, to October 25, 1928, and represent withdrawals made by defendant from a joint account in his name and that of his mother in the Morris Plan Company. This account was opened on December 1, 1926, and closed on October 25, 1928. Defendant testified that practically all of the money which passed through it belonged to his mother, that he could not recall any item which was his own, that it was difficult for his mother to get down town and the purpose of putting her money into the joint account was to facilitate withdrawals, and that most, if not all, of the withdrawals were made by him. He could not recall just what he had done with the various amounts withdrawn, but stated that he had given them to his mother, or deposited them in her commercial account, or used them to pay her expenses, or for investment. He could not recall the exact nature of the investments or give any definite information as to the disposition made of them. He claimed, as a gift from his mother, one item of $800, withdrawn on October 20, 1928, and used to pay a judgment against him.

Attorney French testified that just after October 25, 1928, the day upon which the account was closed, he went with defendant's mother to the office of the Morris Plan Company, and when she came out she told him that all of her money was gone. He thereupon prepared a notice for her to sign, dated October 29, 1928, stating that until further order in writing all payments on account of any indebtedness due her on the estate of her husband should be made by check to her or to her attorney. This notice was forwarded to the Morris Plan Company. During the period the Morris Plan account was in existence, the mother also had a commercial account with another bank, upon which she was constantly drawing.

[1, 2] **It is evident** that the trial court discredited **defendant's** entire testimony with respect to the disposition made of the funds withdrawn from the Morris Bank. Defendant asserts that inasmuch as his

statements were uncontradicted, the court could not thus ignore their purport. This, however, is not a correct statement of the law. It is within the province of the trier of facts to disbelieve and ignore the uncontradicted testimony of a witness, where such testimony is so surrounded by elements of uncertainty, improbability and fraud as to justify the disbelief. Willits v. Helmer, 47 Cal.App. 309, 190 P. 645; Bohn v. Gruver, 111 Cal.App. 386, 295 P. 891; Davis v. Judson, 159 Cal. 121, 113 P. 147; Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220. In the present case these elements were not lacking. The presumption arising from the confidential relationship of defendant to his mother, and the fact that her strength was impaired mentally and physically, and that she was under his undue influence, coupled with his evasive statements and inability to account for her funds, or to recall the use to which they were put, amply justified the trial court in concluding that his real purpose in opening the joint savings account was to enable him to have access to her money for his own purposes, without the necessity of having her sign for its withdrawal.

[3] The last eleven of the twenty-nine items going to make up the money judgment cover the period from August 10, 1929, to January 31, 1936, and total the amount, exclusive of interest, of $5,204.43. They represent sums secured by defendant from his mother, or from a joint bank account which he had with her in 1935 and 1936 and also moneys borrowed by defendant on his credit and that of his mother and used in a series of financial manipulations. These transactions will not be separately anaylzed. With respect to each item representing money taken by defendant and used to purchase assets in his own name or jointly in his name and that of his friend the investment was shown to have been preceded or accompanied by a withdrawal of the mother's funds in substantially the same amount. The method used by defendant in the 1934-1935 series of financial transactions was to borrow from the bank on promissory notes executed by himself and by his mother as comaker and to use the money for investment and reinvestment, or for his own purposes, and then to have the notes paid by arranging with the bank to make a debit entry against the mother's account. As collateral to secure payment of the notes, defendant pledged with the bank certain secured loans, some belonging to him and some to his mother. As assets were purchased, frequently they too were pledged. At the time of trial of this cause a substantial amount was still owing the bank, and by the judgment herein certain real property owned by defendant is subjected to a lien to indemnify the mother's estate against the possibility of having to pay such indebtedness. Defendant makes no criticism of this lien order in itself, although he comments that collection of the $13,431.49 money judgment will deprive him of all means of paying the bank, with resultant loss of both his real estate and the collateral pledged with the bank. Neither does defendant claim that all items have been improperly assessed against him, but he asserts that in the accounting the charges have been pyramided, a number of the items have been duplicated, and certain credits to which he is entitled have been withheld. However, he does not set forth the precise amounts claimed to represent duplications of charge, or say for exactly which items he feels he may justly be held liable. A review of the record fails to reveal any duplication or pyramiding; in fact, it indicates that the assessment of an even larger sum against defendant would have found support in the evidence. Defendant's claims are therefore unwarranted.

One of the main contentions made by defendant is that of failure on the part of plaintiff to sustain the burden of establishing a trust over the specific funds in question. Defendant claims that he was called upon to state what was done with practically every withdrawal from his mother's bank account over the period involved, and that the trial court then penalized him for his failure to keep an accurate account of her affairs by simply charging him with each item which he was unable to explain—and this despite the fact that the evidence showed without contradiction that he did not have exclusive control of her affairs. While admitting liability for any of his mother's money which he actually received, the burden, he claims, was upon plaintiff to prove just what specific funds he did receive, and this burden was not met by the negative evidence under which he was charged with all sums as to the disposition of which he was unable to produce a record.

[4, 5] This argument overlooks the effect of the relation between defendant and his mother, and of his commingling of her funds with his own. The evidence, as

shown by the findings to which no exception is taken, established defendant's relation to his mother as one of trust and confidence, and his status as that of a constructive trustee, charged, by reason of the undue influence which he exerted over her with a duty to account fully with respect to his handling of her affairs. Upon the uncontradicted showing that he had access to certain of her funds, and that they passed through his hands, and that his property and hers were commingled, and that no accurate or complete accounts were kept, the burden was upon him to prove that he acted in the utmost good faith in handling such funds, and that he did not appropriate them for his own purposes. Herbert v. Lankershim, 9 Cal.2d 409, at pages 426, 427, 71 P.2d 220, and cases there cited; Estate of Miller, 16 Cal.App.2d 141, 167, 60 P.2d 492; 65 C.J., sec. 899, pp. 972-3; Moseley v. Fikes, Tex.Civ.App., 126 S.W.2d 589, 597.

In the case last cited the court, quoting from Meyers v. Baylor University in Waco, Tex.Civ.App., 6 S.W.2d 393, said: "It is quite true that the burden of proof was upon plaintiff to establish the trust but, when proof of the fiduciary relationship of the parties was made, the betrayal of the trust, the probable amount of the embezzlements shown, a prima facie case was presented, and the burden was then on Meyers to show, if he could, that his money, and not that of the plaintiff, paid for the properties in whole or in part. * * * As stated in our conclusions, Meyers deposited his own and money embezzled from plaintiff to his personal credit in the banks, thus destroying the identity of the funds; hence the whole mingled fund became subject to the trust, as well as all property purchased therewith. The rule applicable to these facts is clearly and satisfactorily stated in 39 Cyc., p. 538, as follows: 'Where a trustee so mingles the trust fund or property with his own, or so invests it in property together with his own, that the trust fund or property cannot be separated, or the amount of each ascertained, the whole mingled fund or property becomes subject to the trust, except so far as the trustee may be able to distinguish or separate his own fund or property, the burden of making such distinction or separation being on the trustee or his representatives; and this rule applies so long as any portion of the fund or property into which the trust fund or property can be traced, remains.' "

Defendant offered no convincing proof that any of the items charged against him were his own property, or that any credits were wrongfully denied him. He also failed to show that he himself was possessed of sufficient property or earning power to account for the assets standing in his name at the time of his mother's death. With respect to his own financial condition, he testified that in 1925, he owned some stock of an electric appliance shop, a truck, a lot, $5,000 or $6,000 in bills receivable, and personal property. He was indebted to his father in the sum of over $2,000. No evidence was introduced as to the value of the stock or personal property, or the amount actually realized from the bills receivable. He only operated the appliance shop for a few months after his father's death, although for a year or so he carried his stock in trade on the truck and sold from it. After 1930, he devoted himself to day labor, cutting and selling wood from his mother's ranch, sales of produce, making loans, and occasional appraisements for which he received a fee. At no time subsequent to 1925 did he file an income tax return, or pay personal property taxes. Taxes on certain real property owned by his mother were allowed to become delinquent after 1932 or 1933. For a year or two he maintained a small checking account. Later he used his mother's account, stating as his reason: "I used my mother's bank account to make deposits and withdrawals for the reason that there was a penalty if an account dropped below $100, and also a charge for collecting checks, and I never at all times had a balance of $100 cash of my own at hand."

The mother kept no record of her affairs and the accounts of defendant are so meager and unintelligible as to be valueless. In fact, as commented by the trial court, they indicate, if anything, a deliberate attempt on the part of defendant to confuse his mother's affairs, and commingle her property with his to such an extent that no asset can with certainty be proved to belong either to him or to her, thus putting him in a position to lay claim to both his and hers without fear of contradiction.

The fact that defendant's handling of his mother's affairs was not exclusive, as she was also subject to the demands of her other children and relatives, is of no material significance because defendant is charged only with items traced to funds which came under his control.

Defendant presents an analysis of the evidence designed to show that his mother's estate increased in value over the period of his conduct of her business, whereas the property claimed by him represents no more than a balance substantially equal to his original assets, and from this premise he argues that the amount assessed against him is not justified. His analysis, however, is of no weight because it does not contain an accurate listing or complete accounting of all items of property referred to in the evidence.

No other questions merit discussion. There is in the evidence, and in the inferences which may legitimately be drawn from it, sufficient support for the trial court's findings and conclusions.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.

16 Cal.2d 90

KAUFMANN et al. v. CALIFORNIA MINING & DREDGING SYNDICATE (ANDERSON et al., Interveners).

Sac. 5321.

Supreme Court of California.

Aug. 21, 1940.

Rehearing Denied Sept. 19, 1940.

1. Judgment 🔑485, 518

In stockholders' proceeding against corporation to have realty owned by corporation partitioned among stockholders wherein interveners claimed realty by purchase upon execution sale under judgment recovered by third party against corporation, stockholders' contention that judgment was void and that interveners did not acquire title by execution sale thereunder was a "collateral attack" upon judgment, and such attack would fail unless invalidity of judgment affirmatively appeared upon face of judgment roll.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

2. Judgment 🔑518

Where plaintiffs' contention constituted a collateral attack upon a judgment, ordinary rules governing a direct attack upon a judgment had no bearing in determining the contention.

3. Judgment 🔑497(2)

Where judgment showed that oral and documentary evidence was introduced and that trial court made findings in judgment that defendant had been regularly served with process and that defendant's default had been duly entered, and it did not affirmatively appear that such findings were based solely upon any particular document relating to service of summons, presumption in favor of validity of judgment made findings conclusive upon collateral attack, even though there may have been defects in some of the documents constituting part of judgment roll and relating to service of summons. Civ.Code, § 406a; Code Civ.Proc. §§ 412, 413.

4. Corporations 🔑189(12)

In stockholders' proceeding against corporation to have realty allegedly owned by corporation partitioned among stockholders, wherein interveners claimed realty by purchase upon execution sale under judgment recovered by a third party against corporation, evidence sustained findings relating to validity of judgment and execution sale and that interveners were entitled to realty.

◆

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Proceeding by Leo Kaufmann and another, as executors of the last will and testament of Margaret Alta Richards, deceased, and Fred T. Hale, against the California Mining & Dredging Syndicate to have certain real property partitioned among stockholders of defendant, wherein E. J. Anderson and another intervened. From a judgment in favor of interveners, plaintiffs appeal.

Affirmed.

Simeon E. Sheffey, of San Francisco, and Errol C. Gilkey, of Oakland, for appellants.

Nelson & Ricks, of Eureka, for respondent.

Pillsbury, Madison & Sutro, of San Francisco (Eugene M. Prince, Gerald S. Levin, and L. F. Kuechler, all of San Francisco, of counsel), for interveners and respondents.

SPENCE, Justice pro tem.

Plaintiffs, claiming to be stockholders in the defendant California Mining and Dredging Syndicate, a corporation, brought this action against said corporation seeking to have certain real property partitioned among the stockholders. The interveners, E. J. Anderson and H. A. Salstrom, filed their complaint in intervention alleging that they were the owners of said real property, having purchased the same for $13,600 upon an execution sale in another action in which California Pacific Title and Trust Company, a corporation, was the plaintiff and the California Mining and Dredging Syndicate, a corporation, was the defendant. The prayer of the complaint in intervention sought judgment to the effect that plaintiffs take nothing by their action and that the title of the plaintiffs in intervention be quieted. The cause was tried by the court sitting without a jury and judgment was entered in favor of plaintiffs in intervention. Plaintiffs appeal from said judgment. We will hereinafter refer to plaintiffs as appellants and to plaintiffs in intervention as respondents.

The main attack made by appellants upon the judgment in this action is grounded upon their contention that the judgment in the other action was void and that respondents therefore did not acquire title to the property by virtue of the execution sale thereunder. It is apparently conceded that if said judgment in the other action was valid, then the judgment in favor of respondents in this action should be affirmed and we will therefore proceed to a consideration of appellants' attack upon the judgment in the other action.

[1, 2] The foregoing contention of appellants obviously constitutes a collateral attack upon the judgment in the other action (Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; County Bank v. Jack, 148 Cal. 437, 83 P. 705, 113 Am.St.Rep. 285; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138); and such attack must fail unless the invalidity of that judgment affirmatively appears upon the face of the judgment roll. Crouch v. Miller, supra, 169 Cal. at page 343, 146 P. 880; Hahn v. Kelly, 34 Cal. 391, 402, 94 Am.Dec. 742; Hogan v. Superior Court, 74 Cal.App. 704, 708, 241 P. 584. The ordinary rules governing a direct attack upon a judgment have no bearing under the circumstances. Musser v. Fitting, 26 Cal.App. 746, 148 P. 536; Rue v. Quinn, 137 Cal. 651, 66 P. 216, 70 P. 732.

In the other action, the defendant California Mining and Dredging Syndicate, a corporation, was sued upon several promissory notes and the total judgment against said defendant, including interest and attorneys fees, amounted to approximately $550,000. Said judgment was a default judgment entered in 1934. It recited that the cause came on regularly for trial and "evidence both oral and documentary having been introduced, and the cause having been duly submitted to the court for decision and the court being fully advised in the premises and hereby finding that the defendant has been regularly served with process * * * and that the default of said defendant in the premises has been duly entered herein according to law * * *." It is apparently conceded that the judgment itself was in all respects valid upon its face but appellants call attention to certain alleged defects in certain documents on file in that action relating to the service of summons. It is apparent therefrom that service of summons in that action was attempted by at least two methods, first, by service upon the secretary of state under section 406a of the Civil Code and second, by publication under sections 412 and 413 of the Code of Civil Procedure. The plaintiff in that action also caused the real property involved herein to be attached and no question of any attempt to enforce said judgment, except as against the attached property, is before us on this appeal.

Practically all of the authorities cited by appellants involved direct attacks rather than collateral attacks upon judgments. Respondents take the position that the documents on file showed valid service of summons under both methods above mentioned and that said documents are sufficient to render the judgment in question immune from even direct attack but they further contend that, under the circumstances before us, the findings in the judgment to the effect that the defendant therein has been regularly served with process and that the default of said defendant had been duly entered according to law are conclusive upon this collateral attack. In our opinion this contention must be sustained.

The rules governing collateral attacks upon judgments were exhaustively discussed in the early case of Hahn v. Kelly, 34 Cal. 391, 94 Am.Dec. 742, and that decision and the rules therein enunciated have been consistently followed since that time. Quivey v. Porter, 37 Cal. 458; Reily v. Lancaster, 39 Cal. 354; Reeve v. Kennedy, 43 Cal. 643; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138; County Bank v. Jack, 148 Cal. 437, 83 P. 705, 113 Am.St.Rep. 285; Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Bernhard v. Wall, 184 Cal. 612, 194 P. 1040; City of Salinas v. Luke Kow Lee, 217 Cal. 252, 18 P.2d 335; Musser v. Fitting, 26 Cal.App. 746, 148 P. 536.

[3] In the present case it appears from the judgment in the other action that oral and documentary evidence was introduced and that the trial court there made its findings with respect to the validity of the service of process and the entry of the default. It does not affirmatively appear that these findings were based solely upon any particular document or documents relating to service of summons and, under these circumstances, the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting part of the judgment roll and relating to the service of summons.

In Hahn v. Kelly, supra, 34 Cal. at page 431, 94 Am.Dec. 742, it was said: "But if the judgment for proof of service refers generally to a paper or papers on file, or to a summons and Sheriff's return thereon without specifying any particular paper, summons or return, and if there be found on file papers showing a defective and void service, and nothing further appears, the law to support the judgment would presume that the Court had other sufficient proof of service than that which remains on file; and it would not in that case appear affirmatively from the record that the recitals in the judgment were untrue. The recitals would therefore be conclusive proof of service. But if the judgment recites a due service of process without specifying how the service was made or referring to any paper as proof of it, the recital is conclusive on the parties in a collateral proceeding * * *."

Again, in Musser v. Fitting, supra, 26 Cal.App. at page 751, 148 P. at page 538, the court said: "Considering the whole record, we find that the affidavit of service is not the only evidence that defendant was served with process. The jurisdictional recitals in the judgment which constitute a part of the record are that: 'It appearing to the court that defendant, the J. P. Fitting Company, a corporation, was *duly served with summons and complaint herein* * * * and the default of said defendant, the J. P. Fitting Company, a corporation, in the premises having been duly entered according to law.' Notwithstanding the insufficiency of proof contained in the affidavit indorsed upon the summons, this recital must be taken on collateral attack as true, unless the record affirmatively shows the facts upon which it is based to be untrue. There is nothing to indicate that such finding was predicated upon proof of service indorsed upon the summons found in the judgment."

With respect to the application of the above-mentioned rules, it was said in Sacramento Bank v. Montgomery, supra, 146 Cal. at pages 751 and 752, 81 P. at page 140: "Defendants say that while, where the record is silent as to what was done, it will be presumed in favor of the judgment that what ought to have been done was not only done, but rightly done, yet, when the record shows what was done, it will not be presumed that something different was done. This statement is undoubtedly true, and is supported by a wealth of authority. But it has no application where the record does not purport to show all that was done, and the judgment states that all that was necessary to be done was done. This matter was very clearly discussed by this court in Hahn v. Kelly, 34 Cal. 391, 94 Am.Dec. 742, and, so far as the particular question here involved is concerned, the views there announced have never been departed from."

[4] We therefore conclude that the trial court's findings in this action relating to the validity of the judgment in the other action and the execution sale thereunder and the further findings relating to the ownership of the real property by respondents are all sustained by the evidence. These conclusions are determinative of this appeal and it is therefore unnecessary to consider the other points urged by respondents in support of the judgment herein.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.; CURTIS, J.

EDMONDS, J., not having been present at the argument of this case, did not participate in its decision.

RUBIN et al. v. BOARD OF DIRECTORS OF CITY OF PASADENA et al.

L. A. 17443.

Supreme Court of California.

Aug. 23, 1940.

Rehearing Denied Sept. 19, 1940.

1. Municipal corporations 🔑600

A "zoning ordinance" places limitations upon the use of land within certain areas in accordance with a general policy which has been adopted by a municipality.

See Words and Phrases, Permanent Edition, for all other definitions of "Zoning Ordinance".

2. Municipal corporations 🔑621

Provisions for the granting of a variance from zoning regulations provide the opportunity for amelioration of unnecessary hardships which, owing to special conditions, would result from literal enforcement of the restrictive features of the zoning ordinance.

3. Municipal corporations 🔑621

A "variance" or "exception" to zoning ordinance sanctions a deviation from the standard under the dispensing power vested in the administrative body, which is different from a licensing power under which permission may be granted to do an act or conduct a business when the applicant has complied with the requirements of the law under which the license is sought, and the dispensing power is a matter of grace and refusal is not the denial of a conditional statutory right.

See Words and Phrases, Permanent Edition, for all other definitions of "Exception" and "Variance".

4. Constitutional law 🔑43(2)

An application for a variance from zoning regulations necessarily admits constitutionality of ordinance under which city officials charged with duty of administering a zoning ordinance are asked to exercise a discretion, and applicant cannot challenge constitutionality of ordinance before administrative body, since, if an attack on constitutional grounds were successful, discretionary power of the board would also fall.

5. Constitutional law 🔑43(2)
Municipal corporations 🔑621

A provision of the Pasadena zoning code that, when an application for a variance is passed upon by the board of directors, its decision shall be final, was valid and could not be attacked on appeal from refusal of the board to grant a variance.

6. Municipal corporations 🔑621

A provision of the Pasadena zoning code that, when an application for a variance is passed upon by the board of directors, its decision shall be final, does not preclude one from asserting in a judicial proceeding that the zoning law is unconstitutional as applied to his property.

7. Municipal corporations 🔑621

The denial of an application to secure a variance is not "res judicata" in a proceeding attacking the constitutionality of a zoning ordinance as applied to particular property, notwithstanding that the same type of evidence may be used in such proceeding as was presented to zoning committee and board of directors in support of application to secure a variance.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

8. Mandamus 🔑3(1)

Where board of directors of city of Pasadena denied application for a variance, decision did not take away a property right but merely refused to grant a favor, and mandamus would not lie to review the decision denying a variance, since, if applicant's constitutional rights were invaded, appropriate remedy was open to him.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding for writ of mandate by David R. Rubin and another against the Board of Directors of the City of Pasadena and others, to compel the granting of a variance and exception from a zoning ordinance. From a judgment ordering a peremptory writ to issue, defendants appeal.

Reversed, with directions.

For prior opinion, see 97 P.2d 485.

Harold P. Huls, City Atty., and Thomas W. Le Sage, Deputy City Atty., both of Pasadena, for appellants.

Joseph L. Lewinson, Donald Armstrong, and David H. Paltun, all of Los Angeles, for respondents.

EDMONDS, Justice.

After municipal authorities had denied an application to re-zone certain property, the owner successfully prosecuted a proceeding in the superior court for a writ of mandate directing the legislative body to grant a variance and exception from the zoning ordinance. The case is here upon the city's appeal from the judgment ordering a peremptory writ to issue.

The zoning code of the city of Pasadena was adopted in 1922. It provides for variances and exceptions to be allowed by the zoning committee of the Planning Commission, and for an appeal from a determination by that body to the board of directors of the city. Upon such an appeal, "the board, in conformity with the provisions of this ordinance, may reverse or affirm, wholly or partly, or may modify any decision, determination or requirement of the zoning committee, and may make such decision or determination or may impose such conditions as the facts warrant, and may grant a variance or exception, and its decision or determination shall be final." Sec. 12, subd. d-1.

The property in controversy is located at the corner of California street and Mentor avenue in the city of Pasadena. Mentor avenue is the next street east of Lake avenue and runs parallel with it. The intersection of Lake avenue and Mentor street is what may be termed a neighborhood business center in the residential district of a city; each of the four corners is devoted to business use and the commercial zone extends along Lake avenue for several hundred feet in each direction from California street. Business has been allowed on California street east of Lake avenue for a distance of 225 feet on its southerly side, and the westerly line of the lot in controversy, when acquired by the respondents in 1925, was the easterly boundary of the commercial zone. Mentor avenue then and at the time the respondents' present application for variance was made, was zoned for residential uses.

In 1930 the respondents applied for and were granted a variance upon the westerly forty feet of their property, which adjoined a store building fronting on California street, and immediately erected a building which has since been occupied by a chain grocery organization. This variance was granted upon the condition that the residence facing Mentor avenue be moved forward and left on the lot. In other words, the city authorities allowed business to extend along the south side of California street forty feet more to the east of Lake avenue, but maintained the zoning restrictions on Mentor avenue by requiring the respondents to maintain the residence facing on that street. The residential character of Mentor avenue was further protected by prohibiting any access to the store building from the adjoining property.

In 1938 the respondents filed an application with the city's Planning Commission requesting a further variance from the existing zoning restrictions applying to the remainder of their property in order to use it for automobile parking. After notice to other property owners, the zoning committee of the Planning Commission held a public hearing, and later denied the application upon several grounds. It specified that there were no exceptional circumstances or conditions applicable to the property involved, or to the intended use of the property, that did not apply generally to the property or classes of uses in the same zone so that a denial of the variance would result in no undue property loss to the applicant; that the variance was not necessary for the preservation and enjoyment of a property right of the applicant, and, that the operation of a parking lot at this location would be injurious to the property or improvements of other owners of property. Thereupon the respondents appealed to the city's board of directors, which, after a public hearing and an inspection of the property, denied their application for the same reasons stated by the Planning Commission.

The respondents then filed the present action. Their petition alleges that the necessary requirements of the zoning ordinance were proved by them. Facts concerning changed conditions over a period of years are also alleged. For these reasons, the petition continues, the board acted arbitrarily and abused its discretion, and denied to them their constitutional rights.

General and special demurrers and a motion to strike were directed against the conceived deficiencies of the petition. The demurrers were overruled and the motion to strike denied. Thereafter the board by way of answer and return, denied the material allegations of the petition.

A trial de novo was then had, and the court made findings that since the property was purchased by the respondents, changes have occurred in its vicinity because of the growth of business which renders the respondents' property unfit for residential purposes; that its value for business uses is $250 per front foot as against $20 per front foot for residential purposes; and that the store building erected by the respondents on the west 40 feet of their property cannot be advantageously leased unless the adjoining corner lot can be used for parking purposes.

Other findings of fact are, in terms exactly contrary to those of the city's zoning committee. From them the trial judge determined, as conclusions of law, that in denying the respondents' application for a variance, the board of directors applied the zoning code in an arbitrary and discriminatory manner and deprived them of their property without due process of law.

The appellants contend that the determination of the board of directors is not reviewable because the zoning code expressly declares that its decision shall be final. They also assert that the board of directors is under no legal duty to grant a request for a variance; that mandamus will not lie to control or review the exercise of discretion by a board having quasi judicial functions unless there has been a clear abuse of such discretion; and that the evidence supports the findings made by the board of directors and does not support those made by the trial judge. Many other points are also urged. In the main, these are included within the four which have been stated.

On the other hand, the respondents claim, in support of the judgment, that where property rights are involved, due process requires the judicial review of decisions of administrative bodies; that the reviewing court must grant a trial de novo upon the law and the facts where the record before the board is inadequate, and it must exercise an independent judgment in reviewing the board's decision. Further, the respondents contend, mandate is the only remedy by which a decision of an administrative board may be reviewed in California.

[1, 2] A zoning ordinance places limitations upon the use of land within certain areas in accordance with a general policy which has been adopted. But because compliance with the ordinance may present unusual difficulties as to certain property, almost every zoning ordinance includes provisions under which an owner may apply to an administrative board for permission to put his land to a non-conforming use. This procedure has been devised in order to minimize the acknowledged evils of "spot zoning" by amendment of the zoning ordinance. It provides the opportunity "for amelioration of unnecessary hardships which, owing to special conditions, would result from literal enforcement of the restrictive features of the ordinance". Thayer v. Board of Appeals of City of Hartford, 114 Conn. 15, 157 A. 273, 275. Of even more importance is the fact that in granting a variance, municipal authorities may usually attach conditions controlling the excepted use in accordance with the spirit and purposes of the general zoning plan. For example, the Pasadena zoning code provides for the imposition of "such conditions as the facts warrant", and the variance granted to the respondents in 1930 included requirements limiting the permitted use of their lot in such manner that it would conform as nearly as possible to that of the surrounding property.

[3] Unlike the "spot zoning" obtained by amendment of the general zoning ordinance, a variance or exception sanctions a deviation from the standard under the dispensing power vested in the administrative body. People ex rel. Fordham M. R. Church v. Walsh, 244 N.Y. 280, 155 N.E. 575. This authority is entirely different from a licensing power under which permission may be granted to do an act or conduct a business when the applicant has complied with the requirements of the law under which the license is sought. Ordinarily, under such circumstances, the administrative body must issue a license. On the other hand, the grant of dispensation is a matter of grace, and a refusal is not the denial of a conditional statutory right; it merely leaves in operation the statute adopted by the legislative body. People ex rel. Fordham M. R. Church v. Walsh, supra.

[4] The application for a variance necessarily admits the constitutionality of the ordinance under which the city officials charged with the duty of administering a zoning ordinance are asked to exercise a

discretion; therefore, an applicant may not challenge its constitutionality before the administrative body. For if an attack on constitutional grounds was successful, the discretionary power of the board would also fall. In a proceeding to review a decision denying a variance, it has been held that "the sole question before the court is the propriety of the action of the board upon the application addressed to its discretion, and the petitioner will not be heard upon the question of the constitutionality of the act of the Legislature under which the ordinance was enacted." Drabble v. Zoning Board of Review, 52 R.I. 228, 159 A. 828, 829.

The nature of the proceedings before a zoning board to secure a variance under a statute quite similar to the Pasadena ordinance was also considered in Board of Zoning Appeals v. Waintrup, 99 Ind.App. 576, 193 N.E. 701, 703. In that case the court said: "There is no law that requires the board of zoning appeals to grant the variance. It is wholly within its discretion, and the board having the power to exercise that discretion, its decision is not reviewable by the courts, provided there was no illegality in its proceedings. The power and discretion to vary the ordinance rests solely with the board of zoning appeals, and when it refuses to vary the ordinance, it leaves the ordinance in full force as originally passed by the city council and the property subject to the use provided therein."

In that case it was charged that the decision of the board was a taking of property without due process of law and without just compensation. But the court declared: "It is not the act of the appellant that deprived him of any use of his property, but the act of the common council in passing the ordinance; and, if appellee's rights have been invaded by this ordinance as he claims, his remedy is by an attack upon the ordinance, and not by a proceeding to review the decision of the board of zoning appeals." See, also, Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 589, 117 A.L.R. 1110.

[5] The Pasadena zoning code declares that the zoning committee in the first instance, or the board of directors upon appeal, may, where certain conditions exist, grant a variance. This provision is not a mandatory one, and the permissive power granted to each body is to be exercised or not, as discretion dictates. When an application for a variance is passed upon by the board of directors, its decision, says the zoning code, "shall be final". This provision is a perfectly proper one and, for the reasons which have been stated, must be upheld. Even where, by the terms of a zoning ordinance the decision of the municipal authority upon an application for variance was not expressly declared to be final, the Indiana Appellate Court said that "its decision is not reviewable by the courts, provided there was no illegality in its proceedings". Board of Zoning Appeals v. Waintrup, supra.

[6, 7] But the finality of the board of directors' determination does not bar the respondents from asserting in a judicial proceeding that the zoning law is unconstitutional as applied to their property. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93; Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308. And although the same type of evidence may be used in that proceeding as was presented to the zoning committee and board of directors in support of the application to secure the variance, the issues are not the same and its denial is not res judicata upon the constitutional question. Arverne Bay Const. Co. v. Thatcher, supra; Board of Zoning Appeals v. Waintrup, supra.

Petitioners urge that the decision of Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, is controlling, and therefore the judgment of the superior court rendered after a consideration of the evidence de novo should be sustained if there is any substantial evidence to support its conclusions. In that case it was contended that the action of the board of funeral directors in suspending the license of an embalmer was final and could not be judicially reviewed. This court concluded that such a license is property and may not be revoked by an administrative body without the right of review by a trial court exercising an independent judgment upon the evidence introduced.

[8] But in the present case the question is an entirely different one. When the board of directors of Pasadena denied petitioners' application for a variance it did not take away a property right, but merely refused to grant a favor. Its action left the petitioners' property subject

to the zoning restrictions then in force. If these provisions invade the respondents' constitutional rights there is an appropriate remedy open to them, but under the circumstances here shown mandamus will not lie to review the decision denying a variance.

This conclusion makes it unnecessary to consider the other points presented.

The judgment is reversed with directions to the superior court to dismiss the proceeding.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.

I concur in the judgment: HOUSER, J.

16 Cal.2d 62

PEOPLE v. MULHOLLAND.

Cr. 4294.

Supreme Court of California.

Aug. 20, 1940.

1. Courts 🔑42(6)

Under constitutional provision vesting exclusive jurisdiction of all felonies in the superior courts as well as all misdemeanors not otherwise provided for by the Legislature, the Legislature may vest jurisdiction of all misdemeanors in inferior courts established within the county, the effect of which is to entirely deprive the superior court of jurisdiction of all misdemeanors within the county. Const. art. 6, § 5.

2. Criminal law 🔑90(4)

The criminal jurisdiction of a class "A" justice's court established in a township is exclusive and county-wide in respect to a high misdemeanor where there is no municipal court in the county. Pen.Code, § 1425, subd. 1.

3. Criminal law 🔑90(5)

The jurisdiction of the offenses of acting as a dealer and of acting as a commission merchant without procuring licenses, which offenses are punishable by fine of not more than $1,000 or by imprisonment in county jail for not more than one year or by both, was within class "A" justice's court established in a township to the exclusion of the superior court, where there was no municipal court in the county. Pen.Code, § 1425, subd. 1; St.1937, pp. 715, 720, §§ 1261, 1273.

4. Justices of the peace 🔑52

The statute relating to jurisdiction of class "A" justices' courts must be construed to effectuate the purpose of relieving the calendars of the superior courts in the absence of any definition of territorial jurisdiction of justices' courts. Pen.Code, § 1425; § 1425, subd. 1; Code Civ.Proc. §§ 106, 112.

5. Factors 🔑2
Licenses 🔑16(2)

The statutes defining "producer" and "dealer" in farm products and requiring licenses of commission merchants and dealers must be construed in the light of reason. St.1937, pp. 715, 720, §§ 1261, 1273.

6. Constitutional law 🔑82, 205(5), 206(4)
Licenses 🔑7(1), 16(2)
Statutes 🔑72

The statutes relating to the licensing of farm produce dealers and defining "producer" and "dealer" were intended to protect the farmer in disposing of his "products" which are something which farmer has raised upon the farm, whether it be livestock or crops, and the term "dealer" means one who contracts for or obtains such products so raised, and, as so construed, statutes do not violate provisions of the state Constitution referring to inalienable rights, uniform general laws, and privileges and immunities, nor the federal constitutional provision referring to deprivation of rights, privileges, and immunities by a state. St.1937, pp. 715, 720, §§ 1261, 1273; Const.Cal. art. 1, §§ 1, 11, 21; U.S.C.A.Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Dealer" and "Products of Farm".

7. Constitutional law 🔑70(1)

It is not function of an appellate court to define jurisdiction of trial tribunals.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

C. F.Mulholland was charged by information with acting as a commission merchant and as a dealer without having procured licenses as required by the Agricultural Code, and from a judgment sustaining a demurrer, the People appeal.

Affirmed.

For prior opinion, see 98 P.2d 261.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and F. C. Clowdsley, Dist. Atty., and Maxwell M. Willens, Asst. Dist. Atty. both of Stockton, for appellant.

E. H. Zion, of Modesto, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. 98 P.2d 261, 262. Upon further consideration of the issues, we are satisfied that the following opinion of Mr. Justice Tuttle is a correct determination thereof, and we therefore adopt that opinion, with certain additional comments, as the opinion of this court:

"The defendant is charged by the amended information on file herein on two counts of violations of section 1273 of the Agricultural Code, St.1937, p. 720, in the first count, of acting as a commission merchant, and in the second count, as acting as a dealer without having procured licenses as required by section 1261 of said code, St.1937, p. 715.

"The defendant filed a demurrer alleging as to both counts that the superior court of San Joaquin county was without jurisdiction of the offenses, and as to the second count, that said sections of the Agricultural Code defining a dealer and requiring a license by a person acting as such is unconstitutional.

"It is shown by the pleadings and by the stipulation on file herein that the alleged offenses arose in Ripon township in San Joaquin county; that the justice's court of said Ripon township is one of class 'B' jurisdiction as defined by section 1425 of the Penal Code that elsewhere in said county, to-wit, at Stockton, California, there is a justice's court of class 'A' jurisdiction, to-wit, the justice's court of Stockton township.

"The court sustained the demurrer on each of said grounds and the People appeal from each of the said rulings. The decision of the court is necessarily based upon the view that the jurisdiction of the justice's court of Stockton township extends throughout the county to the exclusion of the superior court.

[1] "Article VI, section 5 of the Constitution vests the exclusive jurisdiction of all felonies in the superior courts, as well as all misdemeanors not otherwise provided for by the legislature. It has been definitely held that the legislature may vest the jurisdiction of all misdemeanors in inferior courts established by the legislature within the county, the effect of which is to entirely deprive the superior court of jurisdiction of all misdemeanors within the county. In re Luna, 201 Cal. 405, 257 P. 76; In re Leach and Huggins, 99 Cal.App. 645, 279 P. 157.

"The present statutory provision fixing the jurisdiction of justice's courts is found in section 1425 of the Penal Code as amended in 1933, providing as follows:

" 'The justices' courts have jurisdiction as follows: 1. Justices' courts of Class A shall have jurisdiction exclusive of that of any municipal court established in the county, in all criminal cases amounting to misdemeanor only, except those of which the juvenile court is given original jurisdiction. 2. Justices' Courts of Class B shall have jurisdiction in all criminal cases amounting to misdemeanor only, punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.' (Added by Stats.1905, p. 705; amended by Stats.1929, p. 861; Stats.1933, p. 1454.)

"The punishment prescribed by section 1273 of the Agricultural Code is as follows:

" '(1) Any person is guilty of a misdemeanor and is punishable by a fine of *not more than one thousand dollars, or by imprisonment in the county jail for not more than one year or by both* who assumes or attempts to act as a commission merchant, dealer, broker or agent without a license * * *.'

"The first question presented is whether, where a Class 'A' justice's court is established in any township of the county, that court has exclusive jurisdiction over a criminal offense which is within its subject-matter jurisdiction under the provisions of section 1425, subd. 1 of the Penal Code, or whether the superior court of such county has such exclusive jurisdiction. In other words, is the jurisdiction of such justice's court county-wide in respect to a high misdemeanor where there is no municipal court within the county?

[2, 3] "If the foregoing question were asked in respect to the *civil* jurisdiction of that justice's court, the answer would be in the affirmative. This was so decided in the case of Cambra v. Justice's Court, 4 Cal.2d 445, 49 P.2d 1121, 1122. It was there held that 'the establishment of the justice's court of class A in Santa Ana Township with jurisdiction over demands, such as the claim for damages here involved, amount-

ing to (less than) $1000, ousted the superior court of Orange county of jurisdiction of the cause. The justice's court of class B in Huntington Beach township, limited in this class of cases to demands of $300, cannot take jurisdiction. The superior court of the county, having been deprived of jurisdiction of such causes, the proper and only court for the trial of the cause now in the county is the justice's court of class A, established and functioning in Santa Ana township, the respondent here.' The amount in controversy in the case was $583. The court goes on to say: 'The purpose of the creation of municipal courts and justice's courts of class A was primarily to relieve the calendars of the superior courts in counties wherein such courts are created.' Civil jurisdiction of class A justice's courts is defined in section 112 of the Code of Civil Procedure. In respect of the character of action involved in the Cambra case, its subject-matter jurisdiction is thus defined: '(a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less * * *.' There is nothing whatever said about jurisdiction outside the township in which the court is created—county-wide jurisdiction. There is no territorial limitation whatever now in this state in respect to any justice's court. Prior to the amendment of section 1425 of the Penal Code in 1929, that section read as follows: 'The justices' courts have jurisdiction of the following public offenses committed *within the respective counties* in which such courts are established * * *.' St.1905, p. 705. This territorial designation is now entirely deleted from said section, and has been since 1929. Likewise, as to *civil* jurisdiction, section 106 of the Code of Civil Procedure formerly provided that 'The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held'. This section was repealed in 1933. (Stats.1933, p. 1835.) Section 112 of the Code of Civil Procedure and section 1425 of the Penal Code define subject-matter jurisdiction only, and do not mention territorial jurisdiction. We see no valid reason why there should be any difference in this respect between the rule in a civil case and the rule in a criminal case. The purpose for the creation of such justices' courts (class 'A'), as given in the Cambra case—the relief afforded to the superior court—is an equally potent argument when applied to a criminal case. If county-wide jurisdiction is to be applied in the one case, it should likewise be applied in the other.

"Respondent relies chiefly upon two cases. The first is Antilla v. Justice's Court, 209 Cal. 621, 290 P. 43, decided June 19, 1930. There, the question presented was whether a justices' court (now designated in section 1425 of the Penal Code as a class 'B' court), had county-wide jurisdiction, or whether its jurisdiction was confined to the territorial limits of the township in which it was situated. The court held with the latter contention, upon the ground that the legislature, by omitting the provision of section 1425 of the Penal Code, giving the justices' court county-wide jurisdiction, in the reenactment of said section in 1929, showed an intent to restrict the jurisdiction to the limits of the township. When the last-mentioned section of the Penal Code was originally enacted in 1905 (Stats.1905, p. 705), there was but one class of such courts—now designated as class 'B'. Class 'A' courts (though not under that designation), were not established until 1929. (Stats.1929, p. 861.) The Antilla case may be therefore distinguished from the instant case for the reason that the legislature could only have had Class 'B' courts in contemplation when it fixed the territorial jurisdiction of justices' courts, and when it omitted the county-wide jurisdiction clause in 1929, it could not be said that such repeal indicated any intention to limit the jurisdiction of class 'A' courts, for the reason that class 'A' courts were not established prior to such repeal.

"The second case relied upon by appellant is In re Bridwell, 112 Cal.App. 19, 296 P. 312. Like the Cambra case, that action originated in Orange county, in 1931. At that time section 1425 of the Penal Code set up two classes of justices' courts, and defined the subject-matter jurisdiction of each. The first class was townships having a population of over 30,000. The second class were those townships whose population was under 30,000. Such classes are, under the present section, known as class 'A' and class 'B', respectively. The court held that the former courts were restricted in their jurisdiction to the territorial limits of the township in which they existed. The court based its decision upon the Antilla case. We are of the opinion that the Bridwell case was, in effect, overruled by the Cambra case which was decided several years later. We might add that the failure of the legislature to define the territorial jurisdiction of these inferior courts has resulted in considerable confusion and uncertainty which could have been readily obviated, and the necessity of amendment is still obvious.

[4] "Summarizing the situation, we find that there is a total absence, in the laws of this state, of any definition of the territorial jurisdiction of our justices' courts. The legislature evidently left the question to be decided by the courts. By the enlargement of the subject-matter jurisdiction of class 'A' justices' courts, and the consequent diminishment of such jurisdiction in the superior courts, the work of the latter has been considerably relieved. As the Supreme Court has said, the purpose of such legislation is 'primarily to relieve the calendars of the superior courts'. Cambra case, above. We believe that, in the absence of anything to the contrary, that it is our duty to construe the law to effectuate that purpose.

"Respondent seeks to also uphold the ruling of the trial court upon the ground that the following provisions of the Agricultural Code are unconstitutional:

"'Subd. (b) Producer. The term "producer" means any person engaged in the * * * growing or producing any farm product * * *.

"'Subd. (f) Dealer. The term "dealer" means any person other than a commission merchant who contracts for or obtains from the producer thereof * * * any farm product except by payment to the producer, at the time of obtaining possession or control, of the full agreed price of such commodity in lawful money of the United States,' etc. Section 1261.

"Respondent contends that such provisions violate sections 1, 11 and 21, article 1, of the Constitution of California, and section 1 of the Fourteenth Amendment to the Federal Constitution, U.S.C.A. Section 1 refers to inalienable rights. Section 11 refers to uniform general laws, and section 21 refers to privileges and immunities. Section 1 of the Fourteenth Amendment refers to deprivation of rights, privileges and immunities by the state. Respondent's whole argument upon this question is based upon his own construction of the sections of the code mentioned above. No authorities are cited to uphold such construction. We quote from his brief:

"'Section 1261 of the Agricultural Code hereinafter referred to as section 1261 declares that Any person who is engaged in the business of raising farm products is a producer. In other words, one who buys and sells farm products which he does not raise is a producer if he actually raises one other farm product. To construe it as meaning one who raises the particular product he is about to sell to a dealer, is changing the meaning of the subdivision for it certainly states that *any* (notice that word "any") person who produces Any (notice that word "any") farm product is a dealer. Therefore, if a person is a grower of wheat to sell, who also buys cattle which he fattens and later sells, he is a producer so far as the cattle are concerned under the terms of the subdivision. There is no other construction that can be fairly placed upon it. Such a condition places a burden upon any purchaser as it deprives him of the right to contract freely.'

[5, 6] "We are unable to accept such construction of the law. It is the duty of the courts to construe such enactments in the light of reason. The law was intended to protect the farmer in disposing of his *products*—something which he raised upon the farm, whether it be livestock or crops. The very word 'producer' carries that implication. By the term 'dealer' is meant one who contracts or obtains such products so raised. If a farmer who raises wheat buys stock for the purpose of resale, he does not produce such stock, and one who purchases it from him is not a dealer under the Agricultural Code, which defines a 'dealer' as one 'who contracts for or obtains from the *producer* thereof possession or control of any farm product'. Adopting this construction of the code sections mentioned, we cannot say that they are in violation of the constitutional provisions mentioned, and this seems to be the position of respondent."

[7] In approving the foregoing conclusions reached by Mr. Justice Tuttle on the issue of jurisdiction, we desire to call particular attention, as he has, to the grave need for legislative action in this field. It is not the function of an appellate court to define the jurisdiction of trial tribunals, and the necessity of discovering the legislative intent from a vague phrase, or from a consideration of matters of convenience, is an indication of an unsatisfactory state of the law. This is particularly true where the uncertainty is on such fundamental questions as those relating to jurisdiction over criminal offenses.

The judgment for the defendant on the demurrer is affirmed.

16 Cal.2d 70

BLUSS v. RAHILLY et al.

Sac. 5282.

Supreme Court of California.

Aug. 21, 1940.

1. Waters and water courses 🔑130

Foreign waters are subject to appropriation.

2. Waters and water courses 🔑133

The purpose of Water Commission Act was to provide an orderly method for appropriation of unappropriated waters of California. Gen.Laws 1937, Act 9091.

3. Waters and water courses 🔑130

The Water Commission Act did not enlarge rights of riparian owners as such or curtail rights of appropriators, but made waters of state subject to appropriation in so far as that could be done without interfering with vested rights. Gen.Laws 1937, Act 9091.

4. Waters and water courses 🔑130

The provision, in Water Commission Act, that flowing waters were subject to appropriation except so far as such waters were applied to or were reasonably needed for useful purposes upon riparian lands or were otherwise appropriated, affirmed existing rights of riparian owners, to the natural flow, and did not enlarge rights of riparian owners so as to give them in effect riparian rights in foreign water as well as in natural flow. Gen. Laws 1937, Act 9091, § 11.

5. Trial 🔑395(5)

Where plaintiff alleged that he was owner of right to take, appropriate, and use foreign water of creek, and further alleged evidentiary facts including filing of application, issuance of permit, beneficial use of water, and issuance of final license, trial court's finding that plaintiff was owner of right to appropriate, divert, and beneficially use certain amount of foreign water in creek, was a finding upon the ultimate fact and was sufficient to sustain judgment for plaintiff.

6. Trial 🔑395(5)

A finding upon the "ultimate fact" includes a finding of all evidentiary facts necessary to sustain finding on ultimate fact, and trial court need not make express findings on such evidentiary facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Ultimate Fact".

7. Waters and water courses 🔑152(12)

Defendants appealing from judgment for plaintiff in action for determination of rights to foreign water in creek could not complain that foreign water had no existence in creek, where defendants admitted existence of foreign water in their answers and affirmatively alleged existence of foreign water. Gen. Laws 1937, Act 9091, § 1d.

8. Waters and water courses 🔑151

A lower riparian owner, using quantity of foreign water to which he was entitled under his appropriation so long as such water was available, did not lose his right to such quantity of foreign water by virtue of fact that quantity of foreign water in stream was thereafter diminished by circumstances beyond his control.

9. Waters and water courses 🔑127

Upper riparian owners openly and notoriously using foreign water in creek under claim of right adverse to right of lower riparian owner, only at certain times for three years, did not thereby acquire a prescriptive right to such water as against lower riparian owner having right to foreign water by appropriation.

10. Waters and water courses 🔑152(11)

A judgment that lower riparian owner had right to appropriate 20 cubic feet per second of foreign water in creek, and that upper riparian owners had no right thereto, was not deficient for failure to determine when foreign waters begin to flow and in what quantities they flow and what particular waters they include or what portion of stream can be attributed to natural flow, where foreign flow and natural flow were variable.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by George S. Bloss, Jr., against Mamie F. Rahilly and another, for a determination of rights in and to the natural flow of Duck Creek. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

F. M. Ostrander, of Merced, and Louis L. Bernheim, of San Francisco, for appellants.

H. K. Landram, of Merced, and Edward F. Treadwell, of San Francisco (Russell E. Barnes, of San Francisco, of counsel), for respondent.

SPENCE, Justice pro tem.

Plaintiff sought by this action to have his rights determined in and to the natural flow of Duck creek, sometimes known as Duck slough, and in and to certain foreign waters flowing in said creek; to obtain an injunction enjoining defendants from interfering with said rights; and to recover damages for such interference. Plaintiff had judgment upon a trial by the court sitting without a jury. Defendants appeal from said judgment.

Plaintiff is a lower riparian owner and defendants are upper riparian owners upon said Duck creek which is a continuation of Mariposa creek. This watercourse has its source in the foothills of Mariposa county and flows in a general westerly and southwesterly direction through the county of Merced and into the San Joaquin river. The natural flow of said creek ordinarily starts in November of each year and continues into the late spring or early summer of the following year depending upon the amount of rainfall. Such natural flow has been known to cease as early as April in some years and to continue as late as July in other years.

In recent years the flow of said creek has been increased and water has flowed therein during the summer months as the result of the introduction into the watershed of certain foreign waters. These last-mentioned waters have been brought from the Merced river and have found their way into Duck creek above the lands of plaintiff and defendants through seepage and wastage from the reservoirs, canals, and ditches used in the operations of the Merced Irrigation District. Said district was formed in 1921 and water was first stored in its reservoirs in 1926. On March 21, 1927, plaintiff made application to the division of water rights to appropriate twenty second feet of said water for use upon his lands. A permit was thereafter issued to him on July 27, 1927, and the final license was issued to him on March 5, 1935. Since making the original application, plaintiff has beneficially used all of said water available to him up to twenty second feet. Defendants have likewise used some of said water during some of that time.

In 1932, the El Nido Irrigation District built a dam across the stream above the lands of plaintiff and defendants and, purporting to act under some arrangement with the Merced Irrigation District, the so-called El Nido diversion commenced whereby some of the foreign water was diverted from the stream. Since that time there has been only approximately 2½ to 4 second feet of foreign water in the stream. Plaintiff herein brought an action to enjoin the above-mentioned El Nido diversion and while it appears that said action was tried, our attention has not been called to anything in the record showing the result thereof. Another action was brought by the East Side Canal and Irrigation Company against numerous persons, including all the parties to the present action, seeking to have determined the rights of all of said parties in and to the waters of Duck creek and to enjoin the claimed diversion of said waters by the said parties in excess of their rights as determined by the court. In that action, all parties to the present action filed answers setting up their claimed rights in and to the waters of said Duck creek. Plaintiff herein and defendants herein claimed rights in that action both as riparian owners and as appropriators. The trial court in that action found and decreed that plaintiff herein, George S. Bloss, Jr., owned certain lands riparian to Duck creek and was entitled to all the rights of a riparian owner with respect to said creek; that he was also the owner of the right to appropriate 20 cubic feet of water per second of the water of said creek for the irrigation of his lands; that defendants herein, Mamie F. Rahilly and Peter Rahilly Jr., owned certain lands riparian to Duck creek and were entitled to all the rights of riparian owners but that none of their riparian rights extended to any water in said creek which had its origin in the Merced river; and that they were not the owners of the right to any of the waters of said creek by appropriation. Said judgment was entered but it had not become final during the pendency of the present action in the trial court. Said judgment has since become final and plaintiff herein has made a motion to dismiss the present appeal upon the ground that said judgment finally adjudicated the issues involved herein. In support of said motion, plaintiff cites and relies upon Miller v. Thompson, 139 Cal. 643, 73 P. 583, but owing to our conclusion that the judgment herein must be affirmed upon the record before us, we deem it unnecessary to pass upon said motion.

[1] Defendants took this appeal from the entire judgment but they attack only the portion thereof dealing with foreign

water. Before discussing the contentions of defendants herein, it is appropriate to state that it is settled in this jurisdiction that so-called foreign waters are subject to appropriation. In Crane v. Stevinson, 5 Cal.2d 387, at page 394, 54 P.2d 1100, at page 1104; this court said, "In view of the later definition of state policy in relation to the conservation and use of water, as expressed in the Water Commission Act, and in the recent constitutional amendment (article 14, § 3) on that subject, there should remain no present doubt that so-called foreign waters are now subject to appropriation under the laws of this state. The fact that, where such waters have been brought into a stream as the result of abandonment by another appropriator, there is no way to compel him to continue such abandonment, necessarily affects the value of the subsequent appropriation right, but does not affect the existence of the right, subject to the limitation caused by the nature of the water supply in question."

The complaint in this action contained two counts. The first count was based upon plaintiff's riparian rights in the natural flow and the second count was based upon plaintiff's appropriation rights in the foreign waters. The trial court decreed that both plaintiff and defendants were owners of land riparian to Duck creek and "entitled to use and enjoy the natural flow of the waters of said creek for the irrigation of their lands * * * having due regard to the like right of the said plaintiff and the said defendants", but that neither plaintiff nor defendants, "as such riparian owners have any right, title or interest of, in or to the foreign water of said creek referred to in the complaint and answers herein". It further decreed that "plaintiff is the owner of the right to take, divert and appropriate twenty cubic feet per second of the foreign water flowing in said creek, referred to and described in the complaint and answers herein, but that defendants have no right, title, interest or estate of, in or to any of the foreign water flowing in said creek". Plaintiff's rights as a riparian owner and as an appropriator were quieted as against defendants and defendants were enjoined from interfering with said rights. No award of damages was made.

Defendants first contend that: "A lower riparian owner may not take all of the foreign waters in a stream by virtue of an appropriation as against an upper riparian who needs such water to cultivate crops upon his riparian land." They base said contention upon the wording of section 11 of the Water Commission Act of 1913 as amended. Deering's Gen.Laws 1937, Act 9091. Said section provides in part: "And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act." Defendants argue that as the foreign water in question "may be reasonably needed for useful, and beneficial purposes upon" defendants' riparian land, it falls within the exception set forth in said section and is not subject to appropriation. This argument is based upon their construction of but a portion of one of the many sections of the act and, in our opinion, a reading of the entire act and a consideration of the declared public policy of the state, leads to the conclusion that the construction urged by defendants cannot be sustained.

[2-4] The main purpose of said act was to provide an orderly method for the appropriation of the unappropriated waters of the state and, to that end, a state water commission was created and was vested with certain powers. We find nothing in the act which purported to enlarge the rights of riparian owners as such or to curtail the rights of appropriators. On the contrary, the language employed in the act shows an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights. As we read the exception found in the above-quoted portion of section 11 of the act, in the light of all other provisions of this act, it constitutes no more than an affirmation of the existing rights of riparian owners in and to the natural flow and it may not be construed as enlarging the rights of riparian owners so as to give them in effect riparian rights in foreign water as well as in the natural flow. To hold otherwise, would mean that the act withdrew from appropriation all foreign waters in all streams of the state which had been used or might be reasonably needed at any time in the future for useful and beneficial pur-

poses on any riparian land. Such holding would obviously enlarge the rights of riparian owners and would be contrary to the evident purpose of the act and the express provisions of section 14 thereof. Said section 14 reads: "This act shall not be held to bestow, except as expressly provided in this act, upon any person, firm, association or corporation, any right where no such right existed prior to the time this act takes effect." We find nothing in the act which bestowed upon defendants, as riparian owners, any right in addition to the rights which they previously had as such riparian owners.

[5, 6] Defendants further contend that, "The findings fail to support the judgment as they do not find that the foreign water in which plaintiff's right is quieted was beneficially used by him." We find no merit in this contention. Plaintiff alleged in his complaint that "plaintiff is the owner of the right to take, appropriate and use the foreign water of the said creek to the extent aforesaid * * *". He further alleged certain evidentiary facts including the filing of the application, the issuance of the permit, the beneficial use of the water and the issuance of the final license as provided in the act. The trial court found that plaintiff "is the owner of the right to appropriate, divert and beneficially use * * * twenty cubic feet per second of the foreign water flowing in said creek and described in the complaint and answers in this action". This was a finding upon the ultimate fact and was sufficient to sustain the judgment. Such finding upon the ultimate fact included a finding of all evidentiary facts necessary to sustain it and it was unnecessary for the trial court to make express findings upon such evidentiary facts. Adams v. Crawford, 116 Cal. 495, 48 P. 488; 24 Cal.Jur. 968. We may state in passing, however, that there was no actual dispute upon the trial concerning the beneficial use of the water by plaintiff. Defendants concede that plaintiff introduced evidence "to show necessary and beneficial use of the foreign water" and this evidence stands uncontradicted.

[7] Defendants further contend that, "An appropriator's right to take foreign water may not be quieted where at the time of his application and the issuance of the permit thereon the water had no existence." They cite and rely upon section 1d of the act. While we believe there was sufficient evidence to show the existence of the foreign water in the creek at the time of the application, we are of the opinion that defendants are in no position to raise the point on this appeal. Plaintiff alleged in his complaint the existence of said foreign water in the creek "since 1927". Defendants admitted in their answers the existence of said foreign water in the creek "since 1927" and affirmatively alleged its existence therein "since many years prior to 1927". It is therefore a sufficient answer to this contention of defendants to state that said contention is based upon a statement of fact which is contrary to the admissions and allegations found in their own pleadings.

[8] Defendants also contend that, "The right to take water as an appropriator may not be quieted where the evidence fails to show the existence of the water in the quantity quieted and the beneficial use and reduction to possession of such water." The correctness of the foregoing statement as an abstract proposition of law may be assumed but we do not believe that such assumption is helpful to defendants here. We have heretofore stated that the evidence as to beneficial use by plaintiff stands uncontradicted. Defendants concede that plaintiff testified that after foreign water became present in the stream he "used up to 20 feet" under his application for appropriation and that he "used 20 feet or more under his appropriation if it was available". Defendants claim that there is uncertainty in the testimony as to what portion of the water used by plaintiff was foreign and what portion was natural. We believe, however, that the testimony was as certain as the circumstances would permit. Of course, the natural flow and the foreign water became mingled in the stream during the season of the year when there was a natural flow. After the natural flow ceased, there was only foreign water therein. There appears to have been an ample supply of foreign water prior to the El Nido diversion in 1932, but thereafter such foreign supply was reduced to from 2½ to 4 second feet. The amount of water available to plaintiff was also reduced preceding the commencement of this action by the acts of defendants in diverting the water to their use. The testimony of plaintiff, when considered in the light of these circumstances, showed that he used 20 feet of foreign water under his appropriation when that quantity was avail-

able and, when it was not available in that quantity, he used whatever he could get. We believe the evidence was sufficient to show the existence for some time of the foreign water in the amount of 20 second feet or more and the beneficial use of such water to the amount of 20 second feet by plaintiff under his appropriation. Under these circumstances, he gained a prior right to 20 second feet of the foreign water by virtue of his appropriation and such right was not lost or diminished by the fact that the quantity of such foreign water flowing into the stream was thereafter reduced by circumstances beyond his control. As was said in Crane v. Stevinson, supra, 5 Cal. 2d at page 394, 54 P.2d at page 1104, such reduction "does not affect the existence of the right".

[9] The next contention of defendants is that: "An open and notorious use under claim of right of foreign waters by an upper riparian is sufficient to gain him a prescriptive right to such water as against a lower riparian who claims a right to such water by appropriation." We may assume the soundness of this proposition as an abstract statement of law, but the trial court found against defendants' claim to a prescriptive right and the evidence sustains said finding. A peculiar situation was presented in this case by the nature of the flow of stream in its natural state and the nature of the flow of the stream as changed by the introduction of foreign water into the watershed. During a portion of each year these waters were mingled. Defendants had erected a dam which they were admittedly entitled to use for the purpose of diverting some of the natural flow for use on their riparian lands. At certain times there was undoubtedly water in the stream in excess of the quantity necessary to meet all the desires of defendants and to satisfy all the rights of plaintiff. During such times, the use of the water by defendants, which did not interfere with the rights of plaintiff, could be of no concern to plaintiff. At certain other times following the El Nido diversion, when the use of the water by defendants apparently interfered with plaintiff's rights, plaintiff spoke to defendants and they promptly turned the water down to him. Defendants admittedly used some of the foreign water some of the time but in order to establish a prescriptive right, it was necessary for them to show that their use thereof for the required period was open, notorious and under a claim of right adverse to the right of plaintiff. Under the evidence presented, the trial court was entirely justified in concluding that the only times when the use by defendants measured up to these requirements was at certain times during the three-year period immediately preceding the commencement of this action and that defendants had not acquired a prescriptive right by virtue of such use.

[10] The final contention of defendants is that, "The judgment is uncertain and insufficient." Defendants refer to the portion of the judgment in which it was decreed, "That plaintiff is the owner of the right to take, divert, and appropriate twenty cubic feet per second of the foreign water flowing in said creek, referred to and described in the complaint and answers herein, but the defendants have no right, title, interest or estate of, in or to any of the foreign water flowing in said creek." They state that, "From the judgment it is impossible to determine when the foreign waters begin to flow, in what quantities they flow, what particular waters they include or what portion of the stream can be attributed to natural flow." We do not believe it was either necessary or possible for the court to adjudicate these matters. The judgment decreed with certainty that plaintiff was the owner of the right to appropriate twenty second feet of the foreign water flowing in said creek. It is entirely apparent from the facts above set forth that the foreign flow, as well as the natural flow, was and is variable. Obviously, when there is less than twenty second feet of foreign water in said stream, plaintiff's right to appropriate then extends only to such foreign water as may be present. The claimed difficulty which defendants may have in determining what amount of water they may take at any given time by virtue of their riparian rights is a difficulty inherent in the nature of the flow of this stream and is not a difficulty caused by any deficiency in the provisions of the judgment. In our opinion, the judgment was as definite and certain as it could be made under the circumstances.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.; CURTIS, J.

EDMONDS, J., not having been present at the argument of this case, did not participate in its decision.

40 Cal.App.2d 400

BRAMBLE et al. v. McEWAN.

Civ. 2394.

District Court of Appeal, Fourth District, California.

Aug. 15, 1940.

1. Automobiles 🔑146, 171(13)

A motorist is not negligent because he relies upon presumption that another will use reasonable care, and such rule applies to vehicles approaching each other on intersecting streets. Vehicle Code, § 550, St.1935, p. 186.

2. Automobiles 🔑171(13)

A motorist having a right of way at an intersection and exercising ordinary care can assume that another motorist will also use ordinary care to avoid an accident and yield the right of way. Vehicle Code, § 550, St.1935, p. 186.

3. Negligence 🔑1

One who is himself not negligent is entitled to rely upon presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon part of another.

4. Automobiles 🔑171(13), 245(14)

Although fact that motorist has right of way does not absolutely relieve him of duty to use care, in absence of unusual circumstances, question as to whether motorist who has right of way is negligent presents an issue of fact and not one of law. Vehicle Code, § 550, St.1935, p. 186.

5. Automobiles 🔑245(14)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection, against driver of other automobile, whether defendant motorist, though having right of way, was negligent in failing to anticipate that driver of automobile in which deceased was riding would not obey law and yield right of way or in failing to exercise reasonable care to avoid collision after having seen approach of automobile in which deceased was riding, was for jury. Vehicle Code, § 550, St.1935, p. 186.

6. Automobiles 🔑245(61, 64)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection, against driver of other automobile, whether negligence of either driver was a proximate cause of collision and resultant injuries, and whether negligence of each concurred with that of the other, were questions for jury.

7. Appeal and error 🔑1010(1)

Where there was evidence to support trial court's determination as to proximate cause of automobile collision at an intersection, determination would not be disturbed on appeal, even though facts would warrant a different conclusion.

8. Automobiles 🔑243(17)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection against driver of other automobile, question, asked defendant motorist in an endeavor to develop last clear chance rule, as to whether he had knowledge that other accidents had happened at intersection, was properly excluded, as immaterial.

9. Evidence 🔑471(11)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection against driver of other automobile, question, asked defendant motorist in an endeavor to develop last clear chance rule, as to whether he knew that intersection was a dangerous intersection, was properly excluded on ground that question would call for a "conclusion".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

10. Automobiles 🔑243(3)

Evidence of knowledge of defects or conditions which are dangerous in reference to streets or intersections is admissible for purpose of establishing reasonable amount of care required under the circumstances.

11. Trial 🔑203(1), 229

Ordinarily, trial court must give such appropriate instructions as are offered which will adequately guide jury in its deliberations on the evidence legally produced, but court is not required to give every instruction requested by a litigant or to instruct jury upon any particular phase of the law more than once.

12. Negligence 🔑83

Whether last clear chance doctrine is applicable in a given case depends entirely on existence or nonexistence of elements necessary to bring it into operation.

13. Automobiles ⚷246(38)
Trial ⚷252(8)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection, against driver of other automobile, even if plaintiffs were entitled to invoke last clear chance rule though guest's contributory negligence was not pleaded or established by evidence, trial court was justified in refusing to give plaintiffs' proffered instruction on last clear chance rule, where instruction did not contain a statement of all of the essential elements of the rule, and there was no substantial evidence of all of the elements essential under the rule.

14. Trial ⚷295(6)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection, against driver of other automobile, any error, in using article "the" instead of article "a" before words "proximate cause" at certain places in instructions on defendant's negligence, was not prejudicial, where instructions considered as a whole told jury that negligence of defendant, if any, need not be sole cause, but that it was sufficient if it was a proximate cause or one of the proximate causes.

15. Automobiles ⚷246(47)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection, against driver of other automobile, defendant was entitled to instruction in language of Vehicle Code respecting right of way rule at intersections, notwithstanding that there was a slight jog in street on which defendant was traveling, compelling defendant to veer to left to some extent while passing through intersection. Vehicle Code, §§ 86, 550, St. 1935, pp. 99, 186.

16. Appeal and error ⚷216(1)

In action for death of automobile guest as result of injury sustained in collision with another automobile at intersection, against driver of other automobile, plaintiffs could not complain of failure of trial court to give any instruction with reference to statute requiring motorist to give an appropriate signal of his intention to turn to left if any other vehicle might be affected by such movement, even if such instruction were applicable, where plaintiffs did not request such instruction. Vehicle Code, § 544, St.1935, p. 185.

17. Trial ⚷194(16)

In action for death of automobile guest as result of injuries sustained in collision with another automobile at intersection, against driver of other automobile, an instruction to effect that occurrence of collision was no evidence of negligence of defendant was not erroneous on ground that it left an inference that there was evidence of negligence on part of driver of automobile in which deceased was riding.

18. Appeal and error ⚷870(6)

An order denying a motion for new trial may be reviewed on an appeal from the judgment, even though denied by operation of law. Code Civ.Proc. §§ 473, 660, 956.

19. New trial ⚷56

In action for death of automobile guest, trial court did not err in refusing to grant new trial on ground that defendant, outside of courtroom, made certain derogatory remarks to mother and sister of one of jurors concerning deceased for purpose of influencing jury, where it did not appear that juror was apprised of claimed conversation prior to verdict, or that, if she was so apprised of it, she was influenced in favor of defendant by virtue of it.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Henry W. Bramble and Affie K. Bramble against John M. McEwan, for death of plaintiffs' daughter, Alice Bramble, who was killed as result of an automobile accident. From a judgment for defendant, the plaintiffs appeal.

Affirmed.

Atherton & Atherton and Dempster McKee, all of San Diego, for appellants.

Wright, Monroe, Harden & Thomas, of San Diego, for respondent.

GRIFFIN, Justice.

This action was instituted by the plaintiffs and appellants to recover damages for the death of their daughter, Alice Bramble, who was killed as the result of an automobile accident. The deceased was riding as a guest in a 1928 Erskine sedan automobile which was being driven west on Moorland drive, in Crown Point, San Diego, on a Sunday, about 3:30 p. m., by her friend, Mrs. Hathaway. Defendant and respondent was driving a 1938 Oldsmobile sedan automobile in a southerly direction on Ingraham street, which street is the extension of the causeway road which crosses Mission bay. The vehicles collided at the intersection of the two streets.

It was conceded at the trial that the deceased, being a guest in the automobile, was not to be held responsible for any negligent act or omission on the part of the driver of the car in which she was riding. Although the defense of contributory negligence had been pleaded, this defense was specifically withdrawn at the trial. The sole issues for the determination of the jury, therefore, were whether the respondent was guilty of negligence which was a proximate cause of the accident and, if so, what damages should be awarded. The cause was tried by a jury which returned its general verdict in favor of respondent. This appeal was taken from the judgment.

Ingraham street, extending north and south, carries the main traffic between Pacific Beach and the causeway, while Moorland drive is a street seldom used. The place of the accident is a 45-mile zone. Ingraham street makes a jog to the east as it crosses Moorland drive, the jog being to the extent that the east curb line of Ingraham street to the north, if extended, would be about the center of Ingraham street to the south. Both streets are paved. Just north of the intersection the width of Ingraham street is 52 feet and just south of the intersection it is 45 feet. Moorland drive is 30 feet wide. The center white dividing line in Ingraham street north of Moorland drive terminates just a few feet north of the intersection and again appears a similar distance just south of the intersection. There are no buildings to obstruct the view in any direction, and cars coming from either direction are visible for a considerable distance. Mrs. Hathaway, the driver of the car in which deceased was riding, testified on behalf of the appellants, and her testimony may be summarized briefly as follows:

She was driving westerly on the right-hand side of Moorland drive at a moderate rate of speed, not to exceed 20 miles per hour. She looked but did not see the automobile driven by the respondent until just at the instant she collided with it. She stated that although driving west, she was not bothered by the sunlight; that her windshield was clean and that there was nothing to interfere with her vision; that there was no car in the intersection when she started into it; that she saw the respondent's car just at the instant of the collision; that she became unconscious; that she did not apply her brakes, and to her knowledge she did not swerve her automobile. She made no statement as to what portions of the automobiles came together, as to whether her automobile struck that of the defendant or whether the automobile of the defendant struck hers.

Respondent was called to the stand under section 2055 of the Code of Civil Procedure and testified that he had traveled Ingraham street frequently on his way from his residence to his place of work; that he was familiar with the intersection and its surroundings and with the "slow sign" which was erected at the southwest corner of the intersection; that he first saw the other automobile to his left when he was something between 200 and 250 feet north of the intersection, at which time the other car appeared to him to be about 275 feet distant from the intersection; that as he approached the intersection the Erskine car was in his view at all times except for a period of perhaps 50 feet, when it was obscured by a stone pillar which is approximately 75 feet from the intersection; that the Erskine car apparently did not change its speed as it approached the intersection; that as he approached the intersection he was driving at between 20 and 25 miles an hour; that the other car appeared to be driven in a normal manner; that before he had approached the intersection he had been driving at about 30 to 35 miles per hour, but as he crossed a dip about a block north of the intersection he reduced his speed to 20 or 25 miles; and that as he approached the intersection he was also watching the street ahead and to the right. He stated that there appeared nothing particularly to call his attention to the other automobile. He made the statement that it was the only car which might "bother" him. He explained this statement by saying that by the use of the word "bother" he meant that it was the only car in sight at the time.

A Mr. Boland testified that he met the respondent some distance north of Moorland drive and recognized him; that he estimated that the respondent was then driving at between 30 and 35 miles per hour about half a mile north of the intersection.

McEwan testified relative to the jog in the street that it was of such nature that a person driving south must swerve close to the center of the street to pass around the jog, otherwise a car proceeding straight ahead would run into the curbing at the southwest corner of the intersection; that from his observation of the approaching automobile he didn't expect that the cars would arrive at the intersection at the same time; that he thought he would proceed through the intersection without any interference and did not anticipate that a collision would occur; that as he entered the intersection he looked ahead and also to the right; that he thought "everything was in order, that I would go through as I generally do and she would proceed with her own business". He stated that when he entered the intersection he discovered that she was not stopping and "the situation changed faster than I can explain to you. The impact occurred and I was in the dirt and the young lady was lying on the street;" that he did not anticipate as he entered the intersection that there was any probability of any collision or danger; that the approaching Erskine car struck his automobile immediately to the rear of the left front wheel; that he was thrown against the windshield; that he was driving on the right-hand side of Ingraham street; that when his car was struck it took a turn to the right, to the southwest corner of the intersection; that on the curbing at the southwest corner was a lamp-post protected by a six-inch railing of railroad iron; that the right side of his car struck this railing and the car stopped against the railing and lamp-post and that the "slow" sign was broken off and was underneath his car after the collision.

There was some testimony to the effect that after the collision McEwan stated that he did not see the Erskine automobile until just before the collision. Respondent denied that he made such statement, claiming that what he said was that when he was in the intersection he did not see the approach of the other car until just before it struck him, but that he did not say that he had not seen the other car before he entered the intersection.

A traffic officer, Mr. Pierce, testified that from the appearance of the marks on the pavement, the respondent was driving on his own right-hand side of the street; that there were certain tire marks on the street and that he was unable to determine which car made them.

Respondent testified that he saw a mark on the street where his automobile had been pushed sideways at least 18 inches at the time of the impact. He placed the point of impact as in the south-west quarter of the intersection.

Another witness gave as his opinion that the marks made by the impact of the automobiles were south of the center line of Moorland drive, just about the center of Ingraham street. The testimony of Officer Pierce was to the effect that what he took to be the point of impact was approximately 9 feet south of the extended north curb line of Moorland and about 15 feet west of the northerly extension of the east center line of Ingraham street to the north curb line of Moorland drive.

It will be seen, therefore, that the witnesses who viewed the street after the accident were not entirely in accord as to the exact point of the impact. As a result of the impact the respondent was thrown from his seat into the bottom of the car and suffered a fractured shoulder and other injuries.

Another witness testified that he was driving south on Ingraham street at the time of the collision and had a momentary glimpse of the cars just as they collided. He testified that the respondent's car was on its own right-hand side of the street. There was no testimony from any witness disputing the testimony of respondent as to the speed of his car excepting certain claimed statements made by him shortly after the accident to the effect that he was traveling 25 to 30 miles per hour.

Pictures of the respective damaged automobiles have been brought before this court, on order, for examination and consideration. It is clearly disclosed from an observation of the photograph of the Oldsmobile that there was a comparatively small indentation on the left front bumper. However, the main force of the blow is evidenced by a crescent-shaped indentation on the left front fender and body extending from the middle of that fender along the running board to the left rear fender. It is respondent's contention that this evidence corroborates his statement that the Erskine car ran into the left side of his car. The picture of the Erskine car clearly shows that the main damage and force of the blow was in and about its right front fender and right front wheel. Upon this evidence the jury, by a vote of 9 to 3, returned its general verdict in favor of the respondent. It is a matter of speculation whether the jury was satisfied that the respondent was without fault or whether it was their attitude that the appellants had failed to establish negligence of respondent by a preponderance of the evidence.

It is now argued by appellants (1) that the physical evidence on the pavement clearly shows that the statement of respondent that he had entirely crossed the middle section of Moorland drive when the impact occurred not only could not be true but is completely shown to have been impossible; (2) that by reason of the undisputed facts and the physical evidence, there is no substantial conflict in the evidence and that this court should not permit the verdict, under such circumstances, to stand; and (3) that from an analysis of those facts, together with the application of the law thereto, it clearly appears that the respondent was negligent, and that his negligence contributed proximately to the collision and resulting damage and that therefore the verdict of the jury is not supported by the evidence, citing Chase v. Jonkey, 12 Cal.App.2d 365, 55 P.2d 1229; 10 Cal.Jur., p. 1169, sec. 381; Austin v. Newton, 46 Cal.App. 493, 189 P. 471; Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471; Buchignoni v. DeHaven, 23 Cal.App.2d 76, 72 P.2d 159, and many other similar cases. We therefore deem it to be that appellants are, by their argument, advancing the theory that the evidence was such that it was established as a matter of law that the respondent was guilty of negligence proximately causing or contributing to the collision.

[1] Approaching the questions presented purely on the basis of the question of the evidence supporting the verdict and judgment rendered, the evidence justifies the conclusion that neither respondent nor the driver of the Erskine car was driving at an unreasonable speed. From the evidence and physical facts, it might likewise be said that the theory is supported that respondent had the right of way under section 550 of the Vehicle Code, St.1935, p. 186 (1939). The most reasonable contention made by appellants under the evidence is that respondent having the right of way, he nevertheless failed to anticipate that the driver approaching upon the intersecting street would not obey the law and yield the right of way to him, or that he having seen the approach of the Erskine car, did not exercise reasonable care in failing to avoid the collision. Respondent frankly concedes that even though a party has a right of way, he must nevertheless use reasonable care, and if he fails to do so, he may be held to be negligent, but argues that when a party does have the right of way, and when he relies upon it, and when there is nothing in the manner in which the other vehicle is being driven to make it apparent to him that the other driver is not watching or does not propose to obey the law, then there is fairly presented for the determination of the jury the question of whether he is or is not negligent. This argument is meritorious. It has been repeatedly held in this state that a driver is not to be held negligent because he relies upon the presumption that another will use reasonable care. This applies to vehicles approaching each other on intersecting streets. Robinson v. Clemons, 46 Cal.App. 661, 190 P. 203.

[2, 3] In Wynne v. Wright, 105 Cal. App. 17, 286 P. 1057, it was held that a plaintiff having a right of way at an intersection and exercising ordinary care could assume that defendant would also use ordinary care to avoid an accident and yield the right of way. The same rule is laid down in Briggs v. Koyer, 138 Cal. App. 487, 32 P.2d 649, 650. In this decision the court cited with approval the following quotation: "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another."

The court then stated: "That rule is peculiarly applicable to vehicles crossing each other's path in intersections." In support of this rule the court therein cited many cases and after citing them stated: "Each of the foregoing cases is to the effect that the question as to the negligence of the plaintiff under the facts stated by us is *one of fact* and that the determination by the trier of the facts is conclusive on appeal." (Italics ours.)

[4] The same rule has been applied in later cases. Lee v. Stephens, 8 Cal. App.2d 650, 47 P.2d 1105; Smith v. Aggola, 27 Cal.App.2d 750, 81 P.2d 997. Many cases are cited by appellants to the effect that even though a driver may have the

right of way, this fact does not absolutely relieve him of the duty to use care, and despite the fact that he may have the right of way, he may nevertheless be found to be guilty of negligence. In the absence of very unusual circumstances, however, such question presents an issue of fact and not one of law. For instance, in Almanerz v. San Diego Electric Ry. Co., 15 Cal.App.2d 423, 59 P.2d 513, 514, the court said: "Even when a driver enters an intersection first it may be negligence, as a matter of fact, to proceed in the face of another car which is very close and coming fast. * * * It can rarely be said, as a matter of law, either that he was negligent in proceeding or that he was not. Such a question is nearly always one of fact and this case presents no exception to that general rule."

[5] The above quotations are no doubt the true rule, and when applied to the facts in the instant case, notwithstanding the conflicting evidence, the question presented was purely one of fact for the jury which was fairly presented for its determination and is conclusive on appeal.

Appellants' argument that the physical facts often refute and dispel the evidence opposed to them receives support in the cases cited. However, in the instant case, from an examination of the photographs and the record, we are unable to say that appellants' deduction made therefrom was the only logical conclusion that could have been reached. The expression used in Nagamatsu v. Roher, 10 Cal.App.2d 752, 756, 53 P.2d 174, 176, is particularly applicable: "'Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred.' * * * It is impossible to tell from the condition of the cars, the main physical evidence relied upon, what part thereof resulted from the collision and what part from the fall."

[6, 7] Whether or not the negligence of either driver was a proximate cause of the collision and resultant injuries and whether or not the negligence of each concurred with that of the other was a question of fact to be decided by the jury, and where there was evidence to support the determination so made it will not be disturbed on appeal, even though the facts would warrant a different conclusion. Dougherty v. Ellingson, 97 Cal.App. 87, 93, 275 P. 456; Fishman v. Silva, 116 Cal. App. 1, 7, 2 P.2d 473.

[8-10] Appellants next present the point that the evidence disclosed that respondent observed the approach of the Erskine automobile and by the exercise of the slightest care could have avoided the collision, and therefore offered evidence by way of questions propounded to respondent to show that the intersection was a dangerous one and that respondent had knowledge of that fact, in an endeavor to develop the last clear chance rule. Appellants' instructions bearing on that rule were thereafter offered and refused. The questions to which objections were sustained were directed to respondent and were as follows:

"Q. You knew, did you not, that this intersection of Ingraham Street and Moorland was a dangerous intersection?

"Mr. Monroe: * * * We object to that as calling for a conclusion.

"The Court: Sustained.

"Q. You knew other accidents had happened at that intersection, did you not?

"Mr. Monroe: Objected to as immaterial.

"The Court: Sustained."

Appellants claim error in the ruling, citing McGraw v. Friend & Terry Lumber Co., 133 Cal. 589, 592, 65 P. 1051; and Riley v. Berkeley Motors Co., 1 Cal.App.2d 217, 220, 36 P.2d 398; and in the refusal to give the instructions mentioned, citing Gutter v. Niesley, 1 Cal.App.2d 69, 71, 36 P.2d 155; Welch v. Sink, 24 Cal.App.2d 231, 236, 74 P.2d 832; Godfrey v. Brown, 220 Cal. 57, 62, 29 P.2d 165, 93 A.L.R. 1092; Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066; Donat v. Dillon, 192 Cal. 426, 429, 221 P. 193; Boynton v. Richfield Oil Co., 117 Cal.App. 699, 700, 4 P.2d 614; Girdner v. Union Oil Co., 216 Cal. 197, at page 202, 13 P.2d 915, and Harrington v. Los Angeles Railway Co., 140 Cal. 514, 522, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85. The ruling of the court on the propounded questions appears to have been properly sustained on the grounds mentioned. Whether respondent had knowledge of other and different accidents arising under different sets of circumstances at this intersection was immaterial. The characteristics of the intersection were matters concerning which the jury was fully advised, and of which respondent was fully aware. The question of whether the corner was "a dangerous corner" would call for a conclusion. Duncan v. Atchison, T. & S. F. Ry. Co., 86 Kan. 112, 119 P. 356, 51 L.R.A.,N.S., 565. Knowledge of defects or conditions which are dangerous in reference to streets or intersections is admissible for the purpose of establishing the reasonable amount of care required under the circumstances. Buckingham v. Commary-Peterson Co., 39 Cal. App. 154, 160, 178 P. 318. The record shows that the respondent was familiar with this particular intersection, the character of the streets and the traffic thereon, and demonstrated his familiarity. What additional facts appellants wished to show by the questions propounded is not established by an offer of proof or otherwise. We see no prejudicial error in the rulings on the question of evidence.

[11] As to the refusal to give certain proffered instructions, it is ordinarily the duty of the court to give such appropriate instructions as are offered which will adequately and fairly guide the jury in its deliberations on the evidence legally produced. The court is not required to give every instruction requested by a litigant and is not required to instruct the jury upon any particular phase of the law more than once, nor to say the same thing in as many different ways as the ingenuity of counsel may suggest. In addition to other instructions, the court instructed the jury: "I neglected to state, in explaining the right of way rule, that regardless of whether a person has or has not the right of way, he must still drive with ordinary care and caution." Some of appellants' proposed instructions on that subject might well have been read in place of the ones given. Although the language used by the court in its several instructions differed considerably from that used by counsel in the proposed instructions and was not as clear and informative an exposition of the law as that suggested, the substance of the proposed instructions was amply covered.

[12] Respondent contends that the court was justified in refusing to give appellants' proffered instruction on the "last clear chance" rule, and quotes from 2 California Jurisprudence Ten-Year Supplement, page 176, section 120: The necessary elements of the Doctrine of Last Clear Chance are said by current authorities to be the following: (1) The plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care," and states that this doctrine is applicable only in those cases where the plaintiff by *his* negligence has placed *himself* in a position of imminent danger, citing Hamblin v. Schultis, 64 Cal. App. 104, 105, 220 P. 320. It is respondent's contention that the doctrine of last clear chance is an exception to the rule of contributory negligence, and that by its operation, under proper circumstances, the plaintiff who has himself been negligent, is permitted to recover, and that in the instant action it was conceded that the deceased, a guest in the car, was not negligent; that no effort was made to establish any negligence on her part; that it was conceded that the negligence of the driver of the car in which she was riding was not attributable to her and that the jury was instructed that the negligence of that driver was not an issue in the case and that therefore the doctrine of last clear chance had no applicability to the issues here involved. The question as to whether or not the doctrine of last clear chance is applicable in a given case depends entirely on the existence or non-existence of the elements necessary to bring it into operation. Girdner v. Union Oil Company, supra. The essential elements of the doctrine of last clear chance are clearly set forth in Girdner v. Union Oil Company, supra. See, also, Last Clear Chance, by Mark A. Hall, sec. 5, p. 2. If all of the elements of the last clear chance rule be present the doctrine applies and enables the plaintiff to recover, notwithstanding his own negligence, but if any of them be absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36.

[13] The part of the court's instructions which counsel claims particularly bears on the doctrine of the last clear chance reads: "You are instructed that a person is not privileged to injure another simply because such other person is negligently or otherwise in a position of danger. If a defendant has the opportunity of avoiding the injury, he must at his peril, exercise it." Even if appellants' contention could be upheld, which we do not do, that the guest in the instant case was entitled to invoke the last clear chance rule even though her contributory negligence was not pleaded or established by the evi-

dence, it becomes apparent that the trial court was justified in refusing to give the proffered instruction, not only on the ground that the instruction itself did not contain a statement of all of the essential elements of the rule, but also on the ground that there was no substantial evidence of each and all of the elements essential under the established rule. Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68.

[14] Appellants next complain that because at certain places in the court's instructions it used the expression "the proximate cause" rather than the expression "a proximate cause", the instructions were thereby erroneous, inconsistent and conflicting, citing Morris v. Purity Sausage Co., 2 Cal.App.2d 536, 542, 38 P.2d 193, and Straten v. Spencer, 52 Cal.App. 98, 106, 197 P. 540. Appellants contend that by the use of the term "the proximate cause" is meant the sole cause, citing Flood v. Miura, 120 Cal.App. 467, 8 P.2d 552, and that where one is injured by the concurring negligence of two persons, the injured party may recover from either or both, regardless of whose negligence may have been greater (Fishman v. Silva, 116 Cal.App. 1, 7, 2 P.2d 473), and that the term "a proximate cause" was the one and only proper term to be used and that where these terms were intermittently used that the jury was told that respondent's negligence must have been *the sole cause* of the accident and the giving of the instructions complained of constituted reversible error when considered in connection with the facts in the case, citing Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143.

Appellants offered instructions on the question of "a proximate cause" and they were refused. The court, however, did give specific instructions on the subject, one of which reads in part as follows: "Now the plaintiff has the burden of establishing by a preponderance of the evidence that the defendant was negligent and that his negligence was a proximate cause of the accident and injuries. It does not have to be the sole cause. It must be a proximate cause * * *." From the instructions considered as a whole we are convinced that the jury was not misled, but was told that the negligence of the defendant, if any, need not be the sole cause, but that it was sufficient if it was a proximate cause or one of the proximate causes. An inadvertence of this character is not necessarily prejudicially erroneous. Briggs v. Jess Mead, Inc., 93 Cal.App. 666, 270 P. 263; Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391; Flood v. Miura, supra.

[15] The next assignment of error involves an instruction given in the language of section 550 of the Vehicle Code (1939), respecting the right of way rule at intersections. Appellants contend that due to the jog in the street that section 550 of the Vehicle Code was not applicable; that due to this particular jog, respondent was compelled to veer to the left to some extent while passing through the intersection and therefore that section 544 of the Vehicle Code governed and required respondent to give an appropriate signal of his intention to so turn if any other vehicle might be affected by such movement. From the nature of the intersection described, the instruction given under section 550 of the Vehicle Code was appropriate and proper. Sec. 86, Vehicle Code (1939).

[16] Our attention has not been directed to any refused instruction offered by appellants bearing on the provisions of section 544 of the Vehicle Code. Appellants therefore cannot complain of the failure to give such instruction even though it may be assumed it was applicable. Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.2d 545.

[17] It is next contended that it was prejudicial error for the court to instruct the jury as follows: "The fact that a collision occurred is, in itself no evidence of negligence on the part of a defendant. Standing alone, it does not justify a finding of negligence, for the burden of proving negligence remains to be proved, as I have heretofore indicated, in addition to the admitted fact that a collision occurred." Appellants argue that when the court said that the occurrence of the collision was *no* evidence of negligence on the part of the *defendant* it left an inference that there was evidence of negligence on the part of the driver of the car in which the deceased was riding, because it was not within the realm of reason to believe that a collision could occur in an open intersection in broad daylight without somebody being negligent, citing DeLannoy v. Grammatikos, 126 Cal.App. 79, 87, 14 P.2d 542. We see little, if any, merit to this contention under the facts and issues pre-

sented. Depons v. Ariss, 182 Cal. 485, 188 P. 797.

The last question presented is to the effect that a new trial should have been granted because it is claimed that Mr. McEwan, outside of the courtroom, made certain derogatory remarks to the mother and sister of one of the jurors concerning the deceased girl. It is claimed that he made the claimed remarks for the purpose of influencing the jury. It is admitted that there was no evidence produced on the motion for new trial to show that anything alleged to have been said by McEwan was communicated to the juror or jury. After judgment was entered counsel for appellants filed a motion for new trial, setting forth in general terms all statutory grounds. Appellants' counsel filed his ex parte affidavit. Upon this affidavit the court issued an ex parte order to require the taking of depositions of two witnesses (the mother and sister of the juror). The testimony of the witnesses was taken over objections. It was claimed by the witnesses that during a conversation with them out of the presence of any juror, that McEwan stated in effect that the deceased girl looked as though she were pregnant and that he made some statement to the effect that the deceased ran around with service men and that the funeral bill of $435.83 was excessive for people on the WPA. These witnesses testified that they had not informed that juror of this conversation until after the verdict. McEwan in his affidavit admitted a conversation with the two witnesses but denied that he had made the derogatory statements. When the motion for new trial was argued and on January 27, 1940, the trial judge stated that he was inclined to believe McEwan did make the derogatory statements concerning the dead girl in this conversation but that there being an entire absence of any proof at all that this conversation ever came to the ears of the jury or any of them, he failed to see that it furnished any grounds for granting a new trial. The trial judge further stated that he was not satisfied that the verdict was contrary to the weight of the evidence.

[18, 19] Appellants' counsel then stated that he believed that the juror was informed of this conversation before the verdict was returned and asked leave to have that juror, a Mrs. Warren, brought into court and examined. The court then asked: "How about the time? When is the time up on the motion for new trial?" Counsel for appellants replied: "The sixty days will be up on February 3rd." The court then set February 1st for further hearing. On that day when the matter was called, counsel for respondent called attention to the fact that the statutory time within which the court had power to pass upon the motion for new trial under the provisions of section 660 of the Code of Civil Procedure had expired. The court believed that the time limitation therein set forth was jurisdictional but suggested that appellants' counsel investigate the matter and ascertain whether he might seek relief under the provisions of section 473 of the Code of Civil Procedure. Nothing further was done and this appeal followed. An order denying a motion for new trial may be reviewed on an appeal from the judgment even though denied by operation of law. Lewith v. Rehmke, 215 Cal. 241, 243, 9 P.2d 297; sec. 956, Code Civ.Proc.; Casner v. Daily News Co., Ltd., 12 Cal.2d 402, 84 P.2d 1032. Many authorities are cited in reference to the exception to the general rule that a juror may not impeach his verdict. People v. De Voe, 123 Cal.App. 233, 11 P.2d 26; Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407. It is unnecessary to determine that question, for it is quite apparent that the juror did not testify or sign any affidavit in connection with the subject-matter. It is not shown anywhere what the witness would have said in this connection had she been allowed to testify. We cannot assume that she was apprised of the claimed conversation prior to the verdict or if she was so apprised of it she was influenced in favor of respondent by virtue of it. In fact, it appears that she was one of the three who voted for a verdict for appellants. Appellants have shown no prejudice in the record. We perceive no prejudicial error in the denial of the motion for new trial or in the giving or refusing to give the instructions heretofore mentioned. The question of the negligence of the respondent was a question of fact and was properly presented to the jury.

For the reasons expressed the judgment is affirmed.

I concur: BARNARD, P. J.

40 Cal.App.2d 487

PEOPLE v. HARRMAN.

Cr. 458.

District Court of Appeal, Fourth District, California.

Aug. 20, 1940.

1. False pretenses ⚷49(1)

Evidence sustained conviction of grand theft through the taking of money, as against claim that money was loaned to defendant.

2. Criminal law ⚷1172(1)
False pretenses ⚷52

In prosecution for grand theft, an instruction stating that a promise made with no intention to perform might, under some circumstances, be made the basis of a criminal proceeding, should not have been given, but did not require reversal where only material promise of future action was a promise to use money in a particular way and the promise was interwoven with false representations of past and existing facts.

3. Criminal law ⚷1172(1)

In prosecution for grand theft, an instruction referring to a written receipt, which defendant gave to victim, as "a false token", did not require reversal of conviction, where instruction did not refer to a false token or writing as a substitute for testimony but merely meant that receipt could be considered as a corroborating circumstance, and jury was instructed that a conviction could not be had except upon testimony of two witnesses or of one witness with corroborating circumstances. Pen.Code, § 1110.

4. Criminal law ⚷823(10)
False pretenses ⚷52

In prosecution for grand theft, an instruction that, if jury did not find that victim's testimony was true, jury would have to rely on circumstantial evidence, and, if that was insufficient, jury would have to find defendant not guilty, was erroneous but did not require reversal where jury had been previously instructed that corroborating circumstances alone were not enough upon which to convict and that victim's testimony, standing alone, was also insufficient. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Jake Harrman was convicted of grand theft through the taking of money, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged under each of two counts with grand theft through the taking of money from one Mary E. Ege. Having been found guilty on both counts, he appeals from the judgment.

It is first contended that the evidence is insufficient to sustain the judgment. The appellant, who was 39 years old, struck up an acquaintance with Mrs. Ege, a widow 65 years of age, in a hotel lobby in San Diego on December 8, 1939. Thereafter he spent each evening with her and shortly before Christmas he agreed to marry her. On the second evening he told Mrs. Ege that his father had died in Illinois, leaving an estate of $75,000 which was to go to him and his sister and that the probating of the estate would be completed the following February. A few evenings later he told her that he and his father had been in the marble machine business; that there were 35 or 40 of these machines packed and ready for shipment in Springfield, Illinois; that his sister had put the machines under an attachment; that it would take $1,000 to get them released; that if he could get the machines to California he had arranged with a man in El Centro to put the machines in operation where they would make money rapidly; and that he had $750 but did not know where to get the other $250. After they had talked the matter over on several evenings, and after the appellant told Mrs. Ege that he had telephoned to Springfield, Illinois, and that everything was arranged, she drew $250 from her bank account and handed it to him.

Shortly after Christmas the appellant showed Mrs. Ege a telegram which he claimed to have received from Springfield, Illinois, saying it would be necessary for him to come there to sign some papers. About the same time he told her that he was going to Springfield on a bus, that when he got there he wanted to get a truck with which to bring the marble machines to California, and that when he got back here he could sell the truck and make money on it but that he had no money with which to buy the truck. Mrs. Ege cashed some bonds and gave him $450 to be used in bringing the marble machines to California. On January 3, 1940, the appellant took her with him to the bus station where he inquired as to the fare and available routes to Springfield, Illinois. On the evening of that day he gave her a receipt for the full $700 he had received from her, told her that he was going to Springfield and would be back in two weeks, and arranged with her to write to him at Springfield, General Delivery. He left the next morning and Mrs. Ege later addressed three letters to him at Springfield all of which were returned unclaimed. He was arrested in a hotel lobby in Long Beach on February 6, 1940, where the officers found him talking to an elderly lady. On the trip to San Diego the arresting officer asked him if he did not have a pretty good racket "taking these widows" and he replied that before he came to this state he had "heard there were lots of widows in California, that they asked for it".

The appellant took the stand and told about the same story as that told by Mrs. Ege, except that he denied having told her that his father had left an estate in Illinois or that he or his father's estate had any interest in the marble machines. He testified that he told her that there were some 35 or 40 marble machines in Springfield, Illinois, that were tied up in an estate and that he could get them very cheap, but did not tell her what estate it was. He admitted on the stand that he knew nothing about these marble machines and testified that he was told about them by a "fellow" with whom he was not "acquainted" and that this fellow did not tell him "how much or anything". He further testified that Mrs. Ege "loaned me this $450 to add to the $250 that she gave me before, so that I could * * * get these slot machines started". He testified that he left San Diego on January 4, 1940, and went to Long Beach; that he remained there until he was arrested; that he lost $350 in a rummy game and an additional amount on another occasion; and that when he left San Diego he intended to go to Springfield, Illinois. When asked why he did not go there he replied: "Well, I just—the time passed pretty fast and so I just didn't get that far along yet, which it was only about three or four weeks." When arrested he told the officers that he had only $47 left. Evidence was introduced showing that the estate of appellant's father had never been probated in the county in Illinois in which he said it was being probated.

[1] It requires no comment on this evidence to disclose its sufficiency. The testimony of the appellant himself furnished ample corroboration, as did many circumstances which justified inferences of guilty intent. Many portions of the appellant's testimony were obviously unbelievable. For example, he testified that he had bought a bank draft for $250 which he had sent to a man in Springfield. He was unable to tell what bank he bought the draft from and did not know the address of the man to whom he said he had sent it. He said that this man was one with whom he was not acquainted, and that he had never received any receipt or letter from him.

The appellant complains of a portion of one instruction which stated that a promise made with no intention to perform might, under some circumstances, be made the basis of a criminal proceeding. It is argued that this was erroneous and reliance is placed upon a statement of this court in People v. Jackson, 24 Cal.App.2d 182, 74 P.2d 1085, 1097, to the effect that promises cannot support a conviction of grand theft as defined in section 484 of the Penal Code. The statement thus referred to was used in that case in connection with the consideration of certain representations which this court said "were statements which looked to the future alone. They did not pretend to relate either to the present or to the past." On the other hand, it was held, in effect, in People v. Ferguson, 134 Cal.App. 41, 24 P.2d 965, that promises of future large returns from investments, when supported by false pretenses as to past or existing facts, were sufficient to constitute a criminal pretense.

[2] We agree that this portion of this instruction should not have been given. However, if it be conceded that under some circumstances it would be sufficiently prejudicial to justify a reversal, especially in a close case, we think this result should not obtain here. The only promise of future action material here was the promise to use this money in a particular way, namely, in getting possession of certain marble machines so they could be put in operation. The appellant testified that Mrs. Ege loaned him the $700 for that purpose and there was, of course, an implied promise that he would use it in that manner. But this was so thoroughly connected and interwoven with false representations of

past and existing facts that the two elements should not now be segregated for the purpose of strictly applying a technical rule of law. The appellant had represented that he and his father had operated these machines, that he had an interest in his father's estate and in these machines which were packed and ready for shipment, that these had been tied up with an attachment, that he had been advised that he could release and secure possession of them for $1,000, that he had $750 of this amount, and that he had already arranged with a man in El Centro for a location for the machines. All of these representations were connected with and were a basis for the promise in question, and they so far outweigh the incidental promise that it cannot reasonably be supposed that the jury could have been misled by the instruction, or that it actually decided the issue in the belief that the appellant made a promise which he did not intend to keep, while refusing to believe that the false representations had been made.

[3] It is next urged that the court erred, in another instruction, in referring to the written receipt which the appellant gave to Mrs. Ege as "a false token". It is argued that this was a genuine receipt and therefore not a false token within the meaning of section 1110 of the Penal Code (citing People v. Carter, 131 Cal.App. 177, 21 P.2d 129.) The court, in this instruction, was not referring to a false token or writing as a substitute for testimony or evidence otherwise required, as provided for in section 1110, but was merely saying that this memorandum was one of the things that could be considered as a corroborating circumstance. No attempt was made to use the memorandum for the purpose suggested in section 1110 and the court did instruct the jury that a conviction could not be had in this case except upon the testimony of two witnesses or of one witness together with corroborating circumstances. The appellant frankly admits in his brief that the matter here complained of would not justify a reversal.

Finally, complaint is made of a portion of an instruction which reads: "On the other hand, of course, if you do not find her testimony is true, you will have to rely on circumstantial evidence and if that is insufficient, you will have to find him not guilty."

[4] This was erroneous and while at first blush it might seem prejudicial, as telling the jurors that even though they did not believe the testimony of the prosecuting witness they could convict upon circumstantial evidence alone, it is unreasonable to believe that it was so understood by the jury, or that the verdict was based upon such a rule of law. This was a portion of a long instruction in which the court referred to the attitude of Mrs. Ege on the witness stand and to a portion of her testimony, in which she was obviously trying to protect the appellant, in the course of which she had made one statement which was proven to be untrue. In telling the jury that it might believe portions of this witness' testimony even though it disbelieved other portions, the court stated that if the jury believed, in the light of the other circumstances, this witness' testimony with respect to the manner in which the appellant obtained this money, it could accept that portion of her testimony and convict the defendant. The statement here complained of then followed. Obviously, the court intended to say that if the jury did not believe the material portions of the testimony of this witness there would be nothing left but circumstantial evidence, which was insufficient, and it would then be necessary to find a verdict of not guilty. While the language used is capable of a different construction it plainly appears that such was not intended since the court, in the preceding sentence, had stated that a conviction required both the acceptance of the story of this witness and a consideration of the surrounding circumstances. Moreover, in the preceding instruction, the court had fully gone into the matter of corroborating circumstances and had told the jury that corroborating circumstances alone were not enough upon which to convict, that the testimony of Mrs. Ege, standing alone, would also be insufficient, and that a conviction could not be had unless the making of the false pretense was proven both by her testimony and by corroborating circumstances.

While these errors might well be prejudicial in a close case, we are unable to hold that they justify a reversal, under the circumstances here appearing, in the light of the duty placed upon us by section 4½ of article VI of the Constitution. The guilt of the appellant was established by overwhelming evidence and, in fact, rather clearly appears from his own testimony. He admitted so much and his testimony was so obviously unreliable in connection with the few matters concerning which there was any conflict that it is unbelievable that the jury could have been misled by any error in the instructions, or that these could have affected the result. To suppose that any other verdict was possible would be to question not merely the intelligence but the integrity of the jurors.

The judgment is affirmed.

I concur: GRIFFIN, J.

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40 Cal.App.2d 393

DOUGLASS v. CRABTREE et al.
HAWKS v. SAME.

Civ. 2580.

District Court of Appeal, Fourth District, California.

Aug. 14, 1940.

Appeal and error 🔑787

Where nearly seven months elapsed after the filing of notice of appeal and no transcript was filed and certificate of the clerk of the superior court showed that no proceedings were pending in the trial court for the settlement of a bill of exceptions or a transcript on appeal, and that the time within which to institute proceedings for the settlement of the bill of exceptions or a transcript on appeal had expired, appeal was dismissed.

◆

Appeal from Superior Court, Fresno County.

Action by Leslie L. Douglass, Jr., a minor, by his guardian ad litem, Leslie Douglass, consolidated with an action by A. S. Hawks, against J. S. Crabtree and others. From adverse judgments, defendants appeal. On motion to dismiss the appeal taken in each action.

Appeal dismissed.

Hoge, Pelton & Gunther, of San Francisco, and Ray W. Hays, of Fresno, for appellants.

Glenn M. Devore and Mildred Kluckhohn, both of Fresno, for respondents.

BARNARD, Presiding Justice.

These two actions were consolidated for trial and the respondents have moved to dismiss the appeal taken in each action.

No transcript has been filed in this court although nearly seven months have elapsed since the notice of appeal was filed. It appears from the certificate of the clerk of the superior court that notice of appeal was filed on January 16, 1940, that no proceedings are pending in the trial court for the settlement of a bill of exceptions or a transcript on appeal, and that the time within which to institute proceedings for the settlement of a bill of exceptions or a transcript on appeal has expired.

The motion is granted and the appeal is dismissed.

I concur: GRIFFIN, J.

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40 Cal.App.2d 469

MEANS v. MEANS.

Civ. 2710.

District Court of Appeal, Fourth District, California.

Aug. 19, 1940.

Hearing Denied Oct. 17, 1940.

1. Divorce 🔑2

Laws of the state of Wisconsin under which divorce proceedings were taken governed validity of divorce.

2. Divorce 🔑320

Where plaintiff obtained, in Wisconsin, a divorce judgment containing provision that it should be effective only in accordance with the Wisconsin statutes which provide that a divorce judgment does not become effective until expiration of a year from its entry, and thereafter plaintiff moved to California, a marriage entered into by plaintiff in Arizona within less than one year after entry of the Wisconsin divorce judgment was void. St.Wis.1939, §§ 245.04, 247.37.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Divorce action by Lillian Mae Means against Edward R. Means, wherein defendant filed a cross-complaint seeking an annulment. From a judgment for defendant on his cross-complaint, plaintiff appeals.

Affirmed.

Claude L. Chambers, of San Diego, for appellant.

Hervey & Holt, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a decree of annulment.

On March 9, 1933, the plaintiff was granted a judgment of divorce from her then husband in the state of Wisconsin. Shortly thereafter she came to San Diego to live with her mother. On December 31, 1933, she and the defendant went to Arizona where a marriage ceremony was performed after which they returned to San Diego, where they have since resided. In May, 1939, the plaintiff filed an action for divorce against the defendant and he filed an answer and a cross-complaint, through which he sought to have this Arizona marriage annulled. After a trial the court found that the plaintiff's previous marriage had not been dissolved at the time of her marriage to the defendant and a judgment and decree was entered annulling the latter marriage, from which judgment the plaintiff has appealed.

The question presented is as to the effect of the judgment procured by the appellant in Wisconsin. The appellant thus states the question: "Did the judgment of divorce * * * completely dissolve the marriage relation existing between the parties?" That judgment read, in part, as follows:

"It is hereby ordered, adjudged and decreed that the bonds of matrimony heretofore subsisting between the plaintiff and the defendant be and the same are hereby dissolved, and the parties forever freed from the obligations thereof;

"Provided, however, that this Judgment in so far as it determines the status of the parties hereto shall be effective only in accordance with the provisions which the Wisconsin Statutes in such cases made and provided, and

"Provided, further that neither of the parties hereto, shall be competent to marry until one (1) year from and after the date of entry of this Judgment."

The appellant contends that the entry of this decree completely severed and dissolved the marriage relation existing between the parties to that action; that the reference in the decree to the provisions of other Wisconsin statutes is a reference to section 245.04 of the revised statutes of that state which provides that if any person residing and intending to continue to reside in that state goes into another state or country and contracts a marriage which is prohibited and declared void by the laws of Wisconsin such marriage shall be null and void in that state; and that the provision in the decree that neither of the parties should be competent to marry within one year has no extra-territorial effect.

In commenting on a former statute of this state which purported to forbid a remarriage within a year after a marriage had been absolutely dissolved, the Supreme Court said, in Estate of Wood, 137 Cal. 129, 69 P. 900, 901: "That the legislature had power to provide for the rendition of a decree of divorce by a court which should not be absolute for the period of one year after its rendition, we have no doubt, but that the legislature has failed to so provide by section 61, or even attempted so to do, we also have no doubt."

The Wisconsin judgment here in question purports to render a decree of divorce which is not to be absolute until the expiration of a year. In the same sentence which provides that the bonds of matrimony are dissolved it is provided that this judgment, in so far as it affects the status of the parties, shall be effective only in accordance with the provisions of the statutes of that state, and further provides that neither of the parties shall be competent to marry until the expiration of one year. Conceding that the last-mentioned provision could have no extra-territorial effect if an effective divorce was otherwise granted, the other provision making the judgment effective only in accordance with the state statutes is still applicable and must be given effect. Among those statutes is section 247.37 of the statutes of that state, as in effect at the time this judgment was entered. This section provides, in brief, as follows: (1) When a judgment or decree of divorce from the bonds of matrimony is granted, so far as it affects the status of the parties, it shall not be effective until the expiration of one year from the date thereof (with certain exceptions not material here). (2) So far as said judgment or decree affects the status of the parties the court shall have power to vacate or modify the same upon its own motion. (3) It shall be the duty of every judge who shall grant a judgment or decree of divorce to inform the parties that the judgment so far as it affects the status of the parties, will not become effective until one year after it is granted. (4) Such judgment or decree may be reviewed by an appeal taken within one year from the date it is granted, and such a judgment shall become final and conclusive without further proceedings at the expiration of a year unless an appeal has been taken or unless otherwise ordered.

The judgment here in question not only derived its power and effect from the statutes of that state but it was particularly provided therein that it should not become effective except as provided for in those statutes. These provisos were a part of the judgment and expressly limited the other language used. Under the language of the statutes and of the judgment, an absolute divorce was not granted at the time the judgment was entered and the judgment did not become effective, in so far as changing the status of this appellant to that of a single woman is concerned, until the expiration of a year from the entry of the judgment.

Similar statutes of the state have thus been interpreted by the supreme court of Wisconsin. While these statutes have since been amended these amendments have affected nothing which is material here. In White v. White, 167 Wis. 615, 168 N.W. 704, 706, the court said: "Until at least the year had gone by from the entry of the judgment in this case on August 5, 1916, the parties hereto were still bound by the marital tie. Hiller v. Johnson, 162 Wis. 19, 154 N.W. 845. Until such year elapsed, there was in existence no absolute judgment of divorce and, consequently, no absolute severance of the marital relationship." And also: "It is evidently the declared purpose and policy of these statutes that until such year has passed the court still has absolute control, and up to the last moment, over the question whether the party seeking a divorce is entitled thereto, and that which has been granted conditionally by the court may be forfeited by the one to whom thus granted by his violation of the conditions attached thereto by law."

In Hiller v. Johnson, 162 Wis. 19, 154 N.W. 845, 846, in speaking of the effect of the statute, it is said: "Mrs. Hiller at the time of the trial for all purposes of giving testimony was still the wife of the plaintiff, notwithstanding the decree of divorce had been entered a few weeks previously. Cases decided under former statutes where the judgment became absolute from the date of its entry can have no bearing upon the question here presented."

In Ex parte Soucek, 7 Cir., 101 Fed.2d 405, 406, the court said: "By the laws of Wisconsin, a decree of divorce is not effective until the expiration of one year from the date of the granting of such decree, and if a party to an action for divorce marries before the expiration of one year from the date of the granting of the divorce, such marriage is null and void, and such person cannot evade the force of these laws by marrying in another state or country."

The appellant seeks to distinguish that case on the ground that there the party in question, after marrying another person in Canada, returned almost at once to Wisconsin to live. But the important thing here is not the existence of a statute forbidding another marriage within a year but the fact that the statute of that state, which permits such a judgment to be entered, provides that the same, in so far as it affects the status of the parties, shall not be effective for a year after it is entered.

[1, 2] The question here is not one of giving extra-territorial effect to the Wisconsin statute prohibiting another marriage within one year. The controlling matter is whether or not the appellant was divorced from her former husband at the time of her purported marriage to the respondent. Her divorce proceedings were taken under the laws of Wisconsin and those laws must govern. Since her divorce decree had not become effective in Wisconsin in so far as it affected her status as a married woman at the time she went through the marriage ceremony with the respondent, it was not elsewhere effective for this purpose and she was not then divorced from her former husband. The court's findings that at the time in question the appellant was a married woman and had a husband then living, that no judgment or decree of divorce had then become effective, and that her purported marriage with the respondent was null and void are supported by the evidence and by the law.

The judgment is affirmed.

I concur: GRIFFIN, J.

40 Cal.App.2d 451

MILLER et al. v. PACIFIC FREIGHT LINES et al.

Civ. 2393.

District Court of Appeal, Fourth District, California.

Aug. 19, 1940.

1. Appeal and error ⚷931(1), 1010(1)

Reviewing court on appeal will indulge all presumptions, intendments, and inferences in favor of judgment of trial court and resolve all conflicts and discrepancies in the evidence in support of the judgment, and, where substantial evidence directly or indirectly supports trial court's findings, judgment will be affirmed.

2. Appeal and error ⚷846(5)

Where findings of trial court are waived, reviewing court will draw all reasonable inferences from the evidence and will construe it favorably in order to support the judgment and will presume that trial court found all facts necessary to support the judgment.

3. Appeal and error ⚷931(1)

On appeal from judgment for defendant in action arising out of intersectional collision, reviewing court was required to presume that lower court, trying case without jury, gave credence to defendant's testimony supporting implied finding that plaintiff was contributorily negligent.

4. Automobiles ⚷244(44)

In motorist's action to recover damages sustained in intersectional collision with truck, evidence sustained judgment for truck driver on ground of motorist's contributory negligence in attempting to pass truck on left side of highway within limits of intersection, in violation of the Vehicle Code. Vehicle Code, §§ 525, 530, St.1935, pp. 181, 183.

5. Appeal and error ⚷910

On appeal from judgment for defendant truck lines in action arising out of intersectional collision between automobile and truck, reviewing court could not, under the evidence, assume that truck driver violated provision of Vehicle Code requiring that, when body of a vehicle projects 32 inches or more to the left of the center of the steering wheel, such vehicle must be equipped with an automatic signaling device. Vehicle Code, § 545, as amended, St.1937, p. 1607.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Alvin Miller and another against Pacific Freight Lines, a corporation, and another, to recover damages sustained in automobile accident. From an adverse judgment, plaintiffs appeal.

Affirmed.

Claude L. Chambers, of San Diego, for appellants.

Luce, Forward, Lee & Kunzel, Fred Kunzel, and Herbert Kunzel, all of San Diego, for respondents.

GRIFFIN, Justice.

This action for damages arises out of an automobile accident which occurred on the 17th day of November, 1938, in the city of San Diego. The court, sitting without a jury, rendered judgment for respondents. Findings were waived.

The collision occurred when the respondent driver, Dotty, who was driving for respondent Pacific Freight Lines, a corporation, was making a left turn with his Ford V-8 truck at the intersection of Island and Twelfth streets. Twelfth street runs in a general northerly and southerly direction and Island street runs east and west. The streets are 52 feet in width respectively and intersect approximately at right angles. There were turning buttons on the north and south sides of the intersection. There is a marked center line of Twelfth street with marked cross-walks at the intersection.

The evidence shows that Dotty had been proceeding north on Twelfth street and had started to make a left turn from a point somewhere near the center of Twelfth street and that the appellant Alvin Miller, who was also driving north on Twelfth street, attempted to overtake and pass the truck on its left side somewhere near or within the limits of the intersection. There was some evidence that Miller's car was traveling on the west or left side of Twelfth street in making this maneuver. Although the evidence is conflicting, there is testimony to the effect that Miller's car struck the truck near its left front wheel in the southwest quarter of the intersection and then his car continued through the intersection, striking a car parked on the west side of Twelfth street and north of Island street and then continued across Twelfth street, striking the curb on the east side of Twelfth street.

[1] At the outset, we are confronted with the well-established rule that all presumptions, intendments and inferences are in favor of the judgment of the trial court and all conflicts and discrepancies in the evidence must be resolved on appeal in support of the judgment of the trial court. Where there is substantial evidence directly or indirectly tending to support the findings of the trial court the judgment must be affirmed. Dreyer v. Cole, 210 Cal. 339, 341, 292 P. 123; Ray v. Kennedy, 24 Cal.App.2d 583, 585, 76 P.2d 147.

[2] Where findings are waived, all reasonable inferences will be drawn from the evidence and the most favorable construction will be drawn therefrom to support the judgment. It must be presumed by the reviewing court that the trial court found all facts necessary to support the judgment. Stewart v. Langer, 9 Cal.App. 2d 60, 61, 48 P.2d 758; High v. Bond, 107 Cal.App. 153, 154, 290 P. 145; Benjamin Moore & Co. v. O'Grady, 9 Cal.App.2d 695, 698, 50 P.2d 847. It then follows that the judgment must be affirmed if there is any substantial evidence upon which an implied finding can be based that the respondent driver Dotty was not guilty of negligence, or if there is any substantial evidence to support a finding that appellant Alvin Miller was guilty of contributory negligence.

Appellants argue that respondents were negligent in (1) violating sections 540 and 544 of the Vehicle Code, St. 1935, p. 185, in not making a proper left turn and signal for the turn; (2) violating section 545 of the Vehicle Code in not maintaining a mechanical signal device on the truck; and (3) violating section 674 of the Vehicle Code in not maintaining a rear view mirror on the truck. Appellant Alvin Miller's testimony indicates that when he arrived at the intersection of Island and Twelfth streets respondents' truck tried to make a left-hand turn from the right lane position and hit his car and knocked it into the northwest corner of the intersection and also that in negotiating this turn he did not give any signal, either by hand or mechanical device, of his intention so to do.

In respect to appellants' first contention, Alvin Miller's testimony indicates that just before arriving at the intersection he was driving north on the east half of Twelfth street near the white center line traveling between 20 and 25 miles per hour and that respondents' truck was to his right in the outer or right-hand lane and as he "got at the intersection" the truck driver, who was in a like position in the outer lane, without making a signal or sounding a horn, tried to make a left-hand turn from the right lane position and ran into appellants' car and that at the time of the collision both car and truck were in the intersection. This testimony was corroborated to some extent by other witnesses.

Respondent Dotty testified that about the middle of the block (prior to approaching Island street) he was on the left-hand side of the east half of Twelfth street and continued there next to the center line; that he was following along the center line within a foot or so; that as he reached the south curb line of Island street his truck was in that same position; that when he entered the intersection he was right alongside the button and cars passed him on his right-hand side; that he came up to the button about 20 miles per hour; that he slowed down to about 15 miles for the turn and that he had one hand on the steering wheel and was leaning out the door making a signal; that he got about two-thirds of the turn made and appellant crashed into him and hit the front end of the box of the truck and the front wheel; that appellants' car went on after it hit him and hit a Buick parked on the northwest corner; that he was about 100 feet from the intersection when he put his hand out for a left-hand turn signal; that he imagined he was about a third of the way into the intersection before he turned his wheels to the left; that he was about two-thirds completed with his turn when the impact occurred; that he looked into his rear-view mirror before he started to make the turn but did not notice anything coming; that he would say the appellants' car was going at least 40 miles an hour at the time of the impact.

Appellants' own witness (Robinson), who was riding in appellants' car, testified that the truck was traveling "very close to the center line" when he first saw it; that he first saw the truck when appellants' car was about "a couple of lengths away" from the intersection.

Another witness (West) testified that he saw the truck "making preparation to turn"; that he did not see a signal; that the truck was close to the button in the center of Twelfth street and that at that time two cars passed to the right of the truck; that appellant driver cut to the left of the button in the center of Twelfth street and at that time the truck was ten feet into the intersection; that the impact occurred near the center of Island street and about six feet west of the center of Twelfth street.

[3, 4] A police officer identified certain tire marks and established the point of impact at about the same location described by the witness West. Notwithstanding the conflict, there is sufficient evidence to show that appellant Alvin Miller attempted to pass the truck on the left side of the highway within the limits of the intersection, in violation of sections 525 and 530 of the Vehicle Code (1939). Linde v. Emmick, 16 Cal.App.2d 676, 61 P.2d 338. The evidence, if given credence by the trial court, and we must presume that the trial court did so credit the evidence, supports an implied finding of contributory negligence on the part of Miller.

There is conflicting evidence as to whether respondent Dotty gave a proper signal in accordance with sections 540 and 544 of the Vehicle Code before turning to the left. This conflict must be resolved in favor of respondents. It was admitted that respondents had no mechanical signal device or arm upon the truck at the time of the accident. It appears that sometime prior thereto such a device was on the truck but portions of it had been broken off and it was not working at the time. Section 545 of the Vehicle Code, as amended by St.1937, p. 1607, requires that "when the body of a vehicle or the body or load on any vehicle in a combination of vehicles projects thirty-two inches or more to the left of the center of the steering wheel * * * then such vehicle * * * must be equipped with and said signals must be given by such a * * * device".

[5] Appellant Dotty testified, and his testimony is corroborated by one other witness, that prior to the accident he and a police officer measured the distance between the center of the steering wheel and the left-hand foremost projection of the body of this particular truck and found it to be 31½ inches. There is no testimony in the record to indicate that an arm signal could not have been plainly visible both to the front and rear of the truck. We cannot assume that there was a violation of section 545 of the Vehicle Code.

Appellants' last contention that respondents did not maintain a rear-view mirror on the truck is not supported by the evidence. The claimed fact that respondent driver did not see appellants' car just prior to the accident is not sufficient evidence to warrant the conclusion that the truck was not equipped with a rear-view mirror. Even though there is evidence supporting appellants' contention that respondent truck driver was guilty of negligence, in view of our conclusion that the evidence would support a finding that appellant driver was guilty of contributory negligence, the judgment must be and is affirmed.

I concur: BARNARD, P. J.

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40 Cal.App.2d 517

MacDONALD v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY.

Civ. 11431.

District Court of Appeal, First District,
Division 2, California.
Aug. 22, 1940.

1. Contempt 🔑80

A party to an action cannot ask the aid and assistance of court in hearing his demands while he stands in an attitude of contempt to the court's legal orders and processes.

2. Contempt 🔑80

One who is not in contempt, but makes a timely application to be relieved from an order which if allowed to stand may in future become the basis of a contempt proceeding, is entitled to have the application heard and determined.

3. Divorce 🔑262

Where husband was in default in monthly payments due wife pending trial of divorce action, pursuant to order of trial court, but was not in contempt of court, husband was entitled to have heard and determined his motion for an order modifying the order requiring the monthly payments, and the trial court erroneously divested itself of jurisdiction to entertain the motion.

Mandamus proceeding by Ian L. MacDonald against the Superior Court of the State of California in and for the County of San Mateo to require the respondent to hear a certain motion in a divorce action.

Peremptory writ of mandate ordered to be issued.

Edmund G. Brown and Harold C. Brown, both of San Francisco, for petitioner.

Frank V. Kington, of Redwood City, for respondent.

STURTEVANT, Justice.

This is an application for a writ of mandate. Facts material to the application are as follows: On July 19, 1939, the petitioner commenced an action to obtain a divorce from his wife, Bessie E. MacDonald. The action was commenced in San Francisco, but on application of the defendant an order was entered transferring the case to the county of San Mateo. On September 25, 1939, the Superior Court of the State of California, in and for the county of San Mateo, made an order directing the petitioner to pay to the defendant $50 per month as maintenance pendente lite, the further sum of $15 on account of costs, and $50 on account of attorney's fees for defendant. At all times herein mentioned the defendant had and has an income of $250 per month. On January 22, 1940, the petitioner served and filed a notice of motion for an order modifying the previous order for maintenance, costs and counsel fees, and in support thereof he served and filed an affidavit. On March 4, 1940, said motion came on for hearing. At that time petitioner was present and represented by his counsel. The defendant was present and represented by her counsel. The trial court refused to countenance, entertain or hear the petitioner's motion, stating that the petitioner had not complied with the order dated September 25, 1939. The record does not disclose that at any time or at all any proceedings have been had charging the petitioner as being in contempt or that any order or judgment to that effect has been entered.

The record does not disclose that the petitioner has paid any part or portion of the sums specified in the order dated September 25, 1939. The affidavit above mentioned tendered in support of petitioner's motion set forth that the petitioner has not been employed since September 13, 1939, although he has, on numerous occasions, attempted to obtain work and employment; that the defendant is steadily employed on a salary of $200 a month and has additional income in the sum of $50 per month; that the petitioner is in a highly nervous and excited condition and his doctor has recommended rest; that petitioner is willing to comply, and will, as soon as he is able, comply with the order made September 25, 1939.

The nature of the modification asked by the petitioner is stated by him as follows: "The said order now reads that said plaintiff shall pay to said defendant the sum of $50 per month, beginning on said 25th day of September, 1939, and the further sum of $50 on account of attorney's fees; and your said plaintiff desires that said order be modified by eliminating therefrom any further payments in the sum of $50 per month until the trial of said action." In other words, the request of the petitioner is in effect to limit his obligations before the trial is had to the payment of $50 as attorney's fees, and $200 as maintenance of the defendant.

[1, 2] From the foregoing facts it is obvious that the petitioner may be said to be in default, but it is equally clear he may not be said to be in contempt. No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and processes. Weeks v. Superior Court, 187 Cal. 620, 622, 203 P. 93; Schubert v. Superior Court, 109 Cal.App. 633, 293 P. 814; Funfar v. Superior Court, 107 Cal.App. 488, 290 P. 626. However, it is settled law that one, who is not in contempt but through an abundance of caution makes a timely application to be relieved from an order which, if allowed to stand, may in the future become the basis of contempt proceedings, is entitled to have such application heard and determined. Manriquez v. Superior Court, 199 Cal. 749, 251 P. 1118; Isakson v. Superior Court, 130 Cal.App. 180, 19 P.2d 840; Archer v. Superior Court, 81 Cal.App. 742, 254 P. 939.

[3] The trial court confused the foregoing rules. The confusion resulted in the court erroneously divesting itself of jurisdiction. Such facts clearly support the application now before us. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978.

The defendant's attorney has filed an answer "for the respondents." In it they admit all of the foregoing propositions of law and fact. But they set forth facts and figures showing or tending to show that the defendant needs the benefit of all of the moneys allowed to her by the terms of the order dated September 25, 1939. Be that as it may, such issues are the very ones the plaintiff sought to have heard and determined by the motion which he sought to have heard and determined and which the trial court refused to hear.

Let a peremptory writ of mandate issue as prayed.

I concur: NOURSE, P. J.

40 Cal.App.2d 446

PARSLEY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12678.

District Court of Appeal, Second District, Division 2, California.
Aug. 19, 1940.

1. Courts 🔑200½

Where property is claimed by executor in his individual capacity, superior court sitting in probate is vested with jurisdiction to determine validity of such claim upon settlement of final account.

2. Executors and administrators 🔑469(1)

The superior court sitting in probate has jurisdiction to determine against executor the amount of money or property in his hands for purpose of charging him therewith, and, in determining such question, the court may also determine the issues necessarily incidental thereto.

3. Executors and administrators 🔑469(1)

The superior court has general jurisdiction, and, in any question arising in administration of estate which it has been expressly authorized to decide, it may invoke the full equitable and legal powers with which the superior court is invested.

4. Husband and wife 🔑273(1)

Where wife's estate is administered, superior court sitting in probate may determine what is separate property of deceased wife and what is community property.

5. Husband and wife 🔑273(1)

The right of husband to community property as community survivor should be determined in probate proceeding instituted by deceased wife's sister who qualified as executrix, and any possible controversy relative to such property could be adjudicated in such proceeding, and prosecution of civil action by husband to determine his right to possession of such property was not necessary. Probate Code, §§ 300, 571, 613, 615, 920, 921, 927.

Prohibition proceeding by Pearl Aldana Parsley against the Superior Court of the State of California in and for the County of Los Angeles, and all the Judges thereof.

Writ of prohibition issued.

Norbert Savay, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, and Thomas W. Cochran, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Petitioner, Pearl Aldana Parsley, requests a writ of prohibition against the respondent court to stay the trial of an action. Petitioner is the executrix of the estate of her decedent sister, Lucile Melissa Hare, who deceased January 12, 1938. Petitioner was qualified as the executrix of the estate of said deceased on June 14, 1938, and as such executrix took into her possession all of the assets of said estate. In order to quiet title in himself and to establish property as community property and to recover personal property and to procure an accounting, the surviving, husband of said Lucile, Everett Franklin Hare, filed his action in the superior court of Los Angeles county on the 8th day of December, 1938. In his first complaint he sued the petitioner both in her capacity as executrix of the estate and individually, and he joined a sister and brother of petitioner, to-wit, Theresa Irene Parsley and Joseph Arthur Parsley. After successive demurrers had been sustained, said Hare filed his third amended complaint, omitting therefrom petitioner's name as executrix. The said third amended complaint, after setting out that the decedent bequeathed to plaintiff all of the separate property of decedent to enjoy during his lifetime, including the rents, issues and profits of certain real property and the income from personal property, which was for the support and maintenance of said plaintiff, alleges that plaintiff's deceased wife, pursuant to a mutual agreement between herself and defendants, entrusted certain personal property to defendants to invest for the benefit of decedent, to be accounted for upon the request of said decedent, and the said decedent subsequently turned over other property to defendants to be similarly invested, the identity and amount of which is unknown to plaintiff; that part of same was the separate property of decedent, part of it was community property of decedent and plaintiff; that several years prior to the death of decedent, defendants had in their possession and under their control certain real and personal property, some of which was the separate property of decedent and some was the community property of plaintiff and decedent; that upon the death of decedent said property became and now is the property of plaintiff; that plaintiff is entitled to the possession thereof; that although decedent left a will, said will did not attempt to dispose of any community property of decedent and plaintiff.

Plaintiff alleged that he had requested an "accounting from defendants of certain real and personal property and the rents, issues and profits therefrom". The defendants and each of them have refused to render such an accounting.

Notwithstanding that the said estate of decedent would not be in a condition for distribution on or about the 3rd day of July, 1940, said plaintiff caused his said action to be set for trial on the first day of May, 1940, before said court.

In view of petitioner's plan to cause a distribution of said estate to the parties entitled thereto, on or about April 15, 1940, petitioner filed her motion in said court to have said civil action continued to July 3, 1940. Her motion was based upon the ground that probate proceedings were pending in said court, which petitioner expected to be completed and which would adjudicate the issues between the parties. The motion was supported by an affidavit. The court granted a continuance until May 17, but declined to continue the case until said July 3rd, notwithstanding petitioner argued that the court had no jurisdiction to proceed with the action.

The only pleading filed to said petition for a writ of prohibition is a general demurrer, which alleges that said petition does not state facts sufficient to entitle petitioner to the writ of prohibition prayed for.

From the foregoing resume of the petition it is made to appear that all of the estate of the decedent is in the possession of the executrix of her said estate. All of her property is subject to the possession of said executrix and to the control of the superior court for the purposes of administration, sale or disposition. Prob.Code, sec. 300. It is the duty of her executrix to possess the property of decedent and to collect all debts owing decedent or the estate. Prob.Code, sec. 571. If the surviving spouse had any suspicion that any of the defendants had embezzled, concealed, smuggled or fraudulently disposed of any of the property of said decedent, upon his petition the judge sitting in probate would have cited the suspected person for examination "on oath upon the matter of such complaint". Prob.Code, sec. 613.

Also, it is provided that the judge sitting in probate, may upon the complaint of the executrix cite any person who has been entrusted with any part of the estate of decedent to appear before said court and require such person to render a full account on oath of any moneys, accounts, or other property which have come into his possession. Prob.Code, sec. 613. If it were the intention of plaintiff Hare to procure an accounting from the codefendants of executrix, or to have the estate recover any asset of decedent's estate in their possession, it is the conventional proceeding to request the executrix, under such circumstances, to proceed against such person; and upon her failure to do so, the next step in the proceeding to conserve the estate would have been to cite the executrix for nonfeasance and for causing the dissipation of said estate. Prob.Code, sec. 615. The executrix is chargeable with all of the estate of the decedent which comes into her possession. Prob.Code, sec. 920. Whenever any interested person applies to the court to do so, he must cause the executrix to render a "verified account showing the amount of money received and expended * * * and all other matters necessary to show the condition of the estate". Prob.Code, sec. 921. Had the plaintiff in said action caused or permitted the executrix to file her account in said estate, and if it had appeared from such account that said executrix had not included moneys or assets of the estate which had been a part of the property of the decedent or the community property of decedent and plaintiff, upon a hearing of such account it would have been proper to examine the executrix touching the effects of decedent and the disposition thereof. Sec. 927, Prob. Code.

[1, 2] From an examination of said provisions of the Probate Code it clearly appears that not only is the executrix charged with the duty of taking possession of all of decedent's property and of collecting all sums due the decedent or her estate and of accounting therefor to the court, but the code has provided ample safeguards to all persons interested in the estate of decedent by authorizing such parties to require the executrix to make an accounting and for such interested parties to contest the account so rendered. Where property is claimed by an executor in his individual capacity, the superior court sitting in probate is vested with jurisdiction to determine the validity of such claim upon the settlement of the final account. Bauer v. Bauer, 201 Cal. 267, 256 P. 820. The superior court sitting in probate has jurisdiction to determine against the executor the amount of money or property in his hands for the purpose of charging him therewith, and in determining that question the court may also determine the issues necessarily incidental thereto. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512.

[3, 4] The superior court has general jurisdiction, and in any question arising in the administration of an estate which it has been expressly authorized to decide it may invoke the full equitable and legal powers with which the superior court is invested. Estate of Klepsch, 203 Cal. 613, 265 P. 214; Silva v. Santos, 138 Cal. 536, 541, 71 P. 703; Johnson v. Canty, 162 Cal. 391, 123 P. 263. Moreover, where the wife's estate is administered the superior court sitting in probate may determine what is the separate property of the decedent and what is the community property. Estate of Clark, 190 Cal. 354, 212 P. 622.

[5] The prosecution of a civil action by the surviving husband of the decedent herein to determine his right to possession of any or all property of the estate of decedent is altogether unnecessary. It merely adds volume of work without the accrual of any advantage. If all of the community property goes to said Hare, as the community survivor, it can be so decreed in said probate proceeding, in which any possible controversy relative thereto may be adjudicated.

Upon the authorities cited and the reasons given it is ordered that a writ of prohibition be directed to said superior court commanding it to desist from the trial of said civil action No. 434518, and to make no order therein prior to the final disposition of the estate of Lucile Melissa Hare except an order of dismissal.

We concur: WOOD, J.; McCOMB, J.

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40 Cal.App.2d 494

BLAIR v. NEW YORK LIFE INS. CO.

Civ. 11298.

District Court of Appeal, First District,
Division 1, California.
Aug. 21, 1940.

Rehearing Denied Sept. 20, 1940.
Hearing Denied Oct. 17, 1940.

1. Insurance 🔑147(1)

While laws of one state may determine the interpretation of one clause of an insurance policy, and the laws of another state govern the interpretation of another clause, the laws of two states upon a specified clause presented for interpretation, if inconsistent, may not jointly control.

2. Insurance 🔑136(2)

The delivery of policy usually completes a contract of insurance.

3. Insurance 🔑125(2), 147(3)

The law of place of performance of an insurance contract controls as to its legal construction and effect, but the law of place where contract was made governs on questions of execution and validity of contract unless terms of contract provide otherwise, or circumstances indicate a different intention.

4. Insurance 🔑608

The intention of parties to a life policy providing for disability benefits, as gathered from attending circumstances, was controlling in determining place of trial of action to recover benefits accruing under policy and the law governing such action.

5. Contracts 🔑276

Liability for breach of contract partly performed in one state and made and partly performed in another is fixed by laws of state wherein breach occurred.

6. Insurance 🔑147(3)

Where plaintiff, who was insured under life policy, which provided for disability benefits and which was issued in New York and delivered to plaintiff in Washington in 1927, moved to California in 1930, and premiums were presumably paid from California, and disability benefits were paid for four years in California, plaintiff's good faith in claiming that California law governed the policy could not be attacked on theory of change of residence.

7. Insurance 🔑147(3)

Where life policy, which provided for disability benefits, was issued in New York and delivered to insured in Washington, and policy provided that premiums could be paid at insurer's home office in New York, or to an authorized agent, and parties to contract did not mutually agree that laws of New York or Washington should prevail relative to contract, and insured paid premiums in Washington while residing in that state, performance of terms of contract was partly in New York and partly in Washington, and law of place where contract was made would, generally, prevail as to interpreting provisions of policy. Civ.Code, § 1646.

8. Insurance 🔑147(3)

Where performance of terms of contract for disability insurance was partly in New York and partly in Washington, insurer "waived" the law of Washington as controlling in insured's action on contract in California courts by insurer's continuous acceptance of premiums from California, to which state insured moved after issuance of policy, and by insurer's payment of disability benefits in California, and making a loan to insured upon security of value of policy, without surrender thereof, during period that insured lived in California, and waiver was not one of jurisdiction, but of right to apply Washington law to California action. Civ.Code, § 1646.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

9. Insurance 🔑400

After a stipulated period, evidence based on false statements, even though fraudulently made, was barred as a defense to insured's action for disability benefits under provisions of life policy, unless by terms of policy fraud was expressly or impliedly excepted from effect of incontestability provision.

10. Insurance 🔑400

In insured's action in California for disability benefits under life policy issued in New York and delivered to insured in Washington in 1927, where insurer waived right to claim that action was governed by Washington law, and policy provided that it should be incontestable after two years from date of issue except for nonpayment of premium, and except as to provisions concerning disability and double indemnity benefits, insurer's evidence that statements in insured's application were fraudulent and untrue, that insured knew them to be untrue, and that insurer was induced by statements to issue policy, was inadmissible. Civ.Code, § 1646.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Helen P. Blair against the New York Life Insurance Company to recover disability benefits accruing under a life insurance policy providing for disability benefits, wherein defendant filed a cross-complaint. From a judgment for plaintiff defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for appellant.

Edw. C. Purpus, of Los Angeles, for respondent.

WARD, Justice.

This is an action to recover disability benefits accruing under a policy of insurance issued by defendant company on the life of plaintiff, with particular reference to what law governs the interpretation of the two-year incontestability clause in the policy.

Pursuant to a written application made at Tacoma, Washington, on or about September 23, 1927, and in consideration of the payment of the first year's premium, the New York Life Insurance Company issued a policy of life insurance to Helen P. Blair in the amount of $10,000. This amount was subsequently, by amendment, reduced to $8,000 and approximately thirty days later the company executed and issued a policy in that amount in New York, and delivered it to plaintiff in the state of Washington. In addition to life benefits, the policy contained a provision for the payment of disability benefits of $10 for each $1,000 of the face of the policy for each completed month from the commencement of and during the period of continuous total disability. A waiver of the payment of premiums during such disability was also contained in the policy, and provision for restoration of the policy in case of default after such disability.

Plaintiff became disabled in 1929 and the company paid the disability benefits provided under the policy from February 15, 1929, to August 15, 1930. The record does not show the place of such payments but we may assume they were received by plaintiff in the state of Washington, at least until 1930 when she moved to California, where she has since resided. In October, 1932, plaintiff again became totally disabled and from such time until August, 1936, the company paid her the designated disability income payments. In the meantime, in December, 1932, the company made a loan to plaintiff upon the security of the value of the policy. In September, 1936, the company notified the insured that it elected to rescind the provisions for disability and double indemnity benefits because it had recently learned that Miss Blair, in her application for the policy, had failed to disclose material facts as to her physical condition. The company further notified her that it recalled its waiver of certain annual premiums and demanded the payment thereof, as well as the return to the company of amounts paid by it as monthly disability income benefits.

In December, 1936, plaintiff filed this action in California to compel defendant company to pay all disability income benefits due since August 15th of that year and all payments that may thereafter become due until such time as her disability ceases. Defendant answered, and cross-complained upon allegations of the falsity of certain statements in the original application for insurance, seeking a rescission of the total and permanent disability provisions of the policy and the return of benefits paid thereunder. Judgment was entered for plaintiff and against defendant, whereupon defendant appealed.

Appellant insurance company contends that the contract of insurance herein was to be performed in New York, and that its provisions are to be interpreted in accordance with the laws of that state. A long list of authorities are cited. These include two unreported cases from the appellate department of the superior court of Los Angeles (Furst v. New York Life Ins. Co., Civ. A-3895; Smith v. New York Life Ins. Co., Civ. A-3788): Monahan v. New York Life Ins. Co., (two cases), D.C., 26 F.Supp. 859; Head v. New York Life Ins. Co., 10 Cir., 43 F.2d 517; Ostroff v. New York Life Ins. Co., D.C., 23 F.Supp. 724; Ostroff v. New York Life Ins. Co., 9 Cir., 104 F.2d 986, and dissenting opinion by Wilbur, J.; New York Life Ins. Co. v. Waterman, 9 Cir., 104 F.2d 990, and concurring opinion by Wilbur, J.; Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 P. 180, 61 P. 99; Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273; Grauer v. Equitable Life Assur. Soc., 167 Misc. 30, 3 N.Y.S.2d 564; Equitable Life Assur Soc. v. Kushman, 276 N.Y. 178, 11 N.E.2d 719; Steinberg v. New York Life Ins. Co., 263 N.Y. 45, 188 N.E. 152, 90 A.L.R. 642; Guardian Life Ins. Co. of America v. Katz, 243 App.Div. 11, 275 N.Y.S. 743.

The further contention is made that if the New York law is not controlling, then the law of the state of Washington, wherein the contract was entered into, governs. In support of this theory, appellant cites Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 P. 1023; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 835, 65 L.R.A. 90; Millis v. Continental Life Ins. Co., 162 Wash. 555, 298 P. 739, and other cases. It is claimed that both states permit an attack for fraud.

There is no specific provision that the policy is to be performed in New York, or that the laws of that state shall govern in a controversy involving the legal interpretation to be placed upon any part thereof. The policy provides that benefits for total disability will be paid "upon receipt at the Company's Home Office" of due proof thereof. In connection with paragraph "Payment of Premiums", the policy reads: "All premiums are payable on or before their due date at the Home Office of the Company or to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. * * *"

[1] While the laws of one state may determine the interpretation of one clause of a policy, and the laws of another state govern that of another clause, it must be conceded that the laws of two states upon a specified clause presented for interpretation, if in anywise inconsistent, may not jointly control. The parties hereto did not mutually agree that the laws of New York or Washington should prevail relative to the contract, as appears in Morrison v. Mutual Life Ins. Co. of N. Y., Cal. Sup., 103 P.2d 963. Civil Code, section 1646, provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made", which means that the place where the contract is made is of importance when the contract does not indicate a specific place of performance.

In the instant case, the primary question to decide is whether or not plaintiff was entitled to the monthly disability benefits. If not, then the company might have been entitled to a return of the amounts paid by it, a cancellation of the total disability provisions of the policy and the return to plaintiff of premiums paid in that connection.

[2, 3] The insured had the privilege of paying the premiums to an authorized local agent, although the home office of the company was their final destination. The evidence shows that the premiums were mailed to New York, but the caption on the back of the policy indicates that it was issued through the "Tacoma Branch". Up to this point, as we construe the policy, it was originally intended to be performed partly in New York and partly in Washington. The first premium was paid in Washington one month prior to the execution by the company of the policy in New York; the policy was thereafter delivered to plaintiff in Washington. The delivery usually completes a contract. Mutual Life Ins. Co. v. Cohen, 179 U.S. 262, 21 S.Ct. 106, 45 L.Ed. 181. The law of the place of performance of an insurance contract controls as to its legal construction and effect, but that of the place where made governs on all questions of execution and validity (Flittner v. Equitable Life Assur. Soc., 30 Cal.App. 209, 157 P. 630), unless the terms of the contract provide otherwise or the circumstances indicate a different intention. In this case, the circumstances do not indicate that in the matter of the interpretation of the contract, the parties intended to be restricted to the laws of the state of Washington, where the contract was consummated by the delivery of the policy.

In the body of the policy, there is a provision that: "This policy is free of conditions as to residence * * * except as provided herein. * * *" We fail to find an excepted condition. Under the terms of the policy, the premiums could be paid at the home office or to an authorized agent in exchange for the company's official receipt signed by a designated officer and countersigned by the agent receiving the premium. Under this provision, the contract was to be performed partly in New York and partly in any other place where the premiums were paid or other necessary business could be transacted.

[4, 5] In recognizing California as the place for the payment of benefits by delivery thereof in this state, defendant waived any right to insist that the Washington law governed. The waiver is not one of jurisdiction, but of the right to apply the Washington law to an action tried in California. The intention of the parties, as gathered from attending circumstances, is controlling in determining the place of trial and the governing laws. Liability for the breach of a contract partly performed in one state, and made and partly performed in another, is fixed by the laws of the state wherein the breach occurred. 17 C.J.S., Contracts, § 12, p. 343. The breach in this case was defendant's refusal to pay further disability income benefits to plaintiff in California.

[6] In the present case we are not dealing with an insured who traveled out of the state of Washington and into another because the law of the second state was more favorable to her legal contentions—a situation that should not be approved; here the plaintiff moved to California in 1930. The premiums were thereafter presumably paid from California. The disability income benefits commenced and were paid approximately two years later, and they continued for four years in Cali-

fornia. The good faith of the plaintiff in this case may not be attacked upon the theory of change of residence. The safest rule to follow is that which upholds the contract. Atchison, Topeka & Santa Fe R. Co. v. Smith, 38 Okl. 157, 132 P. 494, Ann.Cas.1915C, 620.

[7,8] In brief, we hold that performance of the terms of the insurance contract was partly in New York and partly in Washington, and that under such circumstances the law of the place where the contract was made generally prevails; that defendant waived the law of Washington as controlling by its continuous acceptance of premiums from California, its payment of disability benefits here; also the making of a loan to Miss Blair upon the security of the value of the policy, without the surrender thereof, during the period that she lived in California, and, as appears from the record, after her second period of disability had commenced.

As relates to the within case, one question is involved, namely, what is the law of this state relative to the "Incontestability" clause in the policy, which reads as follows: "This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

Appellant company contends that fraud on the part of Miss Blair in connection with statements as to her physical condition, as they appear on her application for insurance, provides the exception as to the policy's incontestability.

In Ostroff v. New York Life Ins. Co., 9 Cir., 104 F.2d 986, an identical "incontestable" clause, with a like direction as to payment of premiums, was in dispute. See, also, New York Life Ins. Co. v. Waterman, 9 Cir., 104 F.2d 990. In the Ostroff case, as in this, the repeated payment of premiums, except as waived, when plaintiff was totally disabled, could have been made under the terms of the policy outside of the state of New York. In that case, 104 F.2d at page 989, the court said: "Without deciding what law would control the interpretation of the incontestability clause if the contract were entirely to be performed in New York, we hold that since the policy is to be performed both in California and New York, and the case concerns the making and not the performance of the contract, the law of California, the place of making of the contract, controls. Cf. 12 C.J. 451." In the same case, 104 F.2d at page 989, the court comments upon Burr v. Western States Life Ins. Co., supra, as follows: "* * * the sole question was the place of performance of payment of the benefits under the policy. The policy was construed as requiring the payment of later benefits claimed at San Francisco because the first payment was required by the policy to be paid there. It is obvious that if the policy had provided for the payment of later benefits at the residence of the insured, the place of performance would have changed as his residence changed."

[9] California has answered the question in Coodley v. New York Life Ins. Co., 9 Cal.2d 269, 70 P.2d 602, involving an identical incontestability clause in another policy issued by the same company. It is conceded by the company that, after a stipulated period, evidence based on false statements, even though fraudulently made, was barred as a defense, unless by the terms of the policy fraud was expressly or impliedly excepted from the effect of the incontestability provision. Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 P. 171, Ann.Cas.1917E, 34; Mutual Life Ins. Co. v. Margolis, 11 Cal.App.2d 382, 53 P.2d 1017.

Had defendant desired to take advantage of the exception provided in the incontestability clause as relates to the facts in this case, it could and should have definitely included such provision in the "Total and Permanent Disability" section of the policy, and had it desired that any controversy relative to an interpretation of this clause should be controlled by the laws of the place of execution of the contract, such provision could easily have been inserted in the policy.

[10] In the trial of this action, in support of its contention that the terms of the contract should be construed in accordance with the laws of the state of New York, or of the state of Washington, appellant offered to prove that certain statements in the application signed by plaintiff were fraudulent and untrue; that plaintiff knew them to be untrue, and that the company was induced by the claimed fraudulent statements to issue the policy. An objection to the offer was sustained. Under the facts of this case, and the holding in Coodley v. New York Life Ins. Co., supra, the ruling was correct.

Stroehmann v. Mutual Life Ins. Co. of N. Y., 300 U.S. 435, 57 S.Ct. 607, 81 L.Ed. 732; Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 44 S.Ct. 90, 68 L. Ed. 235, 31 A.L.R. 102; Encyclopedia of Law of Insurance, (Couch), § 2155, p. 6961; Ness v. Mutual Life Ins. Co. of New York, 4 Cir., 70 F.2d 59; New York Life Ins. Co. v. Kaufman, 9 Cir., 78 F.2d 398; Royal Insurance Co. v. Martin, 192 U.S. 149, 24 S.Ct. 247, 48 L.Ed. 385; Cooley's Brief on Insurance, vol. 5, p. 4501 et seq.; Joyce on Insurance, 2d Ed. vol. 5, pp. 6112, 6113.

Certain findings are attacked which involve the questions just discussed. What has been said heretofore is sufficient answer thereto.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

40 Cal.App.2d 461

DREIFUS v. MARX et al.

Civ. 12662.

District Court of Appeal, Second District, Division 2, California.

Aug. 19, 1940.

Rehearing Denied Sept. 16, 1940.

Hearing Denied Oct. 17, 1940.

1. Pleading 🔑129(1)

A defendant by failing to deny or answer the complaint admitted all of its material allegations essential to judgment for plaintiff.

2. Vendor and purchaser 🔑231(13)

The mere fact that an instrument has been recorded does not give constructive notice thereof unless there is some statute authorizing or permitting the instrument to be placed of record and at the same time making the effect of the recording constructive notice.

3. Vendor and purchaser 🔑231(13)

A notice of rescission, in which plaintiff asserted that a recorded conveyance theretofore executed by plaintiff to defendant was of no force or effect, could be recorded under statute as an "instrument affecting the title to real property", and its effect was to declare to the world that plaintiff had by the delivery of a deed been defrauded or had failed to receive consideration for the deed, and that fact was notice of the invalidity of the deed. Civ.Code, §§ 1158, 1213, 1215.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument Affecting the Title to Real Property".

4. Mortgages 🔑154(4)

The recording of a notice of rescission in which plaintiff asserted that a recorded conveyance theretofore executed by plaintiff to defendant was of no force or effect gave to codefendant, named as beneficiary in trust deed conveying realty as security for loan made to defendant by codefendant, constructive notice of contents of notice of rescission which was plaintiff's initial step in rescissory proceedings to nullify alleged fraudulent transaction. Civ.Code, §§ 1158, 1213, 1215.

5. Mortgages 🔑154(2)

Constructive notice of service of notice of rescission in which plaintiff asserted that a recorded conveyance theretofore executed by plaintiff to defendant was of no force or effect was notice of all the contents of the writing, and it was not necessary for the court to find that codefendant, named as beneficiary in trust deed conveying realty as security for loan made to defendant by codefendant, had actual notice of the various grounds for rescission set forth in the notice of rescission. Civ.Code, § 1213.

6. Appeal and error 🔑891

A defendant appealing from a judgment which, among other things, erased from the records a trust deed evidencing a lien on plaintiff's property which had been executed by codefendant, could not invoke the existence of a document signed by plaintiff purporting to reaffirm the validity of her conveyance to codefendant to aid his appeal as having the effect of negativing recorded notice rescinding conveyance, where defendant did not plead and prove his reliance on that document.

7. Mortgages 🔑186(5)

Evidence showed that beneficiary named in trust deed conveying realty to secure loan was negligent in failing to take notice or discover defect in grantor's title, and under statute beneficiary was required to bear the loss occasioned by his own negligence. Civ.Code, §§ 19, 3543.

8. Judgment ⚿251(1)

Where plaintiff sought no money judgment against defendant appealing from judgment canceling certain agreements, quieting title, erasing from records trust deed evidencing a lien on plaintiff's property, and adjudging plaintiff to be entitled to the possession of certain money held by trustee, and no issue was tendered with respect to the money, the trial court had no jurisdiction to determine the respective rights of grantor who executed trust deed, appealing defendant who was named as beneficiary therein, and trustee to the money.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Mary Dreifus against Donald Frederick Marx, also known as Donald Marx, W. E. Hessey and others, to cancel certain agreements, to quiet title, and for other relief. From a judgment for plaintiff, W. E. Hessey appeals.

Judgment modified and, as modified, affirmed.

Kiggins & Hoffman, of Los Angeles, for appellant.

Edwin O. Loucks, of San Pedro, for respondent.

MOORE, Presiding Justice.

From a judgment in favor of plaintiff, cancelling certain agreements quieting her title to certain properties, erasing from the records a deed of trust which evidenced a lien upon plaintiff's Long Beach property, and adjudging her to be entitled to the possession of certain moneys, the defendant Hessey takes this appeal.

The action included as defendant, one Marx, who was the primary factor of plaintiff's misfortunes. Said defendant had induced plaintiff to convey to him certain valuable properties in Long Beach and San Pedro. Notice by plaintiff of rescission of his transactions with plaintiff had been served and recorded. It was after the recording of her notice of rescission that appellant made his loan upon the property described in said notice. Summons having been served upon both defendants, Marx defaulted.

On July 21, 1936, plaintiff was 77 years of age, physically infirm and mentally unequipped to engage in the transaction of matters involving valuable properties without the advice of counsel. She was the owner of lot 11, block G, Bay View Heights, in Long Beach, and other properties in San Pedro. On said date, Marx caused plaintiff to enter into an exchange agreement whereby he should convey to plaintiff the title to a parcel of land in Palm Springs, Riverside county, in exchange for her said lot 11 and the sum of $400. On the 24th day of July, 1936, plaintiff and Marx executed another agreement by the terms of which Marx agreed to procure a building site in said Palm Springs and vest the title thereto in plaintiff, and to construct thereon a five-room bungalow in exchange for her said San Pedro lots. Plaintiff conveyed her said lots in Long Beach and San Pedro to Marx and paid him the sum of $400 *for which he gave her nothing in return.*

Her anxieties having stimulated her to action, plaintiff then employed counsel to advise her with respect to her dealings with Marx. Acting upon the advice of her counsel, a notice of rescission of all agreements and conveyances theretofore made by plaintiff upon the grounds of fraud, undue influence and want of consideration was served on said Marx July 28, 1936. Said notice described the real property involved; it was signed and acknowledged by plaintiff. On the following day said notice was recorded in the office of the county recorder of Los Angeles county, the situs of said properties. At the same time, plaintiff's attorney advised Marx that all dealings thereafter to be transacted between Marx and plaintiff should be in the presence of said attorney. But Marx was not to be throttled by the advice of plaintiff's counsel. On July 31, 1936, he caused plaintiff to visit his office where he stated that he was washing his hands of the whole affair and was returning plaintiff's property to her. Believing and relying upon said statements of Marx, and at his request, plaintiff signed papers presented to her by Marx without reading them. It developed that plaintiff had unwittingly signed a writing by the terms of which it was provided that Marx was to convey to her said San Pedro properties and a lot in Palm Springs and that he should retain said Long Beach lot and the said $400. At the same time and in equal ignorance, she signed a writing by the terms of which she reaffirmed said conveyance of said lot 11 under date of July 21, as a valid transfer. Also, in like manner, she signed a letter by the terms of which she discharged her said attorney and declared that her differences with said Marx had been settled and that her property had been returned to her. Marx did, in fact, reconvey to plaintiff her said San Pedro property but retained title to the said Long Beach lot, which is the only property here involved.

Within a week after plaintiff recorded her notice of rescission on July 29th, appellant commenced negotiations with Marx with a view of lending him the sum of $2,200. In order to procure said loan, Marx offered as security the said Long Beach lot. On the 5th day of August, 1936, an escrow was opened in the Farmers and Merchants Bank of Long Beach in which appellant deposited the sum of $2,200 while Marx placed with the same escrowee his promissory note for $2,200, and a deed of trust conveying said lot 11 in Long Beach to the Farmers and Merchants Trust Company as the trustee with appellant as beneficiary. Following instructions, the bank ordered a policy of title insurance from the National Title Insurance Company which soon discovered and reported the presence upon the deed records of said notice of rescission dated July 29th. Said discovery was disclosed by said title company to both Marx and the appellant and thereupon this title company declined to issue a policy of title insurance and so advised the escrowee.

After appellant had been informed by said title company of its refusal to issue said policy "because there was some discrepancy over the deed or something" Marx and appellant instructed the bank to order the policy from an altogether different title company. In due season a policy showing no defects in the title of said lot 11 was issued by the last-mentioned title company and delivered to said bank. The events heretofore narrated were brought to the knowledge of appellant but subsequent developments were withheld from him.

On August 11 plaintiff served another notice of rescission upon Marx, demanding a rescission of all prior transactions upon the grounds of fraud, undue influence, duress and failure of consideration. This second notice was not recorded and was never brought to the attention of appellant.

One of the assignments of error made by appellant is his lack of knowledge of said last-mentioned notice of rescission. At the time of the closing of the escrow and of the recording of said deed of trust on the 18th day of August, 1936, not only was said last-mentioned notice of rescission unknown to appellant but on said day plaintiff's declaration of July 31, 1936, reaffirming the validity of her said conveyance to Marx under date of July 21st was, itself of record. Appellant's lack of knowledge of the existence of the one instrument and his iteration of his knowledge of the existence of the other, have apparently afforded him much comfort in his enthusiastic rehearsal of the events preceding the recording of said trust deed.

On August 19, 1936, this action was instituted and a notice of lis pendens was filed in the office of the county recorder.

In order that one item of the judgment may be understood, we must observe that the bank paid $2,000 of the escrow fund to Marx and retained $200 thereof, in pursuance of its said escrow instructions, for the purpose of effectuating repairs upon said Long Beach property. In concluding the judgment, the trial court decreed that "all moneys now being held by the defendant Farmers and Merchants Trust Company of Long Beach, under the hereinbefore described deed of trust be paid over to the plaintiff". Clearly, the court intended to refer to the said $200 retained by said bank out of said escrow.

[1] Inasmuch as the failure of Marx to deny or answer the complaint was to admit all of its material allegations essential to the judgment (Strong v. Shatto, 201 Cal. 555, 258 P. 71), there is no question that the judgment against Marx is amply supported by the evidence, as appears from the positive findings of the court upon all of the material allegations of the complaint in favor of plaintiff. Henceforth, therefore, we shall deal only with the assignments of appellant whereby he attacks the validity of the judgment as to himself.

[2] So far as appellant's rights are concerned, his position would not be improved were we to hold that the judgment against Marx is sustained upon one or upon all of the grounds for rescission set forth in the notice thereof. Appellant contends there is no evidence to support the finding that he had knowledge that the title of Marx to lot 11 was obtained through fraud, duress, and undue influence, but in making this contention appellant loses sight of the fact that the principal point is not so much as to the grounds of rescission asserted by plaintiff in her said notice, but rather that the recording of

said notice on July 29, 1936, was sufficient to give constructive notice of a defect in the title of said lot 11. Appellant wisely and properly invokes the rule that the mere fact that an instrument has been recorded does not give constructive notice thereof unless there is some statute authorizing or permitting such instrument to be placed of record and at the same time making the effect of such recording constructive notice. 22 Cal.Jur. 615; Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 P. 21.

[3, 4] There is indeed no special statute providing for the recording of a notice of rescission. Therefore, to test the virtue and effect of said notice, we must refer to a general statute, to-wit, section 1158 of the Civil Code. Said section provides "any instrument * * * affecting the title to or possession of real property may be recorded under this chapter * * *". In deciding that a writ of attachment was not an "instrument" within the meaning of the above provision, the Supreme Court held that the word "instrument" as used in such section, referred to "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty". Hoag v. Howard, 55 Cal. 564, 565. But we cannot concede that the recording of a writ of attachment, issued by the clerk of a court to levy upon any property exempt from execution, is in the same class with the act of recording a notice of rescission which must, of necessity, describe certain transactions affecting real property. The rescinder solemnly asserts claim as the legal owner thereof. In this case, the notice of rescission referred to a writing signed by plaintiff and delivered to Marx in which she asserted that a recorded conveyance theretofore executed by her to Marx was of no force or effect. In the language of said code section, said notice of rescission did affect the title to real property. Its effect was to declare to the world that the author of the notice had by the delivery of a deed been defrauded by the party upon whom the notice had been served, or had failed to receive consideration for the deed, which fact was notice of the invalidity of such prior deed. By the presence of said notice upon the official records of the county, appellant had constructive notice of the contents of said instrument which was her initial step in her rescissory proceedings to nullify the alleged fraudulent transaction. Civ. Code, secs. 1213, 1215. In the case of Bell v. Sage, 60 Cal.App. 149, at page 153, 212 P. 404, at page 406, the court said: "When the terms of the statute are complied with, the record becomes conclusive notice, often contrary to the fact."

[5] Appellant contends that the fact that the court failed to find that appellant had notice of the failure of consideration as well as of fraud, duress and undue influence is fatal to the judgment. On the contrary, the failure to find such fact is immaterial, for the reason that constructive notice of the service of notice of rescission is notice of all of the contents of such writing. Civ. Code, sec. 1213. It was not necessary for the court to find that appellant had actual notice of the various and specific grounds for rescission set forth in the notice. However, we shall assume that the court impliedly found that appellant had constructive notice of the grounds for rescission, one of which was failure of consideration.

[6] In his zeal to avoid the effect of the constructive notice of the grounds of rescission, appellant contends that the document signed by plaintiff July 31st, purporting to reaffirm the validity of her said conveyance to Marx of July 21 had the effect of negativing said notice of rescission. He contends that he had completed the loan transaction in reliance upon affirmatory writing which was obtained from Marx two days after the recording of said notice of rescission but neither the pleadings nor the evidence contains the slightest information that appellant had knowledge of the existence of said affirmatory writing at any time prior to the completion of said escrow. Nothing contained in the record indicates that appellant could have placed any reliance upon the contents of said affirmatory declaration. Since it was not recorded until August 18, after the close of the escrow, we cannot presume that he could have had any notice thereof and of course he had no constructive notice of its existence. It cannot avail appellant that the court failed to find that said affirmatory declaration was signed and delivered to Marx and recorded concurrently with the deed of trust. Its only possible support to appellant's appeal lies in his assertion that he had knowledge thereof and relied upon it in completing his loan. But he should have pleaded and proved his reliance upon said affirmatory writing to

warrant his invoking its existence to aid his appeal. It follows, therefore, that the absence of such finding could not operate prejudicially to appellant.

[7] Not only is the trust deed devitalized because of appellant's notice of plaintiff's attempted rescission, but to his own negligence must be ascribed the responsibility for appellant's own undoing. This we announce, not upon the strength of any course of reasoning but upon an often cited statute that proclaims the reward of the diligent: "Where one of two innocent parties must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ. Code, sec. 3543.

In addition to the fact that the notice of rescission was recorded prior to the time the deed of trust was recorded thereby supplying notice of a defective title, the facts surrounding the entire transaction were such as to lead to the conclusion that appellant was negligent in failing to take notice or discover the defect in the title. Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Before approaching the conclusion of his negotiations for the loan and before the escrow was completed, appellant learned that the National Title Company had refused to insure the title of the Long Beach lot "because there was some discrepancy over the deed or something". Notwithstanding this information, he made no effort to determine the nature of the discrepancy. The facts of which appellant had knowledge were such as to put a person of ordinary prudence upon inquiry. The record discloses that even an inquiry at the offices of the said title company would have put appellant in possession of the facts that would have convinced him of the defect in the title. In view of all of the circumstances, as between appellant and plaintiff, it is clear that it was appellant's negligence which created the present unfortunate situation. He must bear the loss occasioned by his own negligence. Civ. Code, sec. 3543.

[8] Referring to that part of the judgment mentioned in an initial paragraph of this opinion whereby money held by said trust company was awarded to plaintiff, it may be added here, in disposing of that part of the judgment that the sole connection of said trust company with the transaction was the fact that it was trustee under the said trust deed. Assuming that it was the purpose of the court to award to plaintiff said $200 held by the bank, then we must hold that part of the judgment to be erroneous for the reason that said bank is not a party to this action. Plaintiff sought no money judgment against appellant. In view of the fact that no issue was tendered with respect to said $200, the trial court had no jurisdiction to determine the respective rights of Marx, the appellant, and the bank to said money.

It is therefore ordered that the trial court be, and it is hereby, directed to strike from its judgment that portion which reads: "that all moneys now being held by the defendant Farmers and Merchants Trust Company of Long Beach, a corporation, under the hereinabove mentioned deed of trust, be paid over to the plaintiff". As so modified, the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

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40 Cal.App.2d 442

TANNER v. BEST'S ESTATE et al.

Civ. 12126.

District Court of Appeal, Second District,
Division 2, California.

Aug. 19, 1940.

1. Action 🔑1

Before an action can be instituted in superior court, there must be a party plaintiff and a party defendant. Code Civ.Proc. § 367 et seq.

2. Judgment 🔑17(1)

A judgment for plaintiff in proceedings in superior court to quiet title in plaintiff to property of an estate was unauthorized where proceedings named as defendants the estate, an attorney, who was appointed for heirs and estate, decedent's surviving widow and heirs whose true names were unknown, and there was nothing to indicate that heirs were served with summons or that attorney had an interest in estate, and widow was not served with summons, since there was no defendant before court. Code Civ.Proc. §§ 367 et seq., 379, 379a, 382.

3. Appeal and error ⚷909(4)

In absence of a showing of incompetency on the part of decedent's heirs at law, it would not be presumed that superior court was authorized to appoint counsel for them in proceedings wherein plaintiff sought to quiet title in herself to property of decedent's estate.

4. Executors and administrators ⚷1

The "estate" of a decedent is not an entity known to the law, and is neither a natural nor an artificial person, but is merely a name to indicate the sum total of assets and liabilities of a decedent, or of an incompetent, or a bankrupt.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate".

5. Action ⚷1

In order for a civil action to be prosecuted, there must be some existing entity aimed at by the processes of the law, and against whom the court's judgment will operate.

6. Executors and administrators ⚷224

Under statute providing that, if an executor or administrator is a creditor of decedent, he shall file his "claim" with the clerk, quoted word refers to a debt due claimant and is a money demand and recognizes the existence of an estate out of which claimant asks to be paid. Probate Code, § 703.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

7. Executors and administrators ⚷224

A claimant of specific property is not a "creditor" within meaning of statute providing that, if an executor or administrator is a creditor of decedent, he shall file his claim with the clerk. Probate Code, § 703.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor".

8. Executors and administrators ⚷224

The statute providing that, if an executor or administrator is a creditor of decedent, he shall file his claim with the clerk was conceived for purpose of simplifying procedure in the matter of disposing of claims which the judge has rejected. Probate Code, § 703.

9. Parties ⚷21

The statute providing that any person may be made a defendant who claims an interest in the controversy adverse to plaintiff, or who is a necessary party to complete determination of question involved therein, authorizes inclusion of nothing but persons as defendants. Code Civ.Proc. § 379.

10. Appeal and error ⚷1170(1)

The constitutional provision that no judgment shall be set aside for error as to matters of procedure unless, after an examination of entire cause, the court shall be of opinion that error complained of has resulted in a miscarriage of justice, could not be invoked to support a judgment for plaintiff where there was no defendant before trial court, notwithstanding that evidence was sufficient to justify judgment. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Proceeding by Eva M. Tanner against the estate of John L. Best, sometimes known as John L. Bender, and others, to quiet title in plaintiff to all of the assets of the estate. From a judgment for plaintiff, the estate of John L. Best appeals.

Reversed, with instructions.

Joseph A. Ball and Frank C. Charvat, both of Long Beach, for appellant.

Julian P. Van Dyke and John W. Finley, both of Long Beach, for respondent.

MOORE, Presiding Justice.

After judgment by the superior court of Los Angeles county quieting the title in plaintiff to all of the assets of the said estate of said decedent, the "estate" appeals.

John L. Best departed this life November 11, 1936. Thereupon pursuant to her petition plaintiff received letters of administration as a collateral kinswoman. As said administratrix, she took into her possession all of the property of decedent of which he died possessed, consisting of stocks and bonds which had been left in a safety deposit box in a bank. She caused notice to creditors to be published and subsequently filed an inventory of assets. In both her petition for letters of administration and in said inventory, plaintiff inserted notice of her claim of ownership of all of said property. Thereafter, on the petition of Lena Bender, said court determined that the true name of decedent was John H. Bender and that said Lena Bender was his surviving wife.

Instead of filing a final accounting, plaintiff in her individual capacity commenced this action in said superior court, naming as defendants Estate of John L. Best, sometimes known as John L. Bender, Joseph A. Ball, Lena Bender, and other defendants whose true names were unknown at the time of filing said complaint. The nature of her action was to quiet title in herself to all of the assets of said estate.

At the trial of the action plaintiff based her right of recovery upon the force and virtue of a certain writing executed by decedent under date of October 28, 1933, and upon her participation in the purchase of said assets. In other words, her proof indicated to the trial judge that she was not only part owner in the property but that decedent's interest therein had been given to her by him. The evidence was sufficient to justify the judgment were it not for other considerations discussed hereafter.

In an attempt to meet the contentions and the evidence offered by plaintiff, the "estate" urged that said writing was neither evidence of a completed gift nor evidence of an indebtedness on the part of the decedent; that the evidence was insufficient to support the allegation that Mrs. Tanner held legal title and that the complaint did not allege facts which would justify equitable relief.

The trial judge found plaintiff to be the sole owner of the said assets; that their reasonable value was $3,018, and by decree determined that the defendants and all persons claiming under them "subsequent to the filing of this action be forever barred from any claim of right or title to said property or any lien thereon or any part thereof". Upon this appeal the "Estate" contends as follows: (1) That no service was obtained on any defendant; (2) that an "estate" is not a person, natural or artificial which can claim or hold title or sue or be sued; (3) that the rights of an "estate" cannot be determined to nominee. We think such contentions of the "estate" are well founded.

[1-5] It is fundamental that before an action can be instituted in the superior court there must be a party plaintiff and a party defendant. Code Civ.Proc., title III, part 2, § 367 et seq. In the case at bar there is no defendant before the court. While it appears from the answer on file that attorney Ball was appointed by the court as attorney for the heirs at law as well as for said "Estate" there is nothing to indicate that any of the heirs at law were served with summons or that attorney Ball appeared for any heir at law in the trial. In the absence of a showing of incompetency on the part of the heirs at law, it will not be presumed that the court had authority to appoint counsel for them. While attorney Ball was named as a defendant there is nothing to indicate that he had any interest in the estate and he emphasized that fact by filing his disclaimer in the action which left as a defendant only the "Estate of John L. Best". We thus have a civil action with a real plaintiff asserting a real cause but without a defendant against whom a judgment could be entered. Section 379 of the Code of Civil Procedure provides that any person may be made a defendant who claims an interest in the controversy adverse to plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein. Section 379a provides "all persons may be joined as defendants against whom the right to any relief is alleged to exist". But we find no provision of said code authorizing the prosecution of an ex parte action for establishing personal property rights as against the possible claims of others. The "estate" of a decedent is not an entity known to the law. It is neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent, or of a bankrupt. 11 Cal.Jur. 79. In order for a civil action to be prosecuted, there must be some existing entity aimed at by the processes of the law, and against whom the court's judgment will operate. 1 Bouvier's Law Dictionary, Rawle's Third Revision, 1075, defines an "estate" to be a word used to describe a condition of property, not to describe its owner.

In the foregoing discussion, we were not unmindful of section 703 of the Probate Code which reads as follows: "If the executor or administrator is a creditor of the decedent, he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. Its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims in due course of administration. If the judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who shall appoint an attorney, at the expense of the estate, to defend the action. If the claimant fails to recover, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court."

[6-10] But said section has to do with "claims" of an executor or administrator against the estate which he is administering. A "claim" refers to a debt due the claimant. 11a Cal.Jur. 485. It is a money demand. It recognizes the existence of an estate out of which the claimant asks to be paid, whereas a demand for all of the assets, in effect, denies the existence of such estate. The claimant of specific property cannot properly be called a creditor within the meaning of said statute. Estate of Dutard, 147 Cal. 253, 256, 81 P. 519. Said section was evidently conceived for the purpose of simplifying procedure in the matter of disposing of claims which the judge has rejected. Said section 379 of the Code of Civil Procedure authorizes the inclusion of nothing but persons as defendants. Moreover, when a plaintiff finds the interested parties are numerous and it is impracticable to bring them all before the court, one may defend for the benefit of all. Code Civ.Proc. § 382. Not only is there no allegation of such interested number but plaintiff named the surviving wife of decedent and then failed to serve her with summons. Although the evidence presented on behalf of plaintiff is impressive, we find it impossible to invoke the support of section 4½ of article VI of the Constitution because we have not before us the parties who are entitled to resist the demands of plaintiff.

The judgment is reversed with instructions to dismiss as to "The Estate of John L. Best, sometimes known as John L. Bender".

We concur: WOOD, J.; McCOMB, J.

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40 Cal.App.2d 502

PORTER v. EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited.

Civ. 11130.

District Court of Appeal, First District, Division 1, California.

Aug. 22, 1940.

Rehearing Denied Sept. 21, 1940.

1. Insurance ⟹435

Where private automobile is used by the parties for their mutual interest, business, pleasure, or benefit under an express or implied agreement to share expenses, insured is not "carrying passengers for a consideration" within meaning of provision of automobile liability policy providing that insured automobile could not be used for "carrying passengers for a consideration".

See Words and Phrases, Permanent Edition, for all other definitions of "Carrying Passengers for a Consideration".

2. Insurance ⟹435

Under automobile liability policy provision that automobile should not be used for the carrying of passengers for consideration, where business associate accompanied insured on a trip to premises in which they were jointly interested and paid half of the expenses of the trip and compensation for use of the automobile or payment for transportation was not contemplated and no monetary consideration passed to the insured for the use of the automobile, automobile was not used for "carrying passengers for a consideration", so as to preclude business associate from recovering from insurer on a judgment obtained against insured for injuries sustained in automobile accident.

3. Insurance ⟹668(4)

What constitutes "co-operation" or lack of it on the part of the assured under co-operation clause of an automobile liability policy is a question for trier of facts where there is conflict in the evidence.

4. Insurance ⟹514½

A "co-operation" clause in an automobile liability policy may not be expanded to require insured to combine with insurer to present a sham defense, but neither will the clause be contracted to exclude from insurer a fair statement of the facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Co-operation".

5. Insurance ⟹514½

Under a "co-operation" clause in an automobile liability policy, the insured is required to give a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense.

6. Insurance ⟹668(4)

In action on automobile liability policy, whether there was a full, fair, and honest disclosure of true facts by the insured under the co-operation clause was for the trier of facts where the evidence was conflicting.

7. Appeal and error ⟹1011(1)

Finding on conflicting evidence that there was full, fair, and honest disclosure of true facts by the insured under co-operation clause of automobile liability policy would not be disturbed on appeal.

8. Insurance ⟹514½

Unintentional and accidental mistakes in statement made by the insured do not violate "co-operation" clause in automobile liability policy.

9. Insurance ⟹514½

Under provision of automobile liability policy that assured should not "voluntarily assume any liability" without consent of insurer previously given in writing, insured is not prohibited from giving the injured person a truthful explanation of accident and circumstances thereof or telling the injured person of the existence of insurance.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntarily Assume Any Liability".

10. Appeal and error ⟹1010(1)

Trial court's finding, that insured did not voluntarily or at all assume any liability for injuries sustained by business associate injured in automobile accident in violation of automobile liability policy provision that insured should not assume any liability without the consent of the insurer previously given in writing, would not be disturbed on appeal where it was supported by the evidence.

11. Appeal and error ⟹1170(7)

Assignments of error concerning the admission of evidence would not be considered where error, if any, was not sufficient to cause a reversal under constitutional provision that no judgment should be set aside for improper admission or rejection of evidence unless the error complained of has resulted in miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Blanche L. Porter, as executrix of the last will and testament of May E. Walker, deceased, substituted in place and stead of May E. Walker, deceased, against the Employers' Liability Assurance Corporation, Limited, an insurance corporation, to compel defendant to pay a judgment secured by the plaintiff against Stella H. Adamson, who was insured under an automobile public liability policy issued by the defendant. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

A. B. Bianchi, of San Francisco, and Augustin Donovan, of Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff, May E. Walker, brought the present action against defendant, The Employers' Liability Assurance Corporation, Limited, to compel it to pay a judgment secured by plaintiff against Stella H. Adamson, the assured in an automobile public liability policy issued by defendant. The present action is a sequel to the case of Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914. On that appeal the Supreme Court affirmed a judgment in favor of Dr. Walker and against Mrs. Adamson based upon injuries received by Dr. Walker while riding as a business guest in an automobile owned and being driven by Mrs. Adamson. The defendant insurance company defended that action and prosecuted the appeal therein under a written reservation of rights. In the present action the defendant seeks to avoid liability under its policy issued to Mrs. Adamson on the grounds that at the time of the accident the insured was operating the car in violation of the terms of the policy, and thereafter breached the cooperation clause of the policy. From a judgment in favor of plaintiff holding that the policy was in full force and effect defendant prosecutes this appeal.

The policy was entitled "Combination Automobile Policy". It provided that the automobile described therein was to be used for "Business and Pleasure", and expressly provided: "No automobile described herein is or will be rented to others or used to carry passengers for a consideration * * * except as follows: * * * No exceptions." Another clause of the policy excluded liability when the automobile was being "used for renting or livery use or the carrying of passengers for a consideration".

It is the theory of the appellant that, at the time of the accident, Dr. Walker was in fact a passenger for a consideration within the meaning of the above clauses.

The facts as to the use of the car at the time of the accident are succinctly stated by the Supreme Court in the case of Walker v. Adamson, 9 Cal.2d at page 288, 70 P.2d at page 914 as follows: "The plaintiff's injuries were sustained when the automobile driven by the defendant skidded on wet pavement while the parties were on a trip to Lake Tahoe. The undisputed evidence was that the plaintiff, Dr. May E. Walker, and the defendant, Stella H. Adamson, about the year 1925 became business associates. They acquired real property near Mt. Diablo. They also purchased real property at Lake Tahoe, the improvements on which were two main houses and guest cottages. These houses were rented in the summertime, and the proceeds were divided equally. The expense of repairs and upkeep was also shared equally. The two made several trips together each year to the property to supervise construction, repair, and opening of the houses for the rental season. Each owned an automobile. On these trips it was their custom to alternate the use of their cars. Concededly the trip in question, started on May 26, 1934, was for the purpose of taking hardware and other material to carpenters who were then engaged in constructing a guest cottage, also for the purpose of supervising construction and repairs and the renting of the property. Mrs. Adamson drove her own automobile."

On the present trial these facts were elaborated upon, but the further evidence, in no essential, changed the basic situation described by the Supreme Court on the former appeal. On the present trial it developed that Dr. Walker and Mrs. Adamson had definite agreements governing their business relations, and that they kept formal records of their transactions. When Dr. Walker entered Mrs. Adamson's car on the trip in question, the evidence shows that Dr. Walker's obligation was to pay one-half of all expenses on the trip, including gas, oil, repairs, hotel, food and any other expenses incurred. Dr. Walker testified that she paid nothing at all for the ride as such, but simply paid one-half of the car's expenses, as well as all other expenses incurred on the trip, as part of her business arrangement with Mrs. Adamson.

On this state of facts the trial court found that at the time of the accident the car was being used for the business of the assured, and that it was not then being used for the carrying of passengers for a consideration within the meaning of the policy. With this conclusion we agree.

On the prior appeal the main question presented was whether Dr. Walker was a "guest" within the meaning of the so-called "guest-law" of California (Cal.Vehicle Code, sec. 403, St.1935, p. 154), or whether she was a person who had given "compensation" for the transportation within the meaning of that statute. The court held that the "parties were engaged on a business venture for their mutual advantage and that the plaintiff was therefore a person who had given compensation for the transportation and not a guest". 9 Cal.2d at page 289, 70 P.2d at page 915.

Appellant concedes that not every traveler who furnishes "compensation" within the meaning of the "guest-law" is necessarily a "passenger" for a "consideration" within the meaning of the clauses above quoted. This concession was made necessary because of the Supreme Court's decision in Western M. Co. v. Bankers I. Ins. Co., 10 Cal.2d 488, 75 P.2d 609. In that case the policy provided that the insured car would not be "used to carry passengers for a consideration, actual or implied", and also permitted the car to be used for business or pleasure. At the time of the accident an employee of the insured was driving one Lawton from one town to another for the purpose of having Lawton inspect certain machinery the insured had offered to sell to Lawton's employer, and which, after the accident, was purchased by Lawton's employer. It was conceded that Lawton was not a guest, but, predicated on this admission, it was urged that he must be a passenger for a consideration. Citing many cases from other jurisdictions, the court held that the mere fact that the person involved was a passenger for a "compensation" within the meaning of the "guest-law", did not, per se, make the passenger one for a "consideration" within the meaning of the exclusion clause above quoted.

The Western M. Co. case definitely settles the point that the term "compensation" used in the "guest-law" does not have the same meaning as the term "consideration" as used in insurance policies similar to the one here involved. It is true that, factually, that case differs from the instant one. In the Western M. Co. case no direct monetary return was received by the owner of the insured car for the transportation, while in the instant case the passenger was obligated to pay in money one-half of all expenses. However, in the Western M. Co. case the owner of the insured car obviously received a legal benefit for the transportation. For that reason, the theory of that case is applicable to the present one.

[1] The courts in other jurisdictions have frequently considered the problem here involved. The cases are collected in two annotations in 95 A.L.R. 150, and 118 A.L.R. 393. No useful purpose would be served by reviewing the many authorities there discussed. Although it must be conceded that there is some slight conflict in the decisions, according to the overwhelming weight of authority, where a private automobile is used by the parties for their mutual interest, business, pleasure or benefit under an express or implied agreement to share expenses, it is held that the insured is not carrying passengers for a consideration within the meaning of such a clause. The main question presented in each case, under these authorities, is whether the payments made were in fact made for the use of the car. If not, the clause is inapplicable.

One of the cases cited with approval in the Western M. Co. case, supra, is Ocean Accident & Guarantee Corporation v. Olson, 8 Cir., 87 F.2d 465. In that case three friends were returning to North Dakota after having visited California. Before leaving North Dakota they had agreed to contribute to a common fund for gasoline, oil and hotel expenses. The court held that, under such circumstances, nothing was being paid to the owner for the use of the car, and that the exclusion clause of the policy, similar to the one here involved, had no application. After emphasizing that the payments had no relation to payments for the use of the car, that they were not based on a mileage or time basis, that no compensation for wear or tear was included, and that the payments did not exceed actual expense, the court stated (87 F.2d at page 467): "The authorities, without dissent so far as we can find, hold that contribution by a person to the expense of a trip by automobile for the joint pleasure of the party, where the parties are friends or are related, is not 'consideration' or hire within the meaning of policy provisions such as those now before us. On the other hand, where the parties are strangers and the relation is a business one only, or the contribution is not related to the expense of the trip or exceeds the amount of the expense, the arrangement constitutes a carrying 'for a consideration' within the meaning of such policies."

There are many other cases adopting the same sound view. In Beer v. Beer, 134 Ohio St. 271, 16 N.E.2d 413, 118 A.L.R. 388, two sisters agreed with their brother that if he would furnish his car and drive the same to visit their father, who was ill, that they would pay all expenses. It was held that where the parties join in meeting the expenses of a trip made for their mutual interest, pleasure or benefit, the purpose of the owner is not the carrying of passengers for a consideration, and such clause is not applicable.

In Park v. National Casualty Co. 222 Iowa 861, 270 N.W. 23, it was held that where one member of an orchestra who owned a car carried the others from place to place pursuant to an agreement whereby each member paid the car owner a fixed sum per mile, but where such fixed sum was a mere approximation of the cost of operation and did not exceed the cost of operation, the members were not passengers for a consideration within the meaning of such a clause. In that case the court held that in determining the question not only the bare transaction, but also all of its surrounding circumstances, such as the status and relationships of the parties, the existence or lack of a common interest, pleasure or benefit in making the trip, and the relation of the amount paid to the actual cost of carrying, should all be considered.

In Reed v. Bloom, D. C., 15 F.Supp. 600, various friends rode to a convention together and on the way home insisted on making up a fund to pay for gasoline and oil. It was held that there was not a carrying of passengers for a consideration within the meaning of such a clause. Other cases, in addition to those already cited, where pursuant to an agreement or voluntarily without agreement, passengers who are friends or associates of the owner made up a common fund to pay the expenses of a trip in which all are interested, and, holding that such passengers are not being carried for a consideration are: Ocean Accident & Guarantee Corporation v. Myers, D. C., 22 F.Supp. 450; United States Fidelity & Guaranty Co. v. Hearn, 233 Ala. 31, 170 So. 59; Gardner v. Boyer's Estate, 285 Mich. 80, 280 N.W. 117.

Appellant places its greatest reliance on two cases decided by the Circuit Court of Appeals for the Ninth Circuit, both purporting to interpret the California law. The first of these is Jensen v. Canadian Indemnity Co., 98 F.2d 469. In that case three men were appraisers for a national farm loan association. In riding about, they all traveled in one car. They agreed that for the use of the car a charge of five cents a mile should be made, this charge to be borne equally by the three, each passenger paying to the owner one and two-thirds cents a mile. It was held that while being so operated the car was being used to carry passengers for a consideration within the meaning of a clause similar to the one herein involved. *The court held that the case was not one where the owner was merely to be reimbursed for operating expenses,* nor where the compensation was paid as a voluntary contribution or as a mere social amenity, but was one where there was "a prior agreement to pay a fixed amount of money based upon the mileage traveled". 98 F.2d at page 471. It is obvious that, factually, the case differs from the one under consideration, and that the rule of law expressed therein has no application to a case where personal friends and business associates agree to split expenses on a trip for their mutual benefit. Whether the distinction made in the Jensen case between an agreement to reimburse for expenses and an agreement to pay a fixed sum per mile, where such sum was obviously an approximation of the cost of operation, is sound, we do not now have to decide. The case expressly recognized that an agreement to reimburse for expenses of operation did not violate such a clause. That is the situation in the instant case.

The other case upon which appellant places its main reliance is State Compensation Ins. Fund v. Bankers Indem. Ins. Co., 106 F.2d 368. In that case one Dalton contracted with the county of Alameda to furnish the county a truck and driver seven hours a day for $1.50 per hour. The truck was to be used six hours a day to haul dirt, and the other hour to haul workmen to and from the job. While hauling workmen the driver was guilty of negligence resulting in injury to the men. It was held, and properly so, that the truck was clearly carrying passengers for a consideration at the time of the accident, even though that consideration was being paid by the county and not by the passengers or workmen. The court held there was a definite pecuniary benefit to Dalton derived from the carrying of the passengers and that such carriage was part of his legal obligations for which he received compensation. Dalton was obviously carrying passengers for a specified consideration.

[2] Neither case is persuasive in the present case. In the instant case Dr. Walker did not pay, or agree to pay, anything for the use of Mrs. Adamson's car. The case is simply one where the parties owned various properties in joint tenancy. They shared all expenses, profits and losses equally. They made frequent trips to view the premises, using but one car, sometimes Dr. Walker's and sometimes Mrs. Adamson's. They charged all expenses on such trips—food, gas, oil, repairs, equipment for the building, etc.—to the common venture. Obviously, compensation for the use of the car, or payment for transportation by one to the other, never was contemplated or provided for. No monetary consideration ever passed to the owner of the car for the use thereof. Considering the relationship of the parties, and the terms of their agreement, it must be held that there was no violation of the clauses in question.

Appellant's second main point is that it appears as a matter of law that there was a breach of the cooperation clause of the policy by the insured, and that, as a matter of law, prejudice must be presumed. The trial court found that there was no breach of the cooperation clause, and that appellant was not prejudiced by any act or omission on the part of the insured.

There are several recent cases in which the legal effect on the policy of lack of cooperation by the insured is discussed. Valladao v. Fireman's Fund Indem. Co., 13 Cal.2d 322, 89 P.2d 643; Purefoy v. Pacific Automobile Indem. Exch. 5 Cal.2d 81, 53 P.2d 155; Margellini v. Pacific Automobile Ins. Co., 33 Cal.App.2d 93, 91 P.2d 136;

Wright v. Farmers Automobile Inter-Insurance Exchange, Cal.App., 102 P.2d 352. For the purposes of this opinion, it is not necessary to determine whether the insurer must show prejudice resulting from the lack of cooperation, a question expressly left open in the Valladao and Purefoy cases, supra. In the present case, after reading the record, we are convinced that there was a clear-cut conflict in the evidence on this issue.

[3] What constitutes cooperation, or lack of it, on the part of the assured within the meaning of such clauses, is a question of fact, except where there is no dispute in the evidence. Valladao v. Fireman's Fund Indem. Co., supra. Where, however, there is a conflict as to what was said by the insured, that conflict, like other conflicts, is determined by the findings of the lower court.

[4, 5] The following statement appearing in the Valladao case, supra, 13 Cal.2d at page 328, 89 P.2d at page 646, correctly states the law, subject only to the question of prejudice above discussed: "It may not be denied that aside from the obligation arising from the law of contract, a condition of a policy requiring the cooperation and assistance of the assured in opposing a claim or an action lodged against him by an injured person is material to the risk and of the utmost importance in a practical sense. Without such cooperation and assistance the insurer is severely handicapped and may in some instances be absolutely precluded from advancing any defense. Of course, as stated some years ago by Judge Cardozo, a cooperation clause may not be expanded to require the assured 'to combine with the insurer to present a sham defense'. Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443. At the same time, however, it cannot be contracted to exclude a fair statement of the facts. The insurer is entitled to know from its assured the true facts (of which he may have knowledge) underlying an accident and upon which the injured person bases his claim in order that it may determine for itself, in the light of such information, whether it should contest or attempt to settle the claim. Our examination of many authorities indicates the general rule to be that under a cooperation clause the assured is required to give a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. Coleman v. New Amsterdam Cas. Co., supra; Francis v. London G. & A. Co., 100 Vt. 425, 138 A. 780; Seltzer v. Indemnity Ins. Co., 252 N.Y. 330, 169 N.E. 403; Finkle v. Western Auto. Ins. Co., 224 Mo.App. 285, 26 S.W.2d 843. Many other decisions to the same effect might be cited. In Buffalo v. United States F. & G. Co., 10 Cir., 84 F.2d 883, 885, it is stated: 'The company is entitled, however, to an honest statement by the insured of the pertinent circumstances surrounding the accident, as he remembers them. Lacking that, the company is deprived of the opportunity to negotiate a settlement, or to defend upon the solid ground of fact. Nothing is more dangerous than a client who deliberately falsifies the facts.'"

Appellant urges that the insured breached the cooperation clause by misrepresenting the facts of the accident; that the account of the accident as given by the assured prior to trial of Walker v. Adamson, supra indicated that there was a good defense to plaintiff's cause of action, whereas upon the trial, it is urged, the insured changed her story to virtually concede her liability. It is contended that prior to the trial in Walker v. Adamson, supra, the insured gave the insurance company various statements concerning the condition of the automobile tires at the time of the accident, the condition of the road, the speed of the automobile, and as to the time she left Piedmont which led the company to believe a good defense to the action existed. It is urged that at the trial the insured testified differently from these statements and practically admitted liability.

[6, 7] Several of these contentions are predicated upon statements given to an adjuster for appellant, Ted D. Brown, by Dr. Walker and Mrs. Adamson at the hospital several days after the accident on May 28th, and on May 31, 1934. The two women were then occupying the same hospital room, and both were still suffering from the effects of the accident which had occurred on May 26th. The adjuster testified that he made a memorandum of what Mrs. Adamson told him on that day. This memorandum was unsigned. He also stated both women were complaining about their injuries, so he left and returned three days later. At that time he prepared a statement from what he says Mrs. Adamson told him, and had Dr. Walker sign it.

Again, on August 13, 1934, another adjuster, Ben F. Rice, visited Mrs. Adamson and prepared a statement from what he testified she told him. This statement Mrs. Adamson signed. There can be no doubt that the statements appearing in the unsigned memorandum of May 28, 1934, in the statement of May 31, 1934, and in the signed statement of Mrs. Adamson on August 13, 1934, differ materially from the testimony of Mrs. Adamson given on the trial of Walker v. Adamson, supra. Both adjusters testified on the present trial that Mrs. Adamson did not tell them that the cause of the accident was that the rear tires of the automobile were worn smooth. In the August 13, 1934, memorandum appears the statement that the tires were in good condition and that the rear tires had a good tread on them. It also appears that the day after the accident an employee of Mrs. Adamson, a Mr. Brasfield, examined the wrecked automobile and reported to her that the tires were smooth. The adjusters testified that this inspection and report were not reported to them. On the trial Mrs. Adamson testified that she knew the tires were smooth but in spite of inclement weather determined to take a chance. On the present trial Mrs. Adamson denied making the statement appearing in the signed memorandum. She testified that on May 28, 1934, she had a badly gashed head, was bruised, ill and badly shaken, but that she, nevertheless, gave adjuster Brown a full statement of the accident and that she told him about Brasfield, and told him where the wrecked car had been taken. She further testified that she never made the statement appearing in the August 13, 1934, memorandum concerning the tires; that she told Rice about Brasfield and told him the tires were "good enough for a dry trip, dry weather", but did not tell him the treads were good. Dr. Walker, who was in the room when the Adamson statements were given to Brown on May 28th and May 31, 1934, testified that Mrs. Adamson told Brown all about Brasfield and all about the worn tires, and that she, Dr. Walker, told representatives of the insurance company all about the worn tires in August of 1934. Mrs. Adamson testified that when she signed the statement of August 13, 1934, in which appeared the tire statement, she was nervous and did not read it carefully. Obviously, on this issue of whether there was a full, fair, and honest disclosure of the true facts by the insured there was a clear-cut conflict in the evidence. This conflict was resolved against appellant by the trial court, and cannot be disturbed on appeal. See annotation in 98 A.L.R. 1465, at p. 1468.

Certainly, it cannot be urged seriously that Mrs. Adamson is responsible for the carelessness of the adjusters in failing to record her statements properly. Nor can it be contended that by signing statements without reading them, in which statements the adjusters carelessly or by design misrepresented what had been told them, that the insured was guilty of lack of cooperation as a matter of law. She was not dealing with these adjusters at arm's length. As agents of her insurance company she was entitled to believe that they would prepare a proper and correct memorandum of her statements.

The same situation exists as to the other alleged misrepresentations. As to the condition of the road, in the signed statement of Dr. Walker of May 31st, composed by adjuster Brown from information given by Mrs. Adamson, appears the statement that mud had been washed from the higher side of the road to the lower, and that this made the roadway slippery. On the trial of Walker v. Adamson, supra the insured denied that the accident was caused by the unexpected presence of mud in the highway. It is rather significant that in Mrs. Adamson's unsigned statement of May 28th, and in her signed statement of August 13th, there is no mention of mud. Both Mrs. Adamson and Dr. Walker denied that the statement appearing in the Dr. Walker memorandum had been made by Mrs. Adamson. They explained that they had told adjuster Brown that the doctors at the hospital had told them that accidents had occurred at the same spot caused by milk trucks tracking mud on the highway. Clearly, the evidence is in conflict on whether any such misrepresentation was made.

[8] The same situation exists as to time and speed. In the signed statement of Dr. Walker it is stated that they left Piedmont "about 4:30 a. m." on the morning of the accident, and that at the time of the accident Mrs. Adamson was driving within the speed limit of forty-five miles per hour. In Mrs. Adamson's statement of August 13th it is stated that "May 26-1934 around 4 or 4:30 a. m. Dr. Walker came over to my place and after eating breakfast it was around 4:30 or 4:45 a. m.

and we left Oakland". It was also stated therein that after leaving Fairfield (the accident occurred near Dixon) she drove "about 25 or 30 miles an hour". The significance of the time the parties left home is that the accident occurred about eighty miles from Piedmont at about 7 a. m. On the trial the insured testified that on the morning of the accident she had awakened at 4:30 a. m.; that she packed a few things; that they started from Piedmont at "almost about five"; that around Vacaville, because it was raining and foggy, she slowed down to "maybe 25 or 30"; that at the time of the accident she had speeded up to "maybe 30 or 35 * * *. Well, maybe 35 miles an hour"; but that it "might be near 40"; that she was not traveling fifty miles per hour. On cross-examination she disclosed that, after leaving Piedmont a little before five, they drove to a restaurant in Oakland and had some breakfast and that they left Oakland at about 5:30 a. m. Dr. Walker testified that the car was going "about 50 miles or more, an hour" at the time of the accident; that this impression was partially based on computing the distance covered after leaving Oakland, and on the violence of the impact. Obviously, the statements made to the adjusters by the insured as to the times the parties left Piedmont and Oakland are ambiguous. Dr. Walker and Mrs. Adamson both testified that Mrs. Adamson fully and fairly answered every question the adjusters asked her. The adjuster may well have been confused as to whether the leaving time stated to him applied to Piedmont or to Oakland. As to speed, there is no material variance between Mrs. Adamson's statements to the adjuster and those made at the trial. Clearly, there is no evidence that the insured wilfully made any false statements, or that she did not act in good faith or that she did not make a full, fair and complete disclosure, in any material respect, to the insurance company. The accident occurred in May, 1934. Statements were taken while the two women were in a highly nervous and upset condition. No copies were given to them. Subsequently, in August, a statement was taken from Mrs. Adamson. The cause proceeded to trial in June of 1935. Certainly an insured cannot be charged with lack of cooperation simply because of minor variances in her various statements. It would be most startling indeed if such variances did not occur. Moreover, unintentional and accidental mistakes in statements made by the insured do not violate the cooperation clause. See cases 72 A.L.R. 1464; 98 A. L.R. 1473.

Appellant next urges that Mrs. Adamson violated the policy provisions in that she voluntarily assumed liability for the accident. The policy contained a provision that: "The Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at the Assured's own cost * * * without the consent of the Corporation previously given in writing * * * ". In this connection appellant relies partly on Dr. Walker's testimony given on the trial of the accident case that Mrs. Adamson admitted to her "many times" that she was at fault and to blame for the accident. She went on to explain that they had talked a great deal about the accident and that Mrs. Adamson acknowledged at all times "that her tires were smooth, and she knew that her tires were smooth, and that she was going too fast for the condition of the tires and the road and the weather." According to Dr. Walker, Mrs. Adamson told her also that she was heavily insured and that she "would see that my injuries were taken care of, and my loss of time provided". Mrs. Adamson testified at that trial she had told Dr. Walker she was insured, and "that she would be taken care of".

[9, 10] Appellant urges that such action constituted a voluntary assumption of liability on Mrs. Adamson's part in violation of the policy provision above-quoted. In its opening brief appellant cites cases indicating that such statements are properly admissible as declarations against interest or admissions. Those cases are not in point on the question of the interpretation of the policy. In its closing brief appellant cites Kindervater v. Motorists Casualty Ins. Co., 120 N.J.L. 373, 199 A. 606, 607, as supporting its contention. In that case the insured signed a written statement which he delivered to the injured parties in which he stated: "I admit liability in the above mentioned accident". That is far different from the situation here involved. Certainly it cannot be held that under such a clause the insured is prohibited on pain of violating the policy from giving the injured person a truthful explanation of the accident and the circumstances thereof, or from telling the injured person of the existence of insurance. Cases are collected and discussed in

an annotation in 72 A.L.R. 1446, at p. 1477, et seq. If the clause were so construed it would be violative of public policy. In the instant case the trial court found that the assured did not voluntarily, or at all, assume any liability. Clearly, that finding is supported and cannot be disturbed on appeal.

[11] The other contentions of appellant concerning the admission of evidence are so minor as not to require consideration. Even if such evidence was improperly admitted, which we do not decide, it would not cause a reversal under article VI, section 4½ of the Constitution.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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40 Cal.App.2d 417

LIUZZA et al. v. BELL.

Civ. 11440.

District Court of Appeal, First District, Division 1, California.

Aug. 19, 1940.

Rehearing Denied Sept. 18, 1940.

Hearing Denied Oct. 17, 1940.

1. Judgment 🔑506

An administrator, seeking to attack a judgment in a tort action obtained against a deceased during her lifetime, could assign as error only such matters in the trial proceedings culminating in the judgment as injuriously affected the deceased, and administrator could not complain that the judgment was not several in character, unless a substantial right of the deceased was impaired.

2. Appeal and error 🔑909(1)

Where administrator sought to attack judgment obtained against a deceased in tort action brought by a widow and two minors, on ground that prior to trial of action one of the plaintiffs, a minor, died, and judgment was rendered in favor of all plaintiffs without segregation, reviewing court was required to assume that amount of judgment was fixed to cover widow and one minor, but, if judgment was rendered on theory that two minors were involved, it would be immaterial, where amount of verdict was not attacked.

3. Death 🔑29

A minor's cause of action for wrongful death of his father abated on the death of the minor.

4. Judgment 🔑235

Where two minors and their mother commenced an action for wrongful death, the court's right to enter a judgment in favor of mother and one minor was not abridged by the death of other minor.

5. Judgment 🔑486(1)

A judgment, valid on its face and affirmed on appeal, which decreed realty was subject to lien in favor of plaintiffs for payment of a judgment in a tort action, could not be collaterally attacked by administrator of judgment debtor's estate by showing some infirmity in judgment obtained in tort action.

6. Abatement and revival 🔑71

Sound practice requires that, if one or more of the parties to an action die, the legal representatives of their estates shall be substituted, but it is not always necessary to include all parties to a transaction as defendants.

7. Fraudulent conveyances 🔑255(3)

In an action to set aside a fraudulent conveyance, there must be a defendant competent to defend, and one against whom a judgment may be rendered, but the fraudulent grantor who has reserved no interest, legal or equitable, in the conveyance, although a "proper party" is not a "necessary party", since the conveyance is binding as to the grantor and is not affected by his death.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party" and "Proper Party".

8. Judgment 🔑486(1)

Where action to set aside fraudulent conveyance was commenced against fraudulent grantor and grantee, but, pending trial of action, fraudulent grantor died, and no appointment of a representative of her estate was made, a judgment setting aside conveyance rendered by court having jurisdiction over parties and subject matter was not void on its face, and, having become final, could not be collaterally attacked by administrator of fraudulent grantor's estate.

9. Judgment 🔑720

A judgment setting aside a conveyance as fraudulent was "res judicata" of questions whether transfer was fraudulent and made for purpose of rendering grantor's property free from claims of judgment creditor, and whether conveyance made grantor insolvent.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

10. Judgment 🔑28

A portion of a judgment which is in excess of power of court to grant is void, but the void portion of the judgment does not invalidate the legal portion of the judgment, and such portion may stand.

11. Judgment 🔑28

Portion of a judgment, in fraudulent conveyance action, declaring a deed void and the property described therein subject to lien in favor of judgment creditors for payment of their claim, was valid though other portion of judgment decreeing that property described in deed constituted a part of fraudulent grantor's estate for purpose of satisfying judgment creditors' claim was void because of absence of a party litigant representing estate of fraudulent grantor.

12. Appeal and error 🔑332

Where a necessary party litigant dies pending trial, if the fact of death is established in the record, a judgment rendered may be set aside on appeal, but the death of a party to a pending suit does not oust the court of jurisdiction and the judgment is not void, but only voidable. Code Civ. Proc. § 669.

13. Fraudulent conveyances 🔑241(5)

A creditor may attack a transfer as fraudulent when he has reduced his claim to judgment, and has endeavored without avail to collect the judgment by execution.

14. Fraudulent conveyances 🔑241(3)

A judgment creditor, in position to levy execution, can bring an action to set aside a fraudulent conveyance, and it is not necessary that judgment creditor should have impressed a lien upon property alleged to have been fraudulently conveyed, prior to institution of the action.

15. Judgment 🔑781

Ownership and title to property fraudulently conveyed remain in the grantor for protection of creditors, and a judgment duly docketed is a lien on the fraudulently conveyed property.

16. Executors and administrators 🔑133

A lien upon property of an estate in probate is enforced by the same method as a mortgage, where all recourse against other property of the estate is waived, and the lien continues and ceases only after the sale and the application of the purchase money to the indebtedness. Probate Code, §§ 716, 762, 763.

17. Executors and administrators 🔑224

A claim against estate of judgment debtor, based on judgment declaring transfer of realty by judgment debtor fraudulent, was not barred by failure to present it in connection with original judgment obtained against judgment debtor in tort action, where claim stated that it was filed pursuant to judgment in fraudulent conveyance action.

18. Descent and distribution 🔑90(1)
Wills 🔑747

A conveyance in fraud of creditors is binding on the grantor and on his heirs and devisees, and, where creditors reach property after death of fraudulent grantor, any surplus is returned to the party from whom the property was recovered. Probate Code, §§ 579, 580.

19. Executors and administrators 🔑129(3), 423

An administrator of a judgment debtor's estate should act for judgment creditors in seeking to have conveyance by judgment debtor set aside as fraudulent, and administrator should not be aggrieved by a judgment in favor of judgment creditors in fraudulent conveyance action. Probate Code, §§ 579, 580.

20. Executors and administrators 🔑423

Where a claim against an estate has been allowed, and creditor has taken proper means to procure institution of an action by administrator to set aside a fraudulent conveyance by deceased, creditor may institute such an action and prosecute it to judgment. Probate Code, §§ 579, 580.

21. Judgment 🔑720

Where judgment creditors obtained judgment setting aside conveyance by judgment debtor and establishing a lien on property conveyed, probate court on judgment debtor's death did not have jurisdiction to determine interests, if any, of judgment debtor's estate and lienors in property fraudulently conveyed and could not direct administrator of judgment debtor's estate to sell that which it could not determine was property of estate, and could not order administrator to sue himself as such, and could not direct him on behalf of judgment creditors to sue fraudulent grantee, since such controversy was "res judicata".

22. Executors and administrators ⟹431(1)

Judgment creditors had right to bring action against administrator of judgment debtor's estate to enforce lien provided by judgment setting aside fraudulent conveyance by judgment debtor without the filing of a petition in probate court to require administrator to sell property fraudulently conveyed, where administrator was antagonistic to judgment creditors and a petition would be futile. Probate Code, § 758.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Auralia Liuzza and another against Aubrey Bell, as administrator of the estate of Emilie Brinkerhoff, based on a judgment obtained in fraudulent conveyance action. From an adverse judgment, defendant appeals.

Affirmed.

Morgan V. Spicer and H. Reid Whiting, both of San Francisco, for appellant.

James F. Brennan and Saul Perlis, both of San Francisco, for respondents.

WARD, Justice.

An appeal by defendant Aubrey Bell as administrator of the estate of Emilie Brinkerhoff, deceased, from a judgment wherein it was decreed that a deed from Mrs. Brinkerhoff to her daughter Dorothy A. Bell is null and void as against plaintiffs; that the property described therein is a part and parcel of decedent's estate for the purpose of satisfying plaintiffs' claim in the sum of $5,000, and is subject to a lien for the payment of such claim, together with interest and costs of suit, and that the property, or such portion thereof as is necessary, be sold to satisfy the claim, the estate being entitled only to the amount remaining after such payment, the costs of sale, etc.

Three judgments, all rendered in the city and county of San Francisco, are involved in this appeal. For convenience, they will be hereinafter referred to respectively as judgment "A"—being one rendered in a tort action; "B"—that rendered in a suit to set aside a fraudulent conveyance, and "C", the one from which the present appeal is taken. They are the outgrowth of an accident which happened on May 7, 1927, and which resulted in the death of Guiseppe Liuzza, husband of Jessie Liuzza and the father of their minor children Auralia and Nicholas. Notwithstanding the death of Nicholas after the commencement of an action for damages against Emilie Brinkerhoff, but prior to the trial thereof, and without dismissal as to plaintiff Nicholas or substitution of any representative, a judgment in the sum of $5,000 was rendered against Mrs. Brinkerhoff and in favor of the two minors and their mother, plaintiffs in the action, without segregation. Said judgment, "A", was not recorded, nor was execution, although issued, levied during the lifetime of Mrs. Brinkerhoff for the reason that several days after the accident, on May 10, 1927, Mrs. Brinkerhoff deeded to her daughter Dorothy A. Bell two pieces of real property, her sole assets. This deed bore a false date, one prior to the date of the accident, but was recorded on May 10th. Liuzza v. Brinkerhoff, 3 Cal.App.2d 218, 220, 39 P.2d 283.

Some time later, Jessie and Auralia Liuzza filed an action against Emilie Brinkerhoff and Dorothy Bell, to set aside the conveyance on the ground that there was no consideration therefor and that it was made for the purpose of defrauding the creditors of the grantor; also to enforce the judgment in the action for damages for the death of their husband and father respectively. Prior to the trial of the action Mrs. Brinkerhoff died, and judgment "B", was subsequently ordered against Dorothy Bell, which declared the deed to be null and void; "that the property described in said instrument and in the findings of fact herein and hereinafter described, is a part and parcel of the estate of said decedent for the purpose of satisfying the claim of plaintiffs as hereinafter set forth, and the same is hereby added thereto to become a part thereof for the purpose of satisfying said claim, and that the same, or as much thereof as is necessary, be applied to the satisfaction of the claim of said plaintiffs". On appeal by Dorothy A. Bell this judgment was affirmed. Liuzza v. Brinkerhoff, 3 Cal. App.2d 218, 39 P.2d 283. The appeal was taken from the whole of the judgment, but no point was urged that the judgment was against a named defendant who had ceased to be a party to the action.

Some time after the affirmance of judgment "B", probate proceedings were instituted in the matter of Mrs. Brinkerhoff's estate, and Aubrey Bell was appointed as administrator. Upon publication of a notice to creditors, plaintiffs herein filed a claim in the sum of $5,000 and interest, based on judgment "B", which claim, however, was rejected, following which the present action was commenced. No claim based on judgment "A" was ever presented against Mrs. Brinkerhoff's estate.

Subsequent to filing the present action, plaintiffs presented certain motions to amend judgment "B". The motions were granted, and Dorothy A. Bell, the defendant in that action, appealed. The substance of the motions and the orders are set forth in Liuzza v. Brinkerhoff, 29 Cal. App.2d 1, at pages 2, 3, 83 P.2d 976. The orders amending judgment "B" were reversed upon the theory that the error was inherently prejudicial and not clerical or inadvertent.

In the present case, after trial, the judgment decreed that the lien established by the judgment in the second action is a valid and subsisting lien on property deeded to Mrs. Bell; that defendant administrator comply with the terms and provisions of that judgment; that the property so deeded be sold by the administrator in the manner prescribed by law for the sale of real property in probate; that the proceeds be used to pay the judgment of $5,000 together with interest and costs, and that the estate of Mrs. Brinkerhoff is entitled only to any excess over the aggregate of such amounts.

The complaint alleged that Emilie Brinkerhoff died in 1931, and that in 1935 Aubrey Bell was appointed administrator of her estate. There is also set forth therein the history of the actions upon which judgments "A" and "B" are based, together with a narration of certain preliminary steps taken before the commencement of the present suit, namely, the filing of the claim and the rejection thereof, waiver of all claims and recourse against other property of the estate and allegations of willingness to accept the proceeds from the sale of the property described in the deed, whether the claims "arise by virtue of judgments A. or B. or A. and B.".

Much of appellant's opening brief is devoted to an attack upon judgment "A", the judgment upon tort. He contends that such judgment, entered without severance of its amount, is void as to all plaintiffs; that any right based on the claim on file in the estate of Emilie Brinkerhoff, deceased, not being founded upon judgment "A", is now barred; and that whether judgment "A" is void or valid, there is, both in the present proceeding and that resulting in judgment "B", a nonjoinder of necessary parties plaintiff. It should be noted that the present record does not disclose whether or not any effort was made by either plaintiffs or defendant during the trial or subsequent thereto to correct judgment "A", but we discover from the findings in the present action that "no appeal was ever taken from said judgment" and that "said judgment became final and has not nor has any part thereof been paid".

[1-4] Assuming that appellant administrator is in a position to attack judgment "A", he may assign as error only such matters in the trial proceedings as injuriously affected the defendant in that action; he cannot complain that the judgment was not several in character unless a substantial right of the defendant was impaired. In Scoville v. Keglor, 27 Cal. App.2d 17, 30, 80 P.2d 162, 168, the court said: "It does not in all cases follow that errors of this description are prejudicial to the losing party. It frequently happens, indeed, that a judgment in solido in favor of two parties plaintiff, is for some reason or other not prejudicial to a defendant. Meek v. Pacific El. Ry. Co., 175 Cal. 53, 164 P. 1117; Fairchild v. Bay Point & C. Ry. Co., 22 Cal.App. 328, 330, 134 P. 338; De Arman v. Connelly, 134 Cal.App. 173, 181, 25 P.2d 24. Segregation is, in some circumstances, said to have been no concern of the losing party and therefore no reason for the reversal of a judgment." The complaint prayed damages for the wrongful death of a husband, and father of two minors. It is inconceivable that the trial court during the hearing of testimony, a jury having been waived, did not learn of the death of one of the minors. We must assume therefore that the amount of the judgment was fixed to cover the widow and one minor. Up

to this point defendant in judgment "A" had not been injured. If in fact the judgment was rendered upon the theory that two minors were involved, it would be immaterial in so far as the present proceeding is concerned, as the amount of the verdict has not been attacked. If appellant administrator claims that a substantial right was impaired by reason of the neglect to substitute an administrator of the estate of the deceased minor in the proceeding resulting in judgment "A", or in subsequent proceedings, the answer is that the minor's cause of action died with him. De La Torre v. Johnson, 200 Cal. 754, 254 P. 1105; 1 C.J.S., Abatement and Revival, pp. 196, 197, §§ 143, 144; Lapique v. Dunnigan, 210 Cal. 281, 291 P. 184. No claim is made that the mother had a separate cause of action against the defendant in that suit for the death of the minor; if so, the statute of limitations has long since tolled that right. So far as the judgment in favor of the widow, and the widow as guardian ad litem of the living minor is concerned, the court's right to enter it was not abridged by the death of the other minor. Scoville v. Keglor, supra.

[5] The present action is based upon judgment "B", in which it was adjudged and decreed that certain property was subject to a lien in favor of plaintiffs therein for the payment of a judgment for $5,000 recovered in the tort suit. Thereby the court necessarily determined that plaintiffs had the status of defrauded creditors, otherwise the judgment in their favor could not have been entered. This is true although no attack on their status was made in that action, at least not upon appeal, with the result that the question was not expressly decided by the court. However, such question was necessarily involved and if any objection had been made during the trial the error, if any, would have been ground for reversal on appeal. For aught that appears in the judgment roll, it was brought by two plaintiffs in favor of whom, alone, a money judgment for $5,000 had been rendered. In other words, that record does not disclose that the *judgment* was in favor of three, rather than two plaintiffs. Judgment "B", valid on its face, and affirmed on appeal, may not be collaterally attacked by showing some infirmity in judgment "A".

The present record indicates that the only creditors interested in Mrs. Brinkerhoff's estate are the plaintiffs herein. Assuming, but not deciding, that had there been other creditors, appellant administrator might have been in a position to defeat plaintiff's recovery through a showing, for the benefit of such other creditors, that judgment "A" was void on its face and that such other creditors were not parties to the fraudulent conveyance suit and would not be bound by judgment "B", upholding judgment "A", still appellant administrator has not shown that he represents any creditors other than plaintiffs and respondents. For the reasons stated, the case of Estate of Parsell, 190 Cal. 454, 213 P. 40, 25 A.L.R. 1561, and other authorities cited by appellant are not in point.

Is judgment "B" enforceable against defendant administrator? Appellant contends that it was neither against the deceased Emilie Brinkerhoff nor against him as administrator of her estate; that the action to set aside the fraudulent conveyance abated upon the death of Mrs. Brinkerhoff and that the court lacked jurisdiction over the parties and the subject-matter. While Emilie Brinkerhoff was one of the defendants in the action resulting in judgment "B", she died prior to trial and there was no substitution or appointment of a representative of her estate, nor, prior to the rendition of judgment, was there any attempt to file letters of administration of her estate. Judgment "B" was entered against Dorothy Bell only, daughter of Mrs. Brinkerhoff. Appellant relies principally upon Estate of Parsell, supra, holding, at page 456, of 190 Cal., at page 41 of 213 P., 25 A.L.R. 1561 that "A judgment rendered for or against a dead person is void." The judgment was not rendered against a dead person. Overell v. Overell, 18 Cal. App.2d 499, 64 P.2d 483, is also cited to the effect that a judgment cannot be given against one who is not a party to the action. Emilie Brinkerhoff, however, was a party to the action notwithstanding her death before the entry of the judgment. De Leonis v. Walsh, 140 Cal. 175, 73 P. 813, comes a little nearer upholding appellant's contention. In that case the plaintiff brought an action to recover certain money received by defendant as her agent, and to compel him to reconvey to her certain real property alleged to have been conveyed to him upon his false representations. Only one defendant was named in the complaint. Prior to the time the case was submitted for decision, defendant died. On appeal, the court said (140 Cal. at page 179, 73 P. at page 814) that the trial court "could regularly take no action in the case until there was a substitution of some one to defend the action". The death of the only defendant necessitated a substitution of party.

[6-8] Sound practice dictates that if one or more of the parties to an action die, the legal representatives of their estates shall be substituted. It is not always necessary, however, to include all parties to a transaction, as defendants. In California, while there must be a defendant competent to defend, and one against whom a judgment may be rendered, in the matter of a fraudulent conveyance the grantee or his representative must be a party at the time of the rendition of the judgment, but the fraudulent grantor who has reserved no interest, legal or equitable, although a proper, is not a necessary, party to the action to set it aside. Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 P. 765, 29 Am. St.Rep. 149; 24 Am.Jur., p. 324, sec. 205; 27 Cor.Jur., p. 751, sec. 630. The reason is that the conveyance is binding as to the grantor and is not affected by his death. In a suit wherein a creditor seeks to set aside a fraudulent conveyance, if the grantor is not a necessary party neither is the legal representative of the grantor's estate, unless there should be other creditors. Under the circumstances of the instant case, the record not disclosing other creditors, a judgment rendered in the absence of the administrator as a party defendant is not void on its face. The court had jurisdiction over the parties and over the subject-matter. The judgment has become final (Liuzza v. Brinkerhoff, 3 Cal.App.2d 218, 39 P.2d 283; Liuzza v. Brinkerhoff, 29 Cal.App.2d 1, 83 P.2d 976) and, as relates to the fraudulent conveyance and lien, may not be attacked collaterally. Seeming to be in conflict with the last statement is the holding in Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 P. 295, 50 Am.St.Rep. 67.

The decision in the Maddux case is predicated upon Texas (Chambers v. Hodges, 23 Tex. 104) and Mississippi (Wilson v. Montgomery, 14 Smedes &.M. 205) decisions, also an excerpt from section 16 of Mr. Van Fleet's work on "Collateral Attack", and involves the question of a necessary party to an action not having been properly served. The first appeal was from an order denying a motion to vacate a judgment in the case of People v. Goodhue, 80 Cal. 199, 22 P. 66. Pioneer Land Co. v. Maddux, supra was a direct appeal upon the merits of the entire controversy in an action to quiet title instituted subsequent to the decision in People v. Goodhue. In the Maddux case, at page 642, of 109 Cal., at page 297 of 42 P., 50 Am.St.Rep. 67, the court said: "'In order to make a judgment void collaterally, either (1) a legal organization of the tribunal, or (2) jurisdiction over the subject-matter, or (3) jurisdiction over the person, must be wanting; or (4) one or more of these matters must have been lost after it once existed. When either of these defects can be shown, the judgment and all rights and titles founded thereon are void.'"

No question of the legal organization of the tribunal is raised in this case. There is no doubt that the court rendering judgment "B" had jurisdiction of the subject-matter and of the parties, and that prior to judgment none of its essential jurisdictional authority had been lost.

[9] The jurisdictional questions in connection with the instant appeal, growing out of judgment "C", were not raised, were not necessarily connected with and therefore not decided in Liuzza v. Brinkerhoff, 3 Cal.App.2d 218, 39 P.2d 283, 284, but the question as to whether the transfer of property from Emilie Brinkerhoff to Dorothy Bell was fraudulent, "made her insolvent and that the transaction was made for the expressed purpose of rendering the property free from the claims of respondents" therein, is res judicata. In Carpenter v. Pacific Mutual L. Ins. Co., 13 Cal. 2d 306, 314, 315, 89 P.2d 637, 642, the court said: "To escape the legal effect of these affirmances appellants in their attempt to relitigate the question of the validity of the rehabilitation order and the order of August 11, rely on the rule that the affirmance of a void order imports no force or validity thereto. Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 P. 295, 50 Am. St. Rep. 67. The rule of the Maddux case only applies to questions which were not decided or involved on the prior appeals—as to all questions which were involved on the prior appeals, as to appellants on this collateral attack, obviously, the prior determinations are res judicata. Lake v. Bonynge, 161 Cal. 120, 131, 118 P. 535. Clearly the question of the jurisdiction of the trial court to make the order of August 11, 1936, was involved on the prior appeals. * * * Even if some of the

points now urged were not made upon the prior appeals, it is perfectly clear that both the trial court and this court in the prior action determined adversely to appellants the question of jurisdiction. From a very early date in this state it has been settled that 'the first point decided by any Court, although it may not be in terms, is, that the Court has jurisdiction, otherwise it would not proceed to determine the rights of the parties. For the purposes of the first trial in this Court, the jurisdiction was as much determined as though the point had been made and passed upon; certain it is, that unless made, it cannot now be questioned'. Clary v. Hoagland, 6 Cal. 685, 688. As was stated in Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 383, 393, 36 P.2d 688, 692: 'It is plain to us that the decision of the first appeal in res adjudicata on the question of jurisdiction subsequently and now raised by appellant. See White v. Fresno Nat. Bank, 98 Cal. (166), at page 167, 32 P. 979; Clary v. Hoagland, 6 Cal. 685. To hold otherwise on the record here presented would be lending encouragement to dilatory and highly technical procedure subversive of an effective disposition of an appeal fully briefed and decided on the merits.'"

In Geibel v. State Bar, 14 Cal.2d 144, 93 P.2d 97, in considering a previous denial of a petition to set aside a judgment (see, also, Geibel v. State Bar, 305 U.S. 653, 59 S.Ct 248, 83 L.Ed. 423), the California Supreme Court held at pages 147, 148 of 14 Cal.2d, at page 99 of 93 P.2d: "Our order of denial was a determination contrary to petitioners' contention that the judgment of suspension should be set aside by reason of the alleged disqualification of Bartlett. Said decision constitutes an adjudication that Bartlett was not disqualified. A determination as to the validity of a former adjudication is res judicata in a subsequent proceeding attacking it. Lake v. Bonynge, 161 Cal. 120, 118 P. 535; Peterson v. Weissbein, 80 Cal. 38, 22 P. 56; 2 Freeman on Judgments, 5th ed., 1498; 15 Cal.Jur. 77, 103, 147."

[10] Appellant relies strongly on Bachman v. Sepulveda, 39 Cal. 688, wherein a judgment that an administrator held in trust property fraudulently conveyed was reversed on the theory that it was an anomaly to render judgment in favor of a party not before the court. That decision involved a direct appeal and to some extent overlooked the representative capacity in which an administrator acts. Assuming that the court had jurisdiction of the parties named, and the subject-matter, still if the court granted relief in a matter over which it had no power by reason of the absence of a necessary party litigant, such portion of the judgment or decree would be void. Baar v. Smith, 201 Cal. 87, 255 P. 827; 15 R.C.L., p. 853. In other words, such portion of the judgment as is in excess of the power of the court to grant is void. If the void portion does not invalidate or vitiate the acknowledged or legally recognized part, such part may stand. As said in 15 Ruling Case Law, page 843, "a judgment may be good in part, and bad in part; good to the extent it is authorized by law, and bad for the residue".

[11] Judgment "B" declared the deeds to the property in question to be null and void and the property therein described to be subject to a lien in favor of the plaintiffs for the payment of their claim, all of which the court had jurisdiction to adjudge. Assuming, but not deciding, for reasons hereinafter appearing, that, because of the absence of a party litigant representing the estate of Emilie Brinkerhoff, that portion of judgment "B" decreeing that the property described is "a part and parcel of the estate of said decedent for the purpose of satisfying the claim of plaintiffs" is void, nevertheless the order declaring the deeds null and void and decreeing a lien thereon in favor of plaintiffs is valid.

We now approach the objections presented to the validity of judgment "C", an action wherein the widow and minor appear as plaintiffs and the administrator of the estate of Emilie Brinkerhoff appears as the defendant. The purpose of the action is to enforce the lien provided by judgment "B" upon the property hereinbefore referred to, and to compel the administrator to sell the real property and apply so much of the proceeds as may be necessary to satisfy their claim. The complaint states a cause of action. The objections raised thereto have been noted in considering judgments "A" and "B" as will be hereafter referred to.

The first amended complaint alleges the entry of judgment "A"; that such judgment has become final, and that no part thereof has been paid; the history and necessary facts leading up to judgment "B", which is likewise final; that at no time since the entry of judgment "B" has the real property described been sufficient to satisfy plaintiffs' claim; that a claim based upon judgment "B" was served within the statutory period upon the administrator of the Emilie Brinkerhoff estate, copy of the claim being attached as an exhibit to the complaint, and that the administrator rejected the claim. The complaint also sets forth a waiver of all claims and all recourse against any property of the estate other than the proceeds or money derived from the sale or disposition of the described property; also an agreement to accept such proceeds in full settlement of any claim arising under any judgment theretofore rendered, and a waiver of any claim to proceeds derived from such sale in excess of their judgment "B". There is a further allegation that the judgment lien provided for in such judgment has not, nor has any part thereof, been enforced or complied with. The evidence shows that subsequent to the rendition of judgment "A", and prior to the filing of the second action, an execution was issued which the sheriff's return shows to be wholly unsatisfied.

[12] Appellant seeks to aid his contention by reference to Code of Civil Procedure, section 669: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate." Should a necessary party litigant die pending trial, if the fact of death is established in the record a judgment rendered may be set aside on appeal. Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317. The death of a party to a pending suit does not oust the court of jurisdiction. The judgment is not void, only voidable. Todhunter v. Klemmer, 134 Cal. 60, 66 P. 75. In the Todhunter case (134 Cal. at page 63, 66 P. at page 76) the court said: "This does not mean that a judgment can be really rendered for or against a dead man, but that it can be rendered nominally for or against him, as representing his heirs, or other successors, who are the real parties intended." As has been noted, Mrs. Brinkerhoff was not a necessary party to the proceeding.

[13-17] The language used in Rossen v. Villanueva, 175 Cal. 632, 634, 166 P. 1004, 1005, is appropriate: "A creditor may attack a transfer as fraudulent when he has reduced his claim to judgment, and has endeavored without avail to collect the same by execution. * * * This the plaintiff did here." Widener v. Hartnett, 12 Cal.2d 287, 83 P.2d 718; Hy-Lo Unit & Metal Products Co. v. Ryon, 21 Cal.App.2d 38, 68 P.2d 393. It was not necessary that respondents herein should have impressed a lien upon the property prior to the institution of the fraudulent conveyance action. All that is necessary is that the creditor is in a position to levy execution. Kemp v. Lynch, 8 Cal.2d 457, 65 P.2d 1316; Widener v. Hartnett, supra. Thereupon it is subject to a lien upon entry of judgment. Johns v. Baender, 40 Cal.App. 790, 182 P. 55; 27 Cor.Jur., p. 848, sec. 808; 24 Am. Jur., p. 313, sec. 185. In fraudulent transactions, for the protection of creditors it has been held that ownership and title remain in the grantor. A judgment duly docketed is a lien on the fraudulently conveyed property. McGee v. Allen, 7 Cal. 2d 468, 60 P.2d 1026; First Nat. Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am.St.Rep. 64. That a lien existed is recognized in Liuzza v. Brinkerhoff, 29 Cal.App. 1, 5, 6, 83 P.2d 976, 978, 979: "The action is one in equity to declare the transfer fraudulent and to impress upon the property the lien of respondents' judgment in the tort action. * * * Thus, right or wrong, respondents' remedy is to enforce the decree as made, the effect of which is to follow the sale of the property through the estate, such sale to be made subject to this lien." The present action to enforce the lien was instituted within the statutory period after judgment "B" had become final. A lien upon property of an estate in probate is enforced by the same method as a mortgage, where all recourse against other property of the estate is waived. Prob. Code, sec. 716. The lien continues and ceases only after the sale and the application of the purchase money to the indebtedness. Prob. Code, secs. 762, 763. The claim herein was not barred by failure to present it in connection with judgment "A". The claim explicitly states that it was filed pursuant to the judgment which we have referred to as judgment "B".

[18, 19] It is contended by the appellant administrator that judgment "B" in favor of plaintiffs, upon which judgment "C" is based, is not binding on him because he was not a party to the action. A conveyance in fraud of creditors is binding on the grantor, likewise on his heirs and devisees. Where creditors reach property after

the death of the grantor, any surplus is returned to the party from whom the property was recovered. Prob.Code, secs. 579, 580. The administrator as the representative of the estate should act for the creditors and should be a party plaintiff in the action. An administrator should not be aggrieved by a judgment in favor of those he ought to represent. In this proceeding, to the contrary, he urges that the judgment in its entirety be set aside.

Appellant's attorney admitted upon the trial that the estate claimed ownership of the property, apparently for the heirs. If judgment "C" is invalid because the administrator was not a party to the judgment "B" proceedings, the whole of judgment "B" falls, with the result that Dorothy Bell would hold title and ownership in the property and the estate would have no interest therein of which either creditors or heirs could reap the advantage.

[20] Appellant contends that judgment "C" encroaches upon the exclusive jurisdiction of the probate court. If an administrator neglects or refuses to sell property of an estate, any person having an interest therein may petition the court for an order requiring him to sell. Prob.Code, sec. 758. When a claim against an estate has been allowed, the right of a creditor to institute an action to set aside a fraudulent conveyance and prosecute to judgment has been sustained (Scholle v. Finnell, 166 Cal. 546, 137 P. 241; Allan-MacMaster Co. v. Exterstein, 126 Cal.App. 757, 15 P.2d 184) where the creditor has taken the proper means to procure the institution of the action by the administrator. We must assume from the fact that the claim herein was rejected, and the additional fact that the administrator strenuously contested the suit resulting in judgment "C", that respondents are dealing with an antagonistic administrator. This case, like Emmons v. Barton, 109 Cal. 662, 668, 42 P. 303, 304, "* * * is a case where the Code provision is not 'applicable to the relief sought' * * * 'because legal remedies are unavailing'". Unless the provision in Probate Code, section 758, relative to filing a petition to require the administrator to sell is exclusively within the jurisdiction of the probate court, respondents had the right to bring the present action.

[21, 22] In California, unlike many other states, general and probate jurisdiction are lodged in one court. Hence many of the close, fine-spun distinctions on jurisdictional questions in decisions of courts of other states may be disregarded. The probate court did not have jurisdiction to determine the interests, if any, of the estate and the lienors. It could not direct the administrator to sell that which it could not determine was the property of the estate; it could not order the administrator to sue himself as such, and it could not direct him on behalf of respondent creditors to sue Dorothy Bell, as the controversy between them was res judicata. Liuzza v. Brinkerhoff, 3 Cal.App.2d 218, 39 P.2d 283. In this situation a petition under Probate Code, section 758, would have been futile.

In Corporation of America v. Marks, 10 Cal.2d 218, 73 P.2d 1215, 114 A.L.R. 1162, plaintiff secured a judgment lien upon certain real property of F. O. Marks who subsequently died. In due course his estate was probated, finally settled and the executor discharged. Plaintiff alleged that a claim based upon the judgment lien was not filed for the reason that it had no knowledge of the death of F. O. Marks. The court held that plaintiff had a right to bring an equitable action to enforce the judgment lien against those to whom the estate had been distributed, providing same was brought within five years after the entry of the judgment. At pages 221, 222, of 10 Cal.2d, at page 1218 of 73 P.2d, 114 A.L.R. 1162, the court said: "We are of the view that section 716, Probate Code, applies to judgment liens, and recognizes a right in the judgment lien creditor to bring an equitable action to foreclose his lien on the death of the judgment debtor. The language of said section is broad. It applies to 'mortgages or liens.' As in the case of a mortgage lien, such an action may be brought during the course of the administration proceeding or after the estate has been distributed against those who have succeeded to the property subject to the lien; recourse against other property being waived. Section 732, Probate Code, terminates the right to levy execution upon property subject to the lien, but we find nothing in said section excluding enforcement of a judgment lien through an equitable action brought to foreclose it, which right is recognized as to mortgages and other liens generally by section 716. * * * By virtue of the provisions of section 716, Probate Code, we are of the view that such an action lies in the instant case, and that enforcement through the probate proceeding, upon a claim filed, was not an exclusive remedy."

If the filing of the claim herein under the provision of section 758, Probate Code, was not an exclusive remedy, then the filing of a petition to sell, particularly under the facts of this case, would still have been an idle act on the part of respondents. For the reasons stated it is unnecessary to consider appellant's contention that the claim was barred by the statute of limitations.

If for the purpose of completing the probate records, an order from the probate court may be obtained by the administrator or the plaintiffs herein upon the production and filing of proper records based upon judgment "C". In any event, the property should be sold in compliance with and in conformity to the provisions of that judgment.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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40 Cal.App.2d Supp. 829

FONDA v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Civ. A 4674.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 15, 1940.

Confusion of goods 🔑11

Where portable radio broadcasting station was built into automobile truck belonging to another, truck was subject to attachment under statutes in action against broadcasting corporation, on ground that truck and radio station were combined as an integral unit, so that truck owner could not recover on bond given to procure issuance of attachment, for damages from loss of use of truck. Civ.Code, §§ 1025, 1026.

Appeal from Municipal Court of City of Los Angeles; Irvin Taplin, Judge.

Action by Willard Fonda against the Fidelity & Deposit Company of Maryland on a bond given to procure the issuance of a writ of attachment. Judgment for plaintiff, and defendant appeals.

Reversed.

Joe Crider, Jr., and Courtney Lacey, both of Los Angeles, for appellant.

Cannon & Callister, of Los Angeles, for respondent.

SCHAUER, Judge.

This litigation is based on a bond that was given to procure the issuance of a writ of attachment in an action which was brought by the Advance Auto Body Works, Inc., against the KMTR Radio Station as well as against plaintiff here, Willard Fonda, and others. Attachment was levied on an automobile truck claimed by Fonda and a radio broadcasting station, KIIQ, which was built into the truck and which station was owned by the KMTR corporation. Judgment in that action went for the plaintiff therein against the KMTR corporation but against that plaintiff in favor of Fonda, who is plaintiff here. The truck and broadcasting station were held under attachment from 29 October 1936 to 21 April 1937 and Fonda brought this action on the attachment bond for damages for loss of use of his truck. In defense defendant offered to prove, in substance, that the truck and radio station were so combined that the one was an integral part of the other and that they could not be separated without injury to the unit. The offer was rejected, judgment went for plaintiff and defendant appeals. The judgment must be reversed.

Sections 1025 and 1026 of the Civil Code provide, respectively, in material parts, that "When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part" and "That part is to be deemed the principal to which the other has been united only for the use, ornament, or completion of the former." Obviously the radio station does not contribute to the "use, ornament, or completion" of the truck but the truck does add to the use and completion of the radio transmitter as a portable unit. The truck, therefore, if it was a part of the radio station, as could have been found if the proffered evidence had been received, was subject to attachment in the action against the KMTR corporation.

This would be true even if the truck and radio transmitter were to be regarded as jointly owned 7 C.J.S., Attachment, § 90, p. 260; Veach v. Adams, 1877, 51 Cal. 609, 612; Conolley v. Power, 1924, 70 Cal.App. 70, 76, 232 P. 744.

The judgment is reversed and the cause is remanded to the Municipal Court for a new trial, appellant to recover its costs of appeal.

We concur: SHAW, P. J.; BISHOP, J.